

Proposed Action plan for the 4x4 Industry to address historic non-compliance with the Environmental Impact Assessment Regulations

Background

The Off-Road Vehicle Industry (“4x4 Industry”), as a major stakeholder and member of the National Off-Road Workgroup (“NOW”), is currently in consultation with the national Department of Environmental Affairs and Tourism (“DEAT”) to assist the DEAT in finding ways to promote the maximum self-regulation of the Off-Road Industry in South Africa. As a responsible stakeholder the 4x4 Industry wants to be pro-active in developing a strategy that will not only be aimed at the protection of the environment and responsible tourism development in South Africa but which will also ensure that members of the 4x4 fraternity is in compliance with any statutory provisos governing the off-road vehicle activities in South Africa.

One of the concerns highlighted by industry is that examples may exist where members may potentially be liable because they are in contravention of the Environmental Impact Assessment Regulations (i.e. they commenced with a listed activity prior to be granted a Record of Decision to proceed with the activity). This contravention might not have been intentional since the previous (ECA EIA regulations) and current NEMA EIA Regulations, did not and still does not specifically provide for the construction of off-road vehicle courses.

The Environmental Conservation Act, 1989, EIA Regulations listed activities which might have, indirectly, been relevant to the 4x4 industry. These activities included:

- The construction, erection or upgrading (“upgrading” means the expansion beyond its existing size, volume or capacity of an existing facility, installation or other activity referred to in this Schedule, but does not include regular or routine maintenance and the replacement of inefficient or old plant, equipment or machinery where such does not have an increased detrimental effect on the environment) of-
 - roads, railways, airfields and associated structures;
 - racing tracks for motor-powered vehicles and horse racing. But not including indoor tracks;
 - canals and channels, including structures causing disturbances to the flow of water in a river bed, and water transfer schemes between water catchments and impoundments;

- dams, levees and weirs affecting the flow of a river;
- the change of land use from
 - agricultural or zoned undetermined use or an equivalent zoning to any other land use;
 - use for nature conservation or zoned open space to any other land use.
- The reclamation of land, including wetlands, below the high-water mark of the sea, and in inland waters.

The above mentioned activities came into effect from September 1997 up to 1 April 1998. The relevance of the abovementioned commencement dates are that if a person commenced with a listed activity after 1 April 1998, without conducting an EIA, and therefore did not receive approval for such an activity, such a person will be in contravention of section 22 of the ECA. This in turn will result in the necessity to apply for amnesty in respect of section 24(G) of NEMA, discussed below.

In terms of section 24(5) read with section 44 of the National Environmental Management Act, 1998 (Act No. 107 of 1998), new (current) Environmental Impact Assessment (“EIA”) regulations, which are provided for in Regulations 385, 386 and 387 of 21 April 2006, came into effect in July 2006.

The NEMA EIA Regulations also lists activities which may, indirectly, be relevant to the 4x4 industry. These activities include:

The construction of facilities or infrastructure, including associated structures or infrastructure, for—

- any purpose in the one in ten year flood line of a river or stream, or within 32 metres from the bank of a river or stream where the flood line is unknown, excluding purposes associated with existing residential use, but including -
 - (i) canals;
 - (ii) channels;
 - (iii) bridges;
 - (iv) dams; and
 - (v) weirs;
- The transformation or removal of indigenous vegetation of 3 hectares or more;

- The construction of a road that is wider than 4 meters or that has a reserve wider than 6 meters;
- The transformation of undeveloped, vacant or derelict land;
- The transformation of an area zoned for use as public open space or for a conservation purpose to another use.
- the outdoor racing of motor powered vehicles including –
 - motorcars;
 - trucks;
 - motorcycles;
 - quad bikes;

Section 24F (1) of the National Environmental Management Act, 1998 (“NEMA”) as amended, provides that no person may commence an activity listed in terms of section 24(2)(a) or (b) unless the competent authority has granted an environmental authorisation for the activity, and no person may continue an existing activity listed in terms of section 24(2)(d) if an application for an environmental authorisation is refused.

The abovementioned provision was preceded by Section 22(1) of the Environmental Conservation Act, 1989, which provided that no person shall undertake (commencement of any physical activity on the site in furtherance of a listed activity); an activity identified in terms of section 21 (1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by a competent authority or local authority or an officer, which competent authority, authority or officer shall be designated by the Minister by notice in the Gazette. This provision effectively implies that a person who commenced with a “listed activity” such as the change of land use from agricultural or zoned undetermined use or an equivalent zoning to any other land use, after the regulations came into effect, (i.e. the effect of the abovementioned provision is that if a person commenced with a listed activity after 1 April 1998, without conducting an EIA, and therefore did not receive approval for such an activity, such a person will be in contravention of section 22 of the ECA. This in turn will result in the necessity to apply for amnesty in respect of section 24(G) of NEMA, discussed below.

Section 24F (2) of NEMA further provides that it is an offence for any person to contravene section 24(F)(1) or the conditions applicable to any environmental authorisation granted for a listed activity and that a person convicted of an offence in terms of section 24(F)2 is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment.

It is thus clear that both the previous and current EIA Regulations did not specifically provide for the construction of 4x4 routes and associated facilities but did however provide for activities which might be associated with the construction of a 4x4 routes such as the clearing of vegetation or the diversion of a stream, ect. It is in such scenarios where a member of the 4x4 fraternity might have contravened the EIA Regulations.

At present a person who commits a section 24F offence has the discretion to apply for rectification. Should such an application be made, the competent authority is obliged to consider the application. This means that even in the event of the intentional commission of a section 24F crime that causes extremely serious harm to the environment and that would not ordinarily be authorized, the competent authority must spend time and use already stretched capacity to process such an application. It is also implicit in the present section 24G provision that an illegal activity in respect of which a section 24G application is submitted may continue until such time as the MEC either grants authorization or directs a person to cease (despite the implication in the section, there are other mechanisms (eg. directives, compliance notices and criminal prosecution) that may be used to stop development). At present the Act does not allow the Minister or MEC to issue a directive in the event of a person admitting to an offence being committed in terms of section 24F(2) NEMA.

In effect, if there is a need for a 24G application, it means the potential applicant is already in non-compliance of the law and only has the option to submit a 24G application or face enforcement action.

Section 24G(1) of NEMA provides that on application by a person who has committed an offence in terms of section 24F(2) the Minister or MEC, as the case may be, may direct the applicant to—

(a) compile a report containing—

- (i) an assessment of the nature, extent, duration and significance of the impacts of the activity on the environment, including the cumulative effects;
- (ii) a description of mitigation measures undertaken or to be undertaken in respect of the impacts of the activity on the environment;
- (iii) 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 issues raised have been addressed;
- (iv) an environmental management plan; and provide such other information or undertake such further studies as the Minister or MEC may deem necessary.

Section 24G(2) provides that upon the payment by the person of an administration fine not exceeding R1 million as determined by the competent authority, the Minister or MEC concerned must consider the report contemplated in section 24G(1) and thereafter may—

- (a) direct the person to cease the activity, either wholly or in part, and to rehabilitate the environment within such time and subject to such conditions as the Minister or MEC may deem necessary; or
- (b) issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary.

Section 24G(3) provides that a person who fails to comply with a directive to cease the activity, either wholly or in part, and to rehabilitate the environment within such time and subject to such conditions as the Minister or MEC may deem necessary or who fails to comply with a condition as set out in an environmental authorisation is guilty of an offence and liable on conviction to a penalty liable of a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment.

It is thus almost a certainty that the applicant will pay a fine, and only thereafter will the competent authority decide whether the activity will be authorised in full or only a part of the activity, whether the activity is declined or if any additional impact studies will be needed before a decision can be made.

Taking into consideration the abovementioned discussion it is important, from the 4x4 industry perspective, that a strategy is to be formulated in respect of the management of regulatory contraventions by members of the industry as well as to develop a system which will allow members to be in a position to clearly understand when and how they should adhere to all EIA requirements relating to any off-road vehicle activities.

In light of the above the following action plans are proposed:

- It is proposed that the 4x4 industry launch a drive to invite all industry members to investigate the potential of being in non-compliance with the EIA regulations and the consideration of submitting a section 24G application.
- Liaise and agree with the industry and authorities to embark on a process to develop a set of norms and standards and operational guidelines tailor-made for the 4x4 industry, that will be inline with the 4x4 strategy and, as far as it is permissible, which might be used as a basis for excluding the 4x4 industry to conduct EIAs.

- Liaise and agree with the industry and authorities to embark on a process to develop a standard Environmental Management Plan relevant to 4x4 industry.

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