



Department of Environmental Affairs and Development Planning
Departement van Omgewingsake en Ontwikkelingsbeplanning
ISEBE leMicimbi yeNdalo esiNgqongileyo noCwangciso loPhuhliso



Chief Directorate : Environmental and Land Management

NEMA ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON EXEMPTION APPLICATIONS

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Abbreviations

DEA&DP	Department of Environmental Affairs and Development Planning
EAP	Environmental Assessment Practitioner
EIA	Environmental Impact Assessment
I&APs	Interested and Affected Parties
NEMA	National Environmental Management Act, 1998 (Act No. 107 of 1998)

1. INTRODUCTION

On 21 April 2006 the Minister of Environmental Affairs and Tourism promulgated regulations in terms of Chapter 5 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”) (Government Notice No. R. 385, R. 386, and R. 387 in the Government Gazette of 21 April 2006 refer). The regulations replaced the environmental impact assessment (“EIA”) regulations that were promulgated in terms of the Environment Conservation Act, 1989 (Act No. 73 of 1989) in 1997 and introduced new provisions regarding environmental impact assessment.

This guideline forms part of this Department’s *NEMA Environmental Impact Assessment Regulations Guideline and Information Document Series* and provides information and guidance for applicants, authorities and interested and affected parties (“I&APs”) on applications for exemptions as described in Chapter 5 of the NEMA EIA Regulations. It provides guidance on the application procedure, criteria for consideration of such applications, decision on exemption applications, review of exemptions, the minimum legal requirements for exemptions, and the minimum legal requirements for public participation processes related to exemptions. This guideline should be read in conjunction with NEMA and the regulations and is not intended to be a substitute for the provisions of NEMA or the regulations in any way.

2. DEFINITIONS

“applicant” means a person who has submitted or intends to submit an application to the Department in compliance with the provisions of the NEMA EIA Regulations;

“competent authority” means the authority indicated in regulation 3 of the NEMA EIA Regulations as the competent authority for the application.

“days” means calendar days.

Note: When a period of days must in terms of these Regulations be reckoned from or after a particular day, that period must be reckoned as from the start of the day following that particular day to the end of the last day of the period, but if the last day of the period falls on a Saturday, Sunday or public holiday, that period must be extended to the end of the next day which is not a Saturday, Sunday or public holiday.

“Department” means the Western Cape Department of Environmental Affairs and Development Planning;

“interested and affected party” means an interested and affected party contemplated in section 24(4)(d) of the Act, and which in terms of that section includes –

- any person, group of persons or organizations interested in or affected by an activity; and
- any organ of state that may have jurisdiction over any aspect of the activity;

“NEMA EIA Regulations” means the Environmental Impact Assessment Regulations in terms of the National Environmental Management Act, 1998 (Act

No. 107 of 1998) (Government Notice No. R. 385, R. 386, and R. 387 in the Government Gazette of 21 April 2006 refer).

“registered interested and affected parties” means:

- (a) all persons who, as a consequence of the public participation process conducted in respect of an application, have submitted written comments or attended meetings with the applicant or EAP;
- (b) all persons who, after completion of the public participation process, have requested the applicant or the EAP managing the application, in writing, for their names to be placed on the register; and
- (c) all organs of state which have jurisdiction in respect of the activity to which the application relates.

Note: To be registered as an interested and affected party the persons referred to in (a) and (b) above must provide their names and postal addresses to the EAP managing the application process. Registered I&APs must ensure that they notify the EAP if their address change during the application process.

3. PURPOSE

This guideline relates to exemptions and provides guidance on the application procedures, criteria for consideration of such applications, decision on exemption applications, review of exemptions, and minimum legal requirements, including the minimum legal requirements for public participation processes.

An important rationale of this guideline is to integrate the public participation processes required for exemption applications with the public participation requirements of a Basic Assessment process or a Scoping and Environmental Impact Assessment (EIA) process:

1. The regulations require that a public participation process be followed as part of any exemption application;
2. The regulations also required that a public participation process be followed for a basic assessment or Scoping and EIA application.

It is recommended that in instances where an applicant intends applying for exemption from certain provisions of the regulations, the public participation process for such an exemption application be conducted at the same time as the public participation process related to a basic assessment or scoping and EIA process.

Note: In terms of the minimum requirements with respect to s 24 (4) of NEMA, an investigation of alternatives must form part of the procedures for the investigation, assessment and communication of the potential impact of activities with respect to every application for an environmental authorization. As such, and in order to meet the minimum requirements of the NEMA, exemption from having to investigate alternatives cannot be applied for in terms of the NEMA EIA Regulations. This is to say that alternatives must always be investigated (refer to the Provincial Alternatives Guideline which forms part of the Department's *NEMA Environmental Impact Assessment Regulations Guideline and Information Document Series*).

4. GENERIC REQUIREMENTS FOR EXEMPTION APPLICATIONS IN TERMS OF THE NEMA EIA REGULATIONS

- a) Any person may apply for exemption from a provision of the regulations:
 - i. For activities for which Basic Assessment must be undertaken, a notice of intent to apply (for Basic Assessment) must be submitted to the competent authority (hereinafter referred to as “the Department”). A Notice of Intent to

- Apply form is available from the Department. This notice **must include** an indication of exemptions that will be applied for.
- ii. Although the NEMA EIA Regulations specifies that an EAP must submit the notice of intent to apply, the Notice of Intent Form makes provision for the applicant to apply to be exempted from this specific requirement (which will then allow the applicant to submit the notice of intent to apply).
 - iii. When applying for exemption from any other provision of the regulations the relevant section of the general application form (for Basic Assessment or Scoping and EIA) or the separate exemption application form (depending on when during the process exemption is being applied for), must be completed.
- b) The Department will acknowledge receipt of an application within 14 days of receipt thereof.
- c) If the rights and interests of other parties are likely to be adversely affected by the proposed exemption, the Department will request that the requirements as set out in regulation 53(4) must be met. These are:
- i. conduct at least the public participation process set out in regulation 56, or any aspect of such process (refer to the Provincial Public Participation Guideline which forms part of the Department's *NEMA Environmental Impact Assessment Regulations Guideline and Information Document Series*);
 - ii. open and maintain a register of all interested and affected parties in respect of the application in accordance with regulation 57; and
 - iii. submit any comments received from interested and affected parties following such a public participation process, to the competent authority.

The application for exemption(s) must be clearly communicated during the public participation process to be followed during the Basic Assessment or Scoping and EIA process.

- d) The application for exemption (see section 5 below) must be submitted to the Department in writing and must be accompanied by:
 - i. an explanation of the reasons for the application for exemption;
 - ii. any applicable supporting documents; and
 - iii. the prescribed application fee.

- e) The Department will decide on the application for exemption (see section 8 below) in accordance with Regulation 10 of the NEMA EIA Regulations which *inter alia* stipulates that a response, in writing, on the application must be forwarded to the applicant within 10 days of the decision being taken. If the application for exemption is granted or refused, the Department will issue an exemption notice to the applicant in accordance with regulation 54.

- f) The decision taken by the Department may be appealed. See the Department's Guideline on Appeals, which forms part of the Department's *NEMA Environmental Impact Assessment Regulations Guideline and Information Document Series*.

- g) If an application is approved, the Department will stipulate conditions and the period for which the exemption is granted (if the exemption is granted for a period), and may review, from time to time, any exemption notice issued, and withdraw or amend the exemption notice in writing. The holder of the exemption notice will first be given an opportunity to comment in writing on the reasons for the amendment or withdrawal in accordance with NEMA EIA Regulation 55(2).

5. SUBMISSION OF EXEMPTION APPLICATIONS

5.1 When to apply for exemption

According to the regulations, applications for exemption can be submitted at any time within the EIA process (by completing and submitting the relevant section of

the general application form (for Basic Assessment or Scoping and EIA) to be submitted).

For administrative reasons the Department however encourages the submission of applications for exemptions as part of the general application form for a Basic Assessment or Scoping and EIA application (as apposite to a separate stand alone application for exemption), and that one public participation process is followed.

Note: Take note that exemption from having to apply for and obtain environmental authorisation prior to commencement with a listed activity cannot be applied for. Although Regulation 51 in GN No. R. 385 allows one to apply for exemption from provisions of the Regulations, it is however NEMA itself that makes it a requirement that identified activities "may not commence without environmental authorisation from the competent authority" (Section 24(2)(a) of the Act as amended refers). The exemption provision in the Regulations therefore does not allow for exemption from the provisions of the Act itself. An applicant will therefore always have to apply for and obtain environmental authorisation.

5.2 Reasons for the Exemption Application

The applicant or EAP must, to the satisfaction of the Department, explain the reasons for the exemption application in accordance with the requirements of Regulation 52(1) of the NEMA EIA Regulations. These reasons must address, *inter alia*, the following:

- a) Possible effects of the proposed exemption on the rights and/or interests of other parties;
- b) Possible impacts of the proposed activity(ies) on the environment,
- c) Possible cumulative impacts of the proposed activity(ies); and
- d) Any relevant factors in terms of Regulation 8(b) of the NEMA EIA Regulations.

5.3 Exemption application procedure

The applicant or EAP must indicate the exemptions to be applied for in the Notice of Intent to Apply for Basic Assessment activities. The actual application for exemption must then be indicated in the relevant section of the general application form (for Basic Assessment or Scoping and EIA) or the separate exemption application form (depending on when during the process exemption is being applied for), must be completed.

The fact that an applicant or EAP applied for or is to apply for exemption(s) must be clearly communicated during the public participation process to be followed during the Basic Assessment or Scoping and EIA process. An applicant may proceed with a Basic Assessment process prior to receiving an exemption notice from the Department if so advised by the Department. The Department may grant or refuse the application for exemption as explained in section 4 above. Should an application for exemption however be refused, the applicant or EAP will be required to fulfil the requirements of the provisions of the NEMA EIA Regulations for which exemption was applied for.

Applications that have not included the exemption application in their public participation process, will be required to follow a separate public participation process in accordance with regulation 53(4) of the NEMA EIA Regulations (refer to the Department's Guideline on Public Participation which forms part of the Departments' *NEMA Environmental Impact Assessment Regulations Guideline and Information Document Series*).

6. PUBLIC PARTICIPATION PROCESSES FOR EXEMPTIONS

A person may only be exempted from conducting a public participation process (or parts thereof) if the rights or interests of other parties are not likely to be adversely affected by the granting of the exemption. It is recommended that in instances where an applicant intends applying for exemption from certain

provisions of the regulations, the public participation process for such an exemption application be conducted at the same time as the public participation process related to a Basic Assessment or Scoping and EIA process.

Regulation 56 (*Public participation process*) stipulates that when conducting the public participation process in terms of these regulations, the person required to conduct the process must take into account any guidelines applicable to public participation. The Department's Guideline on Public Participation, which forms part of the Department's *NEMA Environmental Impact Assessment Regulations Guideline and Information Document Series*, must be referred to for a further explanation of the minimum requirements for public participation.

7. CONSIDERATION OF EXEMPTION APPLICATIONS

7.1 Circumstances under which applications for exemption will be considered include *inter alia*:

- a) the competent authority is convinced that the rights or interests of other parties will not be adversely affected by the application for exemption or have been sufficiently addressed by the applicant;
- b) the competent authority is convinced that sufficient public participation has been done;
- c) the nature and scale of the environmental impacts of the proposed project does reasonably allow for an exemption application;
- d) the competent authority is satisfied that the applicant has complied with the requirements, as set out in Regulation 52(1) which prescribe that an application must be in writing and must be accompanied by an explanation of the reasons for the application, any applicable supporting documents, and the prescribed application fee (if any); and
- e) urgent applications submitted in response to disasters.

7.2 Circumstances under which applications for exemption will not be considered

- a) if any of the requirements of Regulation 52(1) are not met or;
- b) if the granting of the exemption is likely to adversely affect the rights and interests of other parties;
- c) if the Department is of the opinion that an activity is likely to result in significant environmental impacts and the granting of the exemption will result in significant environmental impacts not being adequately addressed
- d) if an exemption application is made for an exemption from having to apply for and obtain environmental authorisation; and
- e) if an exemption application is made for an exemption from an investigation of alternatives;
- f) if an exemption application is made for an exemption from the submission of any report compiled in terms of the NEMA EIA regulations.

Note: For applications that must follow a Scoping and EIA process, applicants' are discouraged from applying for exemption from having to appoint an Environmental Assessment Practitioner.

8. EXEMPTION APPLICATION DECISION – ISSUING OF EXEMPTION NOTICE

The Department's decision on an exemption application will be in the form of an exemption notice issued in terms of Regulation 54. The Department may issue an exemption notice:

- i. as part of or prior to the decision to authorise or refuse the undertaking of activity(ies) requiring Basic Assessment;
- ii. as part of or prior to the Department's letter of acceptance or rejection of the scoping report and plan of study for environmental impact assessment, or
- iii. as part of the decision to authorise or refuse the undertaking of the activity(ies) requiring Scoping and EIA.

9. APPEAL

- The Department's decision to grant or refuse exemption may be appealed and such an appeal may suspend the EIA application process;
- The Department's decision to grant or refuse exemption may be appealed and such an appeal will suspend the environmental authorisation;
- The applicant must inform all registered interested and affected parties of the Departments' exemption decision within 10 days of being notified of the exemption decision;
- Any person affected by the exemption decision of the Department has 10 days from being notified of the decision to lodge a notice of intention to appeal with the MEC;
- An applicant has 10 days from being notified of the decision to lodge a notice of intention to appeal with the MEC;
- More information regarding appeals is contained in the Department's Guideline on Appeals, which forms part of the Departments' *NEMA Environmental Impact Assessment Regulations Guideline and Information Document Series*.

It must be stressed that exemption applications must be made with extreme caution and discretion.

10. REFERENCES

DEAT (2005) Guideline 4: Public Participation, in terms of the EIA Regulations, 2005, Integrated Environmental Management Guideline Series, Department of Environmental Affairs and Tourism (DEAT), Pretoria.

DEAT (2006) *Environmental Impact Assessment Regulations in terms of the National Environmental Management Act (Act No. 107 of 1998)* (Government Notice No. R. 385, R. 386, and R. 387 in the Government Gazette of 21 April 2006 refer).