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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

NO. R. 698

20 JULY 2017

NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998)

REGULATIONS RELATING TO THE PROCEDURE TO BE FOLLOWED AND CRITERIA TO BE CONSIDERED WHEN DETERMINING AN APPROPRIATE FINE IN TERMS OF SECTION 24G

I, Bomo Edith Edna Molewa, Minister of Environmental Affairs, hereby make regulations in terms of section 44(1)(aC) and 44(1)(b) of the National Environmental Management Act, 1998 (Act No.107 of 1998).



BOMO EDITH EDNA MOLEWA
MINISTER OF ENVIRONMENTAL AFFAIRS

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Definitions

1. In these Regulations any word or expression to which a meaning has been assigned in the Act has that meaning, and unless the context requires otherwise:

"applicant" means a person who has submitted an application pursuant to the provisions of section 24G of the Act;

"authorisations authority" means the division in the national or provincial department responsible for environmental affairs or the department of mineral resources as the case may be, that is tasked with evaluating the environmental impact of a listed or specified activity or waste management activity and, where appropriate, with granting or refusing of an environmental authorisation or waste management licence in respect of that activity;

"biodiversity impact" means the impact or potential impact that an activity has, has had or may have on living organisms from all sources, including terrestrial, marine and other aquatic ecosystems and the ecological complexities of which they are part, taking into account the conservation value of the biodiversity affected and whether or not the harm or potential harm is irreversible;

"director" means a member of the board, executive committee, or other managing body of a corporate body or parastatal, a member of a close corporation, a partner of a partnership, or a trustee of a trust;

"fine calculator" means the fine calculator approved by the Minister which incorporates the factors listed in Regulation 4 and includes a formula for the determination of an appropriate fine;

"fine committee" means the committee established in terms of Regulation 3 that is required to make a recommendation on the fine quantum to the competent authority;

"firm" means any body incorporated by, or established in terms of, any law as well as any partnership, trust, parastatal or organ of state;

"heritage impact" means the impact or potential impact that an activity has, has had, or may have on -

- (a) an object or place of cultural or archaeological significance,
- (b) paleontological remains or a paleontological site,
- (c) living heritage,
- (d) public monuments and memorials, or
- (e) a place declared to be a national or provincial heritage site by the relevant authority;

"National Environmental Management Waste Act" means the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008);

"registered interested and affected party" means an interested and affected party whose name is recorded in the register opened for that application in terms of Regulation 8;

"relevant time" means the time when the administrative enforcement notice was issued, or when the criminal offence was committed, or when the application in terms of section 24G was submitted;

"repeat contravener" means an applicant who satisfies one or more of the criterion listed in Regulation 4(1)(e) read with Regulation 4(3);

"sense of place impact" means the impact or potential impact that an activity has, has had, or may have on the mix of natural and cultural features in the landscape that provide a strong and unique identity and character that is deeply felt by local inhabitants and/or visitors;

"socio-economic impact" means the impact or potential impact that an activity has, has had, or may have on the surrounding community's social and economic wellbeing, including changes in demographics, housing, employment, income opportunities and demand for public services; and

"the Act" means the National Environmental Management Act, 1998 (Act No. 107 of 1998).

Purpose of Regulations

2. The purpose of these Regulations is to provide for the procedure to be followed and criteria to be considered in the determination of a fine pursuant to an application submitted in terms of section 24G of the Act and any matters incidental thereto.

Fine committee

3. (1) Each competent authority must establish a fine committee within 90 days of the publication of these regulations to consider all applications made in terms of section 24G with a view to making a recommendation to the competent authority on the quantum of the fine to be imposed on an applicant.
- (2) The fine committee must—
 - (a) be approved by the Director-General, the Director-General of the department responsible for mineral resources or the provincial head of department; and
 - (b) consist of at least 3 members, comprised of designated environmental management inspectors, or designated environmental mineral resource inspectors where appropriate, and officials from the authorisations authority to which the application relates.
- (3) The members of the fine committee may call upon any other person with relevant technical, specialist or local knowledge to advise the fine committee as and when deemed reasonably necessary by the fine committee.

Factors to be taken into account

4. (1) The fine committee, when determining the proposed quantum of the fine, as well as the competent authority when determining the fine in terms of section 24G(4), must take the following considerations into account—
 - (a) the information submitted by an applicant in terms of section 24G(1)(b)(vii)-(viii);

- (b) the completed application form, including Section C of Annexure A, Part 1 of which is to be completed by the applicant's environmental assessment practitioner;
 - (c) the impacts or potential impacts, including the cumulative impacts, of the activity or activities namely—
 - (i) the socio-economic impact;
 - (ii) the biodiversity impact;
 - (iii) the impact on sense of place and/or heritage; and
 - (iv) any pollution and/or environmental degradation which has been, is being or may be caused by the activity or activities.
 - (d) any technical or specialist advice or information on local knowledge received pursuant to Regulation 3(3) above.
 - (e) the compliance history of the applicant, namely—
 - (i) whether or not administrative enforcement notices, including pre-notices where appropriate, have previously been issued to the applicant in respect of a contravention of section 24F(1) of the Act and/or section 20(b) of the National Environmental Management Waste Act;
 - (ii) whether or not the applicant has previously been convicted in respect of a contravention of section 24F(1) of the Act and/or section 20(b) of the National Environmental Management Waste Act; and
 - (iii) whether or not the applicant has previously submitted a section 24G application in respect of an activity or activities which commenced prior to the activity or activities that are the subject of the current application;
 - (f) whether the applicant is a firm or a natural person; and
 - (g) any other representations made by the applicant in terms of Annexure A Section C in respect of the quantum of the fine.
- (2) If the fine committee requires any further information, in addition to that received in accordance with subregulation (1) above, in order properly to determine the proposed quantum of the fine, it may request the competent authority to direct the applicant, within a specified period, to provide such further information and/or to undertake such further studies as the fine committee deems necessary.
- (3) For the purposes of subregulation (1)(e) and in Part 2 of Section C In Annexure A the fine committee and the competent authority must take into account whether or not—
- (a) any of the directors of the applicant firm are, or were, at the relevant time, directors of a firm to whom subregulation (1)(e) applies;
 - (b) an applicant who is a natural person is, or was, at the relevant time a director of a firm to whom subregulation (1)(e) applies.

- (4) When calculating the proposed quantum of the fine, or the fine, as the case may be, the fine committee and the competent authority must use the fine calculator approved by the Minister.

Representations

5. (1) The competent authority shall include in the application form to be used in respect of section 24G applications, the information as set out in Annexure A, which, amongst others, provides the applicant with an opportunity to make representations in respect of the quantum of the fine.
- (2) The completed application form, including Annexure A, must be attached as an appendix to any report or information submitted by the applicant to the Minister, the Minister responsible for mineral resources or the MEC, as the case may be.
- (3) The recommendation on the quantum of the fine in terms of Regulation 3(1) and reasons for that recommendation together with any representations received from the applicant in terms of Annexure A Section C, as well as any other relevant information, must be submitted by the fine committee to the competent authority for a determination.

Determination of fine

6. (1) The competent authority must determine the quantum of the fine upon receipt of the recommendation of the fine committee.
- (2) The determination referred to in subregulation (1) must—
- (a) within a reasonable time, be communicated by the competent authority to the applicant together with the reasons therefore; and
- (b) specify the time period within which the fine must be paid in full, which period may reasonably be extended by the competent authority upon written application by the applicant.
- (3) The applicant must, within 14 days of receipt of the determination of the quantum of the fine, ensure that all interested and affected parties, registered in terms of Regulation 8, are notified of, and provided with access to, the determination and the reasons for the determination.
- (4) In the event that the applicant fails to pay the fine within the time period specified in the determination, including any extension thereof in accordance with subregulation (2)(b), the application shall lapse and partial amounts paid to the competent authority, if any, will not be refunded to the applicant.

Mandatory record keeping

7. (1) A competent authority must keep—

- (a) all applications received in terms of section 24G;
 - (b) the minutes of all meetings of the fine committee and recommendations made;
 - (c) all determinations, including the reasons therefore and the amount of any fines imposed;
 - (d) a record of whether fines imposed have been paid in full, partially or not at all; and
 - (e) all appeal decisions and reasons therefore; and
 - (f) registers recording the information referred to in subregulation (1)(a) to (e) in respect of each application received.
- (2) The registers referred to in subregulation (1) must be submitted biannually by each competent authority to the National Department of Environmental Affairs on 30 April and 31 October each year beginning on 30 April 2017.

Register of interested and affected parties

8. (1) Prior to the submission of an application in terms of section 24G of the Act, the applicant must place a preliminary advertisement in—
- (a) a local newspaper in circulation in the area in which the activity was, or activities were, commenced; and
 - (b) on the applicant's website, if any.
- (2) This advertisement must comply with the requirements set out in Annexure A, Section D.
- (3) The applicant must open and maintain of a register of interested and affected parties.
- (4) The register must be attached to the application form and included in the report, or form part of the information submitted in terms of section 24G(1) of the Act, which register must, as a minimum, contain the names, contact details and addresses of—
- (a) all persons who, as a consequence of the public participation process conducted in respect of the application, have submitted written comments or attended meetings with the applicant or any environmental assessment practitioner or other specialist appointed by the applicant to assist with the application;
 - (b) all persons who have requested the applicant, in writing, to place their names on the register; and
 - (c) all organs of state that have jurisdiction in respect of the activity to which the application relates.

Repeat Contraveners

9. (1) Where an application is submitted by a repeat contravener, the fine committee must, notwithstanding the quantum calculated pursuant to regulation 4, recommend to the competent authority that the applicant pay the maximum fine amount as specified in section 24G(4) of the Act.
- (2) For the purposes of this regulation, the competent authority may consider the applicant's conduct since 7 January 2005.

Offences and Penalties

10. (1) A person is guilty of an offence if that person—
- (a) fails to comply with Regulations 8(1); 8(2); 8(3) and 8(4); or
 - (b) provides incorrect, false or misleading information in any form, including in any document submitted in terms of these Regulations to a competent authority or omits information that may have an influence on the outcome of a recommendation of a fine committee or determination of the competent authority.
- (3) A person convicted of an offence in terms of these Regulations is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding 5 years, and in the case of a second or subsequent conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, and in both instances to both such fine and such imprisonment.

Consolidated applications

11. Where a consolidated application is submitted for more than one listed or specified activity or waste management activity, or both, the competent authority may impose a single fine in respect of the consolidated application provided the activities are interrelated.

Commencement and short title

12. These Regulations are called the Section 24G Fine Regulations and will take effect on the date of publication in the Government Gazette.

Transitional provisions

13. An application submitted in terms of section 24G of the Act, prior to the date of these Regulations coming into effect, must be dispensed with as if these Regulations have not been promulgated and taken effect.

ANNEXURE A TO THE SECTION 24G APPLICATION FORM

SECTION A: DIRECTIVE

Section 24G(1) of the National Environmental Management Act, 1998 (Act 107 of 1998) ("NEMA") provides that on application by a person who has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F(1); or a person who has commenced, undertaken or conducted a waste management activity without a waste management licence in terms of section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) ("NEM:WA") the Minister, the Minister responsible for mineral resources or the MEC concerned (or the official to which this power has been delegated), as the case may be, may direct the applicant to-

i	immediately cease the activity pending a decision on the application submitted in terms of this subsection
ii	investigate, evaluate and assess the impact of the activity on the environment
iii	remedy any adverse effects of the activity on the environment
iv	cease, modify or control any act, activity, process or omission causing pollution or environmental degradation
v	contain or prevent the movement of pollution or degradation of the environment
vi	eliminate any source of pollution or degradation
vii	compile a report containing-
	aa a description of the need and desirability of the activity
	bb an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity
	cc a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity
	dd a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how the issues raised have been addressed
	ee an environmental management programme
viii	provide such other information or undertake such further studies as the Minister, Minister responsible for mineral resources or MEC, as the case may be, may deem necessary.

You are hereby provided with an opportunity to make representations on any or all of the abovementioned instructions, including where you are of the opinion that any of these instructions are not relevant for the purposes of your application, setting out the reasons for your assertion. Kindly note further that, after taking your representations into account, a final directive may be issued.

SECTION B: DEFERRAL

Section 24G(7) of the NEMA provides that if at any stage after the submission of an application it comes to the attention of the Minister, the Minister responsible for mineral resources or the MEC, that the applicant is under criminal investigation for the contravention of, or failure to comply with, section 24F(1) of the NEMA or section 20(b) of the NEM:WA, the Minister, Minister responsible for mineral resources or MEC may defer a decision to issue an environmental authorisation until such time as the investigation is concluded and-

- (a) the National Prosecuting Authority has decided not to institute prosecution in respect of such contravention or failure;
- (b) the applicant concerned is acquitted or found not guilty after prosecution in respect of which such contravention or failure has been instituted; or
- (c) the applicant concerned has been convicted by a court of law of an offence in respect of such contravention or failure and the applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review.

Kindly answer the following questions:

Are you, the applicant, being investigated for a contravention of section 24F(1) of the NEMA in respect of a matter that <u>is not subject to this application</u> and in any province in the Republic?	YES	NO	UNCERTAIN
If yes provide details of the offence being investigated and authority conducting the investigation. If uncertain provide details of the activity or activities in relation to which you suspect you may be under investigation.			
Are you, the applicant, being investigated for the contravention of section 20(b) of the NEMWA in respect of a matter that is <u>not subject to this application</u> and in any province in the Republic?	YES	NO	UNCERTAIN
If yes provide details of the offence being investigated and authority conducting the investigation. If uncertain provide details of the activity or activities in relation to which you suspect you may be under investigation.			
Are you, the applicant, being investigated for an offence in terms of section 24F(1) of the NEMA or section 20(b) of the NEMWA in terms of which this application directly relates?	YES	NO	UNCERTAIN
If yes provide details of the offence being investigated and authority conducting the investigation. If uncertain provide details of the activity or activities in relation to which you suspect you may be under investigation.			

If you have answered yes or uncertain to any of the above questions, you are hereby provided with an opportunity to make representations as to why the Minister, Minister responsible for mineral resources or MEC, as the case may be, should not defer the application as he or she is entitled to do under section 24G(7).

SECTION C: QUANTUM OF THE SECTION 24G FINE

In terms of section 24G(4) of the NEMA, it is mandatory for an applicant to pay an administrative fine as determined by the competent authority before the Minister, Minister responsible for mineral resource or MEC may take a decision on whether or not to grant an *ex post facto* environmental authorisation or a waste management licence as the case may be. The quantum of this fine may not exceed R5 million.

Having regard to the factors listed below, you are hereby afforded with an opportunity to make representations in respect of the quantum of the fine and as to why the competent authority should not issue a maximum fine of R5 million.

Please note that Part 1 of this section must be completed by an independent environmental assessment practitioner after conducting the necessary specialist studies, copies of which must be submitted with this completed application form.

Please also include in your representations whether or not the activities applied for in this application (if more than 1) are in your view interrelated and provide reasons therefor.

PART 1: THE IMPACTS OR POTENTIAL IMPACTS OF THE ACTIVITY/ACTIVITIES

Index	Socio Economic Impact	Place an "x" in the appropriate box
	Description of variable	
	The activity is not giving, has not given and will not give rise to any negative socio-economic impacts	
	The activity is giving, has given, or could give rise to negative socio-economic impacts, but highly localised	
	The activity is giving, has given, or could give rise to significant negative socio-economic and regionalized impacts	
	The activity is resulting, has resulted or could result in wide-scale negative socio-economic impacts.	
Motivation:		

Index	Biodiversity Impact	Place an "x" in the appropriate
	Description of variable	

	box
The activity is not giving, has not given and will not give rise to any impacts on biodiversity	
The activity is giving, has given or could give rise to localised biodiversity impacts	
The activity is giving, has given or could give rise to significant biodiversity impacts	
The activity is, has or is likely to permanently / irreversibly transform/ destroy a recognised biodiversity 'hot-spot' or threaten the existence of a species or sub-species.	
Motivation:	

Index	Sense of Place Impact and / or Heritage Impact	Place an "x" in the appropriate box
	Description of variable	
	The activity is in keeping with the surrounding environment and / or does not negatively impact on the affected area's sense of place and /or heritage	
	The activity is not in keeping with the surrounding environment and will have a localised impact on the affected area's sense of place and/or heritage	
	The activity is not in keeping with the surrounding environment and will have a significant impact on the affected area's sense of place and/ or heritage	
	The activity is completely out of keeping with the surrounding environment and will have a significant impact on the affected area's sense of place and/ or heritage	
Motivation:		

Index	Pollution Impact	Place an "x" in the appropriate box
	Description of variable	
	The activity is not giving, has not given and will not give rise to any pollution	
	The activity is giving, has given or could give rise to pollution with low impacts.	
	The activity is giving, has given or could give rise to pollution with moderate impacts.	
	The activity is giving, has given or could give rise to pollution with high impacts.	
	The activity is giving, has given or could give rise to pollution with major impacts.	
Motivation:		

PART 2: COMPLIANCE HISTORY AND KNOWLEDGE OF THE APPLICANT

Index	Previous administrative action (i.e. administrative enforcement notices) issued to the applicant in respect of a contravention of section 24F(1) of the National Environmental Management Act and/or section 20(b) of the National Environmental Management Waste Act	Place an "x" in the appropriate box

Description of variable	
Administrative action was previously taken against the applicant in respect of the abovementioned provisions.	
No previous administrative action was taken against the applicant but previous administrative action was taken against a firm(s) on whose board one or more of the applicant's directors sit or sat at the relevant time when the administrative action was taken.	
Administrative action was <u>not</u> previously taken against the applicant in respect of the abovementioned provisions.	
Explanation of all previous administrative action taken in respect of the above:	

Index	Previous Convictions in terms of section 24F(1) of the National Environmental Management Act and/or section 20(b) of the National Environmental Management Waste Act	Place an "x" in the appropriate box
Description of variable		
	The applicant was previously convicted in terms of either or both of the abovementioned provisions.	
	No previous convictions have been secured against the applicant but a conviction has been secured against a firm(s) on whose board one or more of the applicant's directors sit or sat at the relevant time; or a conviction was secured against a director of the applicant in his or her personal capacity.	
	The applicant has not previously been convicted in terms of either or both of the abovementioned provisions.	
Explanation of all previous convictions in respect of the above:		

Index	Number of section 24G applications previously submitted by the applicant	Place an "x" in the appropriate box
Description of variable		
	Previous applications in terms of section 24G of NEMA were submitted by the applicant.	
	No previous applications have been submitted by the applicant but a previous application(s) have been submitted by a firm(s) on whose board one or more of the applicant's directors sit or sat at the relevant time.	
	No previous applications have been submitted by the applicant but the applicant sat on the board of a firm that previously submitted an application.	
Explanation in respect of all previous applications submitted in terms of section 24G:		

PART 3: APPLICANT'S PERSONAL CIRCUMSTANCES

Index	Applicant's legal persona	Place an "x" in the appropriate box
	Description of variable	
	The applicant is a natural person.	
	The applicant is a firm.	
	Describe the firm:	

Index	Any other relevant information that the applicant would like to be considered.
	Motivate and explain fully:

NOTE: An explanation as to why the applicant did not obtain an environmental authorisation and/or waste management licence must be attached to this application.

SECTION D: PRELIMINARY ADVERTISEMENT

When submitting this application form, the applicant must attach proof that the application has been advertised in at least one local newspaper in circulation in the area in which the activity was commenced, and on the applicant's website, if any.

The advertisement must state that the applicant commenced a listed or specified activity or activities or waste management activity or activities without the necessary environmental authorisation and/or waste management licence and is now applying for *ex post facto* approval. It must include the following:

- the date;
- the location;
- the applicable legislative provision contravened; and
- the activity or activities commenced with without the required authorisation.

Interested and affected parties must be provided with the details of where they can register as an interested and affected party and / or submit their comment. At least 20 days must be provided in which to do so.

This advertisement shall be considered as a preliminary notification and the competent authority may direct the applicant to undertake further public participation and advertising after receipt of this application form.

NOTE: Unless protected by law, all information contained in and attached to this application form may become public information on receipt by the competent authority. This application must be attached to any documentation or information submitted by an applicant further to section 24G(1).

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