

Section 3: Legal Scan of Applicable South African Legislation – Trail Development and Operation

3.1 Introduction

This section includes a literature overview of legislation applicable to trail development and operation within the off-road sector in South Africa.

Gaps, indicating possible areas where legislation and regulations fall short in terms of ensuring appropriate activity and behaviour in the off-road sector, have been highlighted.

Not all the legal gaps identified here are addressed in the final off-road strategy. The strategy contains more detail about how some gaps have been addressed. The other gaps highlighted here may be addressed through possible future interventions.

There are probably hundreds of pieces of legislation that relate in some way to the off-road sector in South Africa. It is not feasible or appropriate to analyse all legislation and thus for the purposes of this study, we have only analysed the most relevant legislation.

3.2 Overview of Applicable Legislation

The following national legislation relates directly to trail development and operation within the off-road sector:

- Constitution of the Republic of South Africa;
- NEMA;
- NEMA Environmental Impact Assessment Regulations, 2006;
- National Environmental Management Act: Control of Vehicles in the Coastal Zone Regulations, GN Regulation 1399 of 21 December 2001;
- National Environmental Management: Biodiversity Act, Act 10 of 2004 (“**NEMBA**”);
- National Environmental Management: Protected Areas Act, Act 57 of 2003;
- National Environmental Management: Air Quality Act, Act 39 of 2004;
- Environment Conservation Act 73 of 1989 – Noise Regulations – GNR 154 of 10 January 1992;
- National Heritage Resources Act, Act 25 of 1999; and

- National Water Act, Act 36 of 1998 (“**NWA**”).

Each of these is analysed separately below and key and relevant information highlighted. Gaps within the legislation, as applicable to the off-road sector, have been highlighted at the end.

3.3 Analysis of the Constitution of the Republic of South Africa (Act 108 of 1996)

The Constitution is the supreme law of South Africa and as such all other policies and legislation must be consistent with its principles and provisions.

The Constitution contains a Bill of Rights, which sets out inalienable rights applicable to every South African, which includes both natural and juristic persons.

These rights include substantive rights such as the right to an environment that is not harmful to their health or well-being and everyone has the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development, access to water as well as administrative rights, such as the right of access to information and the right to administrative justice, that assist in the enforcement of the substantive rights.

However the Constitution also provides for property ownership rights and the use of this property.

Looking at it from an off-road angle, these rights can or may be in conflict. Everyone has the right to a protected environment meaning that land use may need to be controlled in order to protect it, but on the other hand, citizens also have the right to own and use their land. Property rights are thus impacted upon if land use is controlled or restricted.

3.4 Analysis of NEMA

NEMA essentially gives effect to Section 24 of the Constitution, which is the environmental right. It is overarching legislation in that it sets out the general principles for dealing with environmental matters regardless of which organ of state is exercising jurisdiction in any given matter. NEMA therefore also contains co-operative governance provisions and procedures for co-ordinating environmental functions exercised by the various organs of state.

NEMA lays down principles that organs of state and citizens must take into account when making decisions affecting the environment. The underlying principle is that development must be socially, environmentally and economically sustainable and that environmental management must address human needs. The section then sets out various considerations that must be taken into account to enable sustainable development and these include the need to protect ecosystems, the polluter pays principle, the precautionary principle, the preventative principle, waste minimisation and public participation, to mention a few.

The NEMA principles apply throughout South Africa to the actions of all organs of state that may significantly affect the environment and the principles must serve as a general framework within which environmental management and implementation plans must be formulated and serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of the NEMA or any statutory provision concerning the protection of the environment.

Section 2(4)(a)(i) provides that sustainable development requires the consideration of all relevant factors including the following:

- (i) That the disturbance of ecosystems and loss of biological diversity be avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (iii) That the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;
- (v) That the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
- (vi) That the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised; and
- (vii) That a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
- (viii) That negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

The NEMA principles also provide for the participation of all interested and affected parties in environmental related matters and for the taking of any decisions (which might have a significant impact on the environment) by a relevant competent authority.

Although public participation as provided for in NEMA is not required in developing the off-road strategy and implementation framework, extensive public consultation will be conducted to elicit comment from all relevant stakeholders.

It is important to note that our courts have held that it is not procedurally sound to submit to the decision maker, information and reports that will not also be considered and commented on by the interested and affected parties (Earthlife Africa (Cape Town) V The Director General: Department of Environmental Affairs and Eskom Holdings Ltd 2005(3) SA 156(C)).

NEMA also imposes a duty of care, which places a positive obligation on any person who has caused, is causing, or is likely to cause damage to the environment to take reasonable steps to prevent such damage. NEMA also sets out the type of steps to be taken as well as who may be held liable for breach of this duty. The list includes owners, those responsible whether directly or indirectly, anyone in control of the land, and anyone with a duty to prevent damage occurring.

Chapter 5 of NEMA deals with Integrated Environmental Management. Integrated environmental management is a philosophy, which prescribes a code of practise for ensuring that environmental considerations are fully integrated into all stages of the development process in order to achieve a desirable balance between conservation and development.

The general objectives of the chapter are contained in Section 23, which states that the purpose of the chapter is to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of activities, i.e. inter alia, off-road activities.

Section 23 provides that the general objective of integrated environmental management is to identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, as well as the risks, consequences, alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management. It goes on to state that the objective is also to ensure that the effects of the activities on the environment receive adequate consideration before actions are taken in connection with them. It will thus be imperative that the off-road strategy and implementation framework adheres to the principles as set out in Section 2 of NEMA as well as the provisions of Chapter 5.

Section 24 deals with the implementation of the general objectives of integrated environmental management. Subsection 24(1) provides that:

"In order to give effect to the general objectives of integrated environmental management, the potential impact on the environment, socio-economic conditions and cultural heritage of activities requiring authorisation by law and which may significantly affect the environment, must be considered, investigated and assessed before they are implemented and reported to the organ of state charged by law with authorising, permitting or otherwise allowing the implementation of the activity".

Section 24 further provides that the investigation, assessment and communication of the potential impact of activities contemplated in subsection 24(1) must take place in accordance with procedures as laid down in Section 24.

Section 24 provides that the Minister of Environmental Affairs and Tourism may, with the concurrence of the relevant Member of the Executive Council (“**MEC**”) in a province, in the prescribed manner, identify activities which may not be commenced without prior authorisation from the Minister or MEC, geographical areas in which specified activities may not be commenced without such prior authorisation, existing authorised and permitted activities which must be assessed, considered, evaluated and reported on, and further, prepare compilations of information and maps specifying the attributes of the environment in particular geographical areas which must be taken into account by every organ of state charged by law with authorising, permitting or allowing the implementation of a new activity or evaluating an existing activity.

The above is subject to the proviso that if the authorisation for an activity falls under another Minister's jurisdiction, then a decision relating to identification of relevant activities and geographical areas must be taken in consultation with that Minister. It is in this context that the NEMA Environmental Impact Assessment Regulations, 2006 have been promulgated to give effect to Section 24.

It is also important to note that compliance with a procedure laid down by a Minister or MEC in terms of Subsection 24(3) does not remove the need to obtain authorisation for that activity from any other organ of state charged by law with authorising, permitting or otherwise allowing the implementation of the activity.

3.5 Norms and Standards, NEMA (as amended)

The potential use of Norms and Standards for the off-road sector was investigated.

According to proposed amendments to the 2006 EIA Regulations (specifically Regulation 385), promulgated in terms of Section 24(5) and read with Section 44 of NEMA, the *“Minister may by notice in the Government Gazette issue national guidelines on the implementation of*

these Regulations (current Regulation 385) in regard to the process and criteria for the development of new or adoption of existing Norms or Standards’.

Currently the proposed amendment relates to the existing listed activities, however, the off-road sector could approach the Minister or the relevant MEC to determine if the development of a set of Norms and Standards could be feasible in terms of the objectives of the competent authority’s approach to integrated environmental management and a self-regulating regime.

The proposed amendments further provide that “*Norms or Standards developed or adopted in terms of section 24(10) of the Act, are legally binding after prescription by the Minister or MEC, as the case may be*”. The proposed amendment may be useful for the off-road sector, which could liaise with DEAT to explore the possibility of including a set of Norms and Standards specifically designed for the off-road sector.

3.6 Analysis of NEMA, Environmental Impact Assessment Regulations, 2006

The Minister of Environmental Affairs and Tourism has in terms of Section 24(5) read with Section 44 of the NEMA, promulgated new Environmental Impact Assessment (“**EIA**”) regulations, which are provided for in Regulations 385, 386 and 387 of 21 April 2006. Regulation 385 provides that certain activities may not commence without a Basic Assessment (activities listed in Regulation 386) or a Scoping and EIA Assessment (activities listed in Regulation 387).

Relevant activities in respect of off-road vehicle activities, which have been identified in terms of Section 24(2)(a) of the Act, which may not commence without environmental authorisation from the competent authority and in respect of which the investigation, assessment and communication of potential impact of activities must follow the procedure as described in Regulations 22 to 26 (Basic Assessment Process – Regulation 386) of the EIA Regulations (Regulation 385), may where relevant include the construction of facilities or infrastructure, including associated structures or infrastructure, for:

- 1(m) 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.

- 1(r) the outdoor racing of motor powered vehicles including -
 - (i) motorcars;
 - (ii) trucks;
 - (iii) motorcycles; and
 - (iv) quad bikes.

- (12) The transformation or removal of indigenous vegetation of 3 hectares or more or of any size where the transformation or removal would occur within a critically endangered or an endangered ecosystem listed in terms of section 52 of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004);

- (15) The construction of a road that is wider than 4 metres or that has a reserve wider than 6 metres, excluding roads that fall within the ambit of another listed activity or which are access roads of less than 30 metres long; and

- (20) The transformation of an area zoned for use as public open space or for a conservation purpose to another use.

From an environmental legislative perspective, it is to be noted that no specific statutory provision, provides for the regulation of off-road vehicle use in conservation areas, which may include a “**national park**” (means an area which was a park in terms of the National Parks Act, 1976 (Act No. 57 of 1976), and includes a park established in terms of an agreement between a local community and the Minister which has been ratified by Parliament; or an area declared or regarded as having been declared as a national park); “**national protected area**” (means a special nature reserve; a national park; or a nature reserve or protected environment- managed by a national organ of state; or which falls under the jurisdiction of the Minister for any other reason) or a “**nature reserve**” (means an area declared, or regarded as having been declared as a nature reserve; or an area which before or after the commencement of this Act was or is declared or designated in terms of provincial legislation for a purpose for which that area could be declared as a nature reserve)..

In addition, it is important to note that most provincial authorities mandated with the protection of South Africa’s natural resources, including water resources, regard a wetland or sensitive ecological setting as a priority for protection, i.e. where a wetland or sensitive ecological setting that is probably sustained by groundwater, occurs within the area of influence of the proposed development. Many off-road vehicle tracks are situated on undeveloped or derelict land, which in many instances, have a wetland system.

3.7 Analysis of the National Environmental Management Act: Control of Vehicles in the Coastal Zone Regulations, GN Regulation 1399 of 21 December 2001

The Regulations have the following objectives:

- Generally to prohibit the use of vehicles in the coastal zone;
- To identify vehicle uses in the coastal zone which are permissible (without any formal authorisations);
- To authorise the use of vehicles in the coastal zone in certain circumstances and when the prescribed requirements have been complied with;
- To provide for specific measures to enforce the Regulations; and
- To prescribe penalties for contraventions of the Regulations.

The Regulations prohibit vehicle use in the coastal zone unless the use is a *permissible use* in terms of Regulation 4, or authorised under Regulation 6 (permit). The vehicle use may also be lawful if a permit, licence or exemption was issued in terms of the Regulation prior to having been amended.

The Regulations, although effective for the regulation of vehicles in the coastal zone, are not vehicle specific (only make reference to any type of vehicle) and are not enforceable in respect of areas, which fall outside the definition of the coastal zone of the Republic of South Africa.

3.8 Analysis of NEMBA

The National Biodiversity Strategy and Action Plan (“**NBSAP**”) and the National Spatial Biodiversity Assessment form the basis of the National Biodiversity Framework (required in terms of Chapter 3 of the NEMBA).

The NBSAP is informed by the principles set out in a number of policies and legislation, in particular the Constitution of South Africa (Act 108 of 1996), the White Paper on the Conservation and Sustainable Use of Biodiversity (1997), NEMA, and related legislation.

Key principles are equity, sustainability, co-operative governance and participation. The Strategy is intended to be a long-term (20 year) strategy and implementation will be prioritized through the Action Plan.

To achieve the overarching goal, strategic objectives have been identified.

The strategic objectives relevant to the off-road strategy and implementation framework include:

- An enabling framework which integrates biodiversity into all sectors of the economy as well as into the policies, strategies, plans, procedures and operations of industry, government and non-governmental bodies;
- Human development and well-being is enhanced through sustainable utilization of biological resources and equitable sharing of benefits specifically looking at an enabling framework for partnerships between government, the private sector, organized civil society and communities that encourages entrepreneurship, innovation, investment and action at local level and the responsible use of biological resources to maximize sustainable benefits;
- Integrated land and water management across the country is minimized by managing the impacts of threatening processes on biodiversity;
- National initiatives to manage land, water and biological resources are coordinated, developed and implemented with full stakeholder participation to contribute to sustainable socio-economic development;
- Biodiversity, including species, ecosystems and ecological processes, is effectively conserved across the landscape and seascape, with a particular focus on biodiversity priority areas;
- Biodiversity, and pressures and threats to biodiversity at all levels, including landscapes, ecosystems, habitats, species and genes, is catalogued, assessed, planned for and monitored to inform policy, strategy and action;
- Biodiversity is managed across the landscape and seascape outside the protected area network, particularly in biodiversity priority areas;
- A coordinated, efficient and effective response to international agreements promotes sustainable development in South Africa;
- Enhanced institutional effectiveness and efficiency to ensure good governance in the biodiversity sector and effective cooperation, coordination and alignment at all levels that will give effect to the principle of cooperative governance;
- The enforcement of regulations ensuring compliance and which discourages activities and processes that impact negatively on biodiversity; and
- The development of a comprehensive and proactive national communication, awareness raising and advocacy strategy which reaches all the people of South Africa and facilitates conservation and wise use of biodiversity.

Implementation of the NBSAP and achievement of the objectives will take time and is an ongoing process.

Apart from the National Biodiversity Framework, the Convention on Biological Diversity (“**CBD**”) and the National Environmental Management: Biodiversity Act, Act 10 of 2004, are key statutory instruments relating to the management and conservation of South Africa’s biological resources.

South Africa ratified the CBD in November 1995. As a Party to the Convention, the country has obligations with respect to implementation of the Convention. As the objectives of the Convention indicate, the CBD should be accorded high importance and priority. In addition to its important goals on conservation and sustainable use, the goal on fair and equitable sharing of the benefits arising out of utilisation of genetic resources, should be considered in a strategic sense particularly since:

- South Africa is the third most biological diverse country in the world, with many unique species occurring within its borders;
- South Africa is well developed knowledge, western and traditional, of its biological diversity; and
- Biological resources underpin many economic sectors such as agriculture, forestry, pharmaceuticals.

The CBD brings a strategic and integrated approach to conservation and sustainable use of biodiversity – an issue which has previously been addressed in a fragmented way. Additionally, the CBD, highlights also political, economic and social issues relating to biodiversity. The fact that South Africa has sovereign right over its biological resources puts an obligation with respect to regulation so as to ensure sustainability of the resource as well as ensure that benefits arising from use of South African biodiversity accrue for the nation’s benefit. The role of local communities and their knowledge is recognised by the Convention and this again requires, at national level, that mechanisms are in place to affect the goals of the Convention in this regard. The scope of the CBD, therefore implies the need for effective co-ordination across all sectors so as to ensure compliance.

The National Environmental Management: Biodiversity Act 10 Of 2004 came into operation on the 1st September 2004, with the exception of Sections 49, 57, 65, 66, and 71 and Chapter 7 (Sections 87 to 96 inclusive) which came in effect on the 1st April 2005; and Chapter 6 (Sections 80 to 86 inclusive) and Section 105 which came in effect on the 1st January 2006.

The main objectives of the Act are to provide for the management and conservation of South Africa's biodiversity within the framework of NEMA, the protection of species and

ecosystems that warrant national protection and the sustainable use of indigenous biological resources.

DEAT has the mandate concerned with policy setting in respect of biodiversity related issues. The implementation of this policy will undoubtedly, require active involvement of a wide range of stakeholders and increased resources and capacity.

The off-road sector representative body to be set up, is one such stakeholder whose active involvement may assist DEAT in implementing the relevant policies. It is envisaged that DEAT, although intending to play an implementing role, would rather see itself in a co-ordinating role. DEAT envisages that if the Department should go the route of co-ordinator, they will need to:

- Develop a strategy for co-ordinating the activities relating to the CBD. The Committee for Environmental Co-ordination (“**CEC**”) and Minister and MEC Committee for Environmental Affairs and Tourism (“**MINMEC**”) are such mechanisms. DEAT will also have to develop technical know-how in the thematic areas, areas such as bio safety, alien / invasive species, agro-biodiversity and access to genetic resources, so that policy decisions of CEC and MINMEC and positions South Africa at the Conference of the Parties (“**COPs**”) are adequately informed;
- A network of technical experts needs to be involved in CBD activities, in a systematic and co-ordinated way. Since there are a range of initiatives driven by non-governmental organisations and private sector, which fulfil the objectives of the CBD and the Act, DEAT will have to have effective co-ordination with these sectors; and
- It is DEAT’s view that, ultimately, the legislative and institutional framework for the management and protection of biological resources that a country develops will only be as good as the process through which it is developed. The Department feels that once established the legislative framework must have the broad support of all relevant sectors in government and society; fit within the country’s larger strategy for conserving and sustainability using biodiversity. DEAT’s policy, thus, needs to be supported by institutional processes and capacities sufficient to implement it.

Formulating effective regulatory instruments requires participation by a wide range of stakeholders and technical experts. This should include representation from NOW.

3.9 Analysis of the National Environmental Management: Protected Areas Act, Act 57 of 2003

The National Environmental Management: Protected Areas Act provides for the declaration and management of protected areas in South Africa and cooperative governance in such declaration and management of protected areas.

If considering and declaring certain areas to be suitable for off-road vehicle use (not yet provided for in the Act), the Minister, an MEC for environmental affairs or a municipality must take note of the different specification of protected areas and the restrictions, in terms of certain activities, which are relevant to the specified areas.

Accordingly, the Minister, an MEC for environmental affairs or a municipality may by notice in the Gazette declare an area specified in the notice as a nature reserve; special nature reserve, protected environment or a part of an existing nature reserve, special nature reserve or protected environment; determine the type of the relevant reserve and assign a name to the relevant reserve. The purpose for declaring an area as a relevant reserve or as part of an existing relevant reserve must be:

- (a) To supplement the system of national parks in South Africa;
- (b) To protect the area if the area:
 - a. Has significant natural features, species, habitats or biotic communities;
 - b. Has a site of scientific, cultural, historical or archaeological interest; or
 - c. Is in need of long term protection and the maintenance of its biodiversity.
- (c) To provide for a sustainable flow of natural products and services to meet the needs of a local community;
- (d) To enable a variety of traditional consumptive uses; or
- (e) To provide for nature based recreation and tourism opportunities.

Only the following land may be declared as a relevant reserve or as part of an existing relevant reserve:

- (a) Land owned by the state or an organ of state;
- (b) Land under the exclusive physical control of the state or an organ of state; or
- (c) Land owned by a private person who has consented to the declaration by way of a written agreement with the Minister, the MEC for environmental affairs in the relevant province or the relevant municipality.

Before declaring an area as a nature reserve or protected environment, or as part of an existing nature reserve or protected environment area, a competent authority must follow a consultative process as may be appropriate in the circumstances, a competent authority must, as may be appropriate:

- (a) Consult:
 - (i) The Minister and other national organs of state affected by the proposed declaration;
 - (ii) The MEC for environmental affairs in the province; and
 - (iii) Any other municipality that may have an interest in the declaration.
- (b) Allow community participation through mechanisms, processes and procedures established in terms of Chapter 4 of the Local Government: Municipal Systems Act, 2000 (Act No.32 of 2000); and
- (c) Give notice of the intention to declare the area as a protected area to each owner of land within the area, by registered post to the last known postal address of each such owner.

The declaration of private land as a protected area, or part of an existing protected area, may be initiated either by the Minister, the MEC for environmental affairs in the province, the relevant municipality or the owners of that land acting individually or collectively.

Any request received by the Minister, an MEC or a municipality from the owners of private land for their land to be declared as a protected area, or part of an existing protected area, must be considered by the Minister, MEC or municipality.

A municipality must manage a local protected area itself; or assign in accordance with the Local Government: Municipal Finance Management Act, 2003, the management of the area to a municipal entity under the sole or shared ownership control of the municipality.

A municipality must prepare a management plan for a local protected area and submit a copy of the plan to the MEC for environmental affairs in the province for approval.

When preparing a management plan for a protected area, the prospective management authority or the municipality must consult other organs of state and affected parties, which have a vested interest in the area. The management authority of a protected area must manage the area in accordance with any applicable municipal by-laws, in the case of a local protected area.

The management plan for a protected area must include:

- (a) The management objectives for the area;
- (b) A zonation of the area indicating what activities may take place in different sections of the area, and the conservation objectives of those sections;

- (c) A development plan for the area;
- (d) Norms and standards for the management of the area;
- (e) Indicators for monitoring compliance with these norms and standards;
- (f) Health promoting education and malaria control measures if malaria causing mosquitos are present in the area; and
- (g) Arrangements for the involvement of local communities in the development plan.

If a municipality fails to ensure that a local protected area is managed in accordance with any prescribed norms and standards, the MEC for environmental affairs in the province may take such steps as may be necessary in the circumstances, including an intervention in terms of Section 139 of the Constitution.

3.10 Analysis of the National Environmental Management: Air Quality Act, Act 39 of 2004

The National Environmental Management: Air Quality Act largely repealed the Atmospheric Pollution Prevention Act, 1965 (Act 45 of 1965) and provides the framework for governance of air quality management through the establishment of national norms and standards, and a regulatory framework for an air quality management planning and reporting regime and numerous regulatory instruments for the control of air pollution and a comprehensive approach to compliance and enforcement.

It is important to note that the administration of Registration Certificates issued for Scheduled Processes under the Atmospheric Pollution Prevention Act, Act 45 of 1965, (“**APPA**”) by national government is intended to be replaced by the administration of Atmospheric Emissions Licenses for Listed Activities under the National Environmental Management: Air Quality Act (Act 39 of 2004) (“**NEMAQA**”). Atmospheric Emissions Licenses will be administered by the relevant metropolitan or district municipality unless they have asked the provincial environmental department to do this or the metro or municipality is the operator of the listed activity.

The APPA is scheduled to be replaced, in its entirety, by the National Environmental Management: Air Quality Act. On 11 September 2005 various sections of the NEMAQA were put into effect, primarily with the exception of the sections dealing with “listed activities”. The APPA will only be repealed once these sections are put into effect. Thus, the NEMAQA will ultimately repeal APPA, but those provisions in the new Act, dealing with registration certificates/licences have not been signed into effect as yet.

In terms of the Air Quality Act the DEAT or a provincial department for environmental affairs or municipality may in terms of national regulations, norms or standards, provincial regulations, norms or standards or a by-law identify substances or mixtures of

substances in ambient air which, through ambient concentrations, bioaccumulation, deposition or in any other way, present a threat to health, well-being or the environment in South Africa as a whole, a specific province or municipality or which the DEAT, province or municipality reasonably believes present such a threat; and in respect of each of those substances or mixtures of substances, establish local standards for emissions from point, non-point or mobile sources, South Africa as a whole, a specific province or municipality. These emissions may include emissions from off-road vehicles.

Section 21 provides that the Minister must, or the MEC may, by Notice in the Gazette, publish a list of activities which result in atmospheric emissions and which the Minister or MEC reasonably believes have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage.

The consequences of listing are that no person may without a provisional atmospheric emission licence or an atmospheric emission licence conduct an activity listed on the national list anywhere in the republic; or listed on the list applicable in a province anywhere in that province.

Apart from regulating activities which result in atmospheric emissions, the Act also provides for the control of noise.

3.11 Analysis of the Environment Conservation Act 73 of 1989 – Noise Regulations – GNR 154 of 10 January 1992

In terms of Section 4 any person is prohibited from producing noise greater than the dbA¹ value determined by the relevant local authority. Section 5 states that a person is prohibited from producing noise, which disturbs or impairs the convenience or peace of any person.

In terms of Regulation 8 the Local Authority may attach vehicles if the sound level of the vehicle exceeds the sound level prescribed in SABS 0181 – 1981 “Code of Practice for the Measurement of Noise Emitted by Road Vehicles when Stationary” published under General Notice 463 of 9 July 1982, by 5 dbA.

The above-mentioned regulations must be considered in the development of off-road vehicle use criteria and regulations.

¹ dB denotes decibel

3.12 Analysis of the National Heritage Resources Act, Act 25 of 1999

The Act governs natural heritage resources and the management thereof. The Act creates Heritage Authorities, namely the South African Heritage Resource Agency (“SAHRA”), with the responsibility to protect and manage certain categories of heritage resources. In addition provincial and local authorities are required to protect and manage conservation-worthy places and areas.

In addition any person that intends undertaking construction and development activities, which may include a facility for off-road vehicle use, must at the very earliest stages of initiating such a development, notify the responsible heritage resources authority and furnish it with details regarding the location, nature and extent of the proposed development. If the responsible authority then determines that additional information is required, it will specify what is needed and the person thereafter submits a report. The responsible heritage authority must then decide whether the development may proceed and under what circumstance.

The Act also provides that no person may without a permit issued by a Heritage Resources Authority disturb any building declared as a national monument, grave of a victim of conflict or the burial ground of such graves or a burial ground older than 60 years situated outside a formal cemetery, bring or use at the listed areas, any excavation equipment or equipment which assists in the detection or recovery of metal. If any person discovers the location of a grave the development activity must cease and reports must be made to the responsible Heritage Resources Authority.

This provision will not, however, be applicable to developments where an evaluation of the impact of such developments on heritage resources is required in terms of the NEMA EIA Regulations, or the Integrated Environmental Management Guidelines issued by the Department of Environment Affairs and Tourism, or any other legislation.

Where this is the case the consenting authority must nevertheless ensure that the evaluation fulfils the requirements of the relevant heritage resources authority and any comments and recommendations of such authority with regard to such development have been taken into account prior to the granting of the consent.

3.13 Analysis of NWA

The NWA is concerned with the overall management, equitable allocation and conservation of water resources in South Africa. To this end, it requires registration of water users and licenses to be obtained for water use except for certain limited instances set out in the Act. Section 21 of the NWA provides the statutory definition of what

constitutes a “water use” and provides that for the purposes of the NWA, water use includes:

- (a) Taking water from a water resource;
- (b) Storing water;
- (c) Impeding or diverting the flow of water in a watercourse;
- (d) Engaging in a stream flow reduction activity contemplated in Section 36;
- (e) Engaging in a controlled activity identified as such in Section 37(1) or declared under Section 38(1);
- (f) Discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit;
- (g) Disposing of waste in a manner which may detrimentally impact on a water resource;
- (h) Disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process;
- (i) Altering the bed, banks, course or characteristics of a watercourse;
- (j) Removing, discharging or disposing of water found underground if it is necessary for the efficient continuation of an activity or for the safety of people; and
- (k) Using water for recreational purposes.

In terms of the above, it will be important to take note that in the instance where a person develops a new off-road vehicle use route, and the construction of such route will for example include the altering the bed, banks, course or characteristics of a watercourse, or any other activity listed in section 21, a water use licence will have to be obtained.

3.14 Gap Analysis and Conclusion

South African legislation does allow for some potential to control off-road vehicle use, viz:

- **NEMA** – Provides that the Minister may, in a province, together with the relevant MEC identify activities that may not be undertaken, as well as geographic areas in which specified activities may not be undertaken without prior authorisation. In addition, current activities can also be assessed.

Off-road vehicle use is not listed as a specific activity (NEMA EIA Regulations).

However, off-road driving track development and operation could become a listed activity and sensitive areas could be specified. In the Northern Cape and Western Cape off-road driving track development and operation are being treated as listed activities under EIA legislation.

- **Norms and Standards, NEMA (as amended)** – NEMA allows for the development of Norms and Standards specific to a sector or an activity. These specify the environmental standards and management requirements for that sector and can supersede or replace the normal EIA process. Such Norms and Standards might be able to be used for trail and track owners, operators and developers and require a specific process as opposed to full EIAs.
- **National Environmental Management: Protected Areas Act** – A management plan must be prepared by a municipality for a local protected area, which includes which activities may take place on the land. The management plan could control and zone for all aspects of off-road activity.
- **NEMAQA** – A list of activities which result in atmospheric emissions which may have a significant detrimental effect on the environment, must be published by the Minister (may be published by the MEC) by Notice in the Gazette. This is however listed by country or province, and not area. It could therefore be used to control emissions, but not by sensitive or defined areas.
- **Environment Conservation Act, Noise Regulations** – Noise levels are determined by relevant local authorities and apply throughout the authority area. However Regulation 8 only refers to the noise made when a vehicle is stationary. It is unlikely that this can cater for any aspects of controlling off-road noise levels.
- **Heritage Act** – The Act indicates that any person that intends undertaking construction and development activities (which **could** include off-road vehicle use facilities) must inform the responsible heritage resources authority. While this probably applies to off-road trails, it is unlikely that it is being applied or policed
- **NWA** – If a new off-road vehicle trail is developed and will requiring the altering of the bed, banks, course or characteristics of a watercourse, a water use license must be obtained. This applies to off-road trail development and use, but it is unlikely that it is being applied.

Annexure B details a discussion that was held on the legislative issues associated with developing and operating trails and tracks and possible ways of overcoming these issues.