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NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998

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PUBLICATION OF PUBLIC PARTICIPATION GUIDELINE

Government Notice 807 in Government Gazette 35769, dated 10 October 2012. Commencement date: 10 October 2012.

I, Bomo Edith Edna Molema, the Minister of Water and Environmental Affairs, hereby publish in terms of section 24J of the National Environmental Management Act, 1998 (Act No. 107 of 1998) the Public Participation Guideline in the schedule hereto.

(Signed)

BOMO EDITH EDNA MOLEWA

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS

INTEGRATED ENVIRONMENTAL MANAGEMENT GUIDELINE SERIES (GUIDLINE 7)[sic]

PUBLIC PARTICIPATION IN THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

Further titles in this series of guideline documents are being prepared and will be made available periodically. The sequence of release and titles are subject to change

Guideline Series 1	Environmental Management Co-operation Agreements
Guideline Series 2	NEMA S24G (ECA applications)
Guideline Series 3	NEMA S24G
Guideline Series 4	Strategic Environmental Assessment
Guideline Series 5	Companion to the NEMA EIA Regulations 2010
Guideline Series 6	Environmental Management Framework
Guideline Series 7	Public Participation in the EIA process
Guideline Series 8	Handbook for authorities on handling the appeals in terms of NEMA S43

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PREFACE

This document is one of the series of guideline documents on environmental impact management legislation and Regulations. It provides guidance on the procedure and the provisions of the public participation process in terms of NEMA and its EIA Regulations as well as other relevant legislation.

ACKNOWLEDGEMENTS

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ABBREVIATIONS

BA	Basic assessment
BAR	Basic assessment report
CA	Competent Authority
DEA	Department of Environmental Affairs
EAP	Environmental assessment practitioner
EIA	Environmental impact assessment
EIR	Environmental impact report
EMP	Environmental management programme
I&APs	Interested and/or affected parties
IEM	Integrated environmental management
MEC	Member of the Executive Council
NEMA	National Environmental Management Act, 1998 (Act 107 of 1998)
PPP	Public Participation Process
S & EIR	Scoping and environmental impact assessment reporting
SR	Scoping report
PoS-EIR	Plan of study for environmental impact report

1. INTRODUCTION AND LEGAL BACKGROUND

In 2010 the Minister of Environmental Affairs passed new regulations on the requirements for conducting environmental impact assessments (EIA Regulations) in terms of Chapter 5 of the National Environmental Management Act, 1998 (Act 107 of 1998) (NEMA). The EIA Regulations replace the Environmental Impact Assessment Regulations, 2006.

In order to assist potential applicants, interested and affected parties (I&APs) and environmental assessment practitioners (EAPs) to understand what is required of them and what their role may be, the Department of Environmental Affairs has produced a series of guidelines. These guidelines are intended to be guides only and should be read in conjunction with NEMA and the EIA Regulations. They are not intended to be a substitute for the provisions of NEMA or the EIA Regulations in any way.

This guideline updates and revises the draft guideline which was developed in 2005. It provides information and guidance for applicants, I&APs and EAPs on the public participation requirements of the EIA Regulations. It provides information on the benefits of public participation, the minimum legal requirements for public participation processes, the steps of a public participation process, guidelines for planning a public participation process and a description of the roles and responsibilities of the various role-players.

2. THE IMPORTANCE OF PUBLIC PARTICIPATION PROCESS

Public participation is one of the most important aspects of the environmental authorisation process. It is considered so important that it is the only requirement for which exemption cannot be given. This is because people have a right to be informed about potential decisions that may affect them and to be afforded an opportunity to influence those decisions. Effective public participation also facilitates informed decision-making by the competent authority and may result in better decisions as the views of all parties are considered.

The benefits of public participation include the following:

- it provides an opportunity for I&APs, EAPs and the competent authority (CA) to obtain clear, accurate and understandable information about the environmental impacts of the proposed activity or implications of a decision;
- it provides I&APs with an opportunity to voice their support, concerns and questions regarding the project, application or decision;
- it provides I&APs with the opportunity of suggesting ways for reducing or mitigating any negative impacts of the project and for enhancing its positive impacts;
- it enables an applicant to incorporate the needs, preferences and values of affected parties into its application;
- it provides opportunities for clearing up misunderstandings about technical issues, resolving disputes and reconciling conflicting interests;
- it is an important aspect of securing transparency and accountability in decision-making; and
- it contributes toward maintaining a healthy, vibrant democracy.

3. WHEN PUBLIC PARTICIPATION MUST BE UNDERTAKEN

The EIA Regulations require that public participation must be done after submission of an application for either basic assessment (BA) or scoping and environmental impact report (S&EIR). Public participation can take place in a number of instances, such as exemptions, amendment of authorisation and rejection of reports within the EIA process. However, requirements for public participation may be different depending on the type of the application process. For example, the applicant or EAP must first submit a notice of his or her intention to apply for exemption to the CA and I&APs, and then submit the exemption application to the CA (notification and submission of an application may also happen simultaneously).

4. NOTIFICATION OF I&APs AND LAND OWNERS

Depending on the type of application process, an applicant/EAP conducting a public participation process (PPP) as described in Regulation 54 (2) must give notice to all potential I&APs of the application.

4.1 Method of notification

The applicant or EAP must give notice to I&APs by:

- (a) fixing a notice board at a place noticeable to the public at the boundary or on the fence of the site where the activity is to be undertaken as well as any alternative sites being considered.

Note: The site notice should be displayed for the duration of the commenting period.

- (b) giving written notice to-
 - (i) the owner or person in control of the land, if the applicant is not the owner or person in control of the land and occupiers of the site or of any alternative site on which the activity is proposed to be undertaken;
 - (ii) the owners and occupiers of land adjacent to the site or any alternative site where the activity is proposed to be undertaken;
 - (iii) the owners and occupiers of land where the site on which the activity is to be undertaken or any alternative site where the activity is to be undertaken;
 - (iv) the municipal councilor of the ward, as well as alternative sites being considered, are situated and any organisation of ratepayers that represents the community in the area;
 - (v) the Municipal Manager's office or office of the Environmental services municipality which has jurisdiction in the area;
- Note:** Both the local municipality and the district municipality should be notified.

 - (vi) any organ of state having jurisdiction in respect of any aspect of the activity (e.g. Department of Water Affairs for water use authorisations); and
 - (vii) any other party as required by the CA.
- (c) placing an advertisement in:

- (i) one local newspaper; (this should be an appropriate newspaper in terms of accessibility and written in a language that I&APs will understand); or
 - (ii) any official *Gazette* that is published specifically for the purpose of providing public notice of applications or other submissions made in terms of these regulations; and
- (d) placing an advertisement in at least one provincial newspaper or national newspaper if the activity has or may have an impact that extends beyond the boundaries of the metropolitan or local municipality and an advertisement is not being placed in any official *Gazette* (referred to in (c)(ii) above).

Note: There is currently no *Gazette* that is published specifically to notify the public of applications that are made in terms of the EIA Regulations. At present all applications must be advertised in one local newspaper where it is anticipated that the impacts of the activity will not extend beyond the boundaries of the metropolitan or local municipality, and in a provincial or national newspaper where the activity may have impacts beyond the boundaries of the metropolitan or local municipality. For the former, applicants may decide to also place an advertisement in a provincial or national paper. In this regard it must further be noted that the requirements specified in the EIA Regulations constitute the minimum requirements, and depending on the facts and circumstances of each application, additional public participation measures might be required.

- (e) Using reasonable alternative methods as agreed to by the CA to accommodate people who wish to, but cannot participate due to illiteracy, disability or any other disadvantage.
- (f) Note: Where circumstances prevent compliance to notification of I&APs, the person conducting the PPP may deviate from the requirements in agreement with the CA.

4.2 Content of the notice, notice board or advertisement

When notifying I&APs of an application by way of notice, a notice board or an advertisement, the person conducting public participation must:

- (a) give details of the particular application; and
- (b) state-
 - (i) that the application has been submitted to the CA in terms of the EIA Regulations, 2010;
 - (ii) whether BA or S&EIR procedures are being applied, in the case of an application for an EA;

- (iii) the nature and location of the activity to which the application relates;
- (iv) where further information on the application or activity can be obtained; and
- (v) the method and the person to whom representations in respect of the application may be made.

If applicable, the following must also be indicated in the notice:

- the applicant's intention to submit an application for exemption to the CA and inviting comments on the intended exemption application;
- the provision from which exemption must be applied for;
- the manner in which and the person to whom comments on the application for such exemption must be submitted;
- the date on which comments on the application for exemption must be submitted; and
- if permission has been granted by the competent authority to apply S&EIR instead of the BA to the application or vice versa.

4.3 Proof of notification

The EIA Regulations requires that notice boards, advertisements and notices notifying potentially interested and affected parties in relation to the application have been displayed, placed or given. In meeting this requirement, the EAP must submit the following to the competent authority:

- (a) a copy of the newspaper advertisement (newspaper clipping) that was published, indicating the name of the newspaper and date of publication and of such quality that the wording in the advertisement is legible;
- (b) a site map showing where the site notice was displayed, a dated photograph showing the notice displayed on site and a copy of the text contained in the notice;
- (c) copies of written notices that have been sent to I&APs, as well as:
 - (i) if the notice was sent by registered mail, a copy of all registered mail receipts which show the registered mail number, the name of the person the notice was sent to, the address of the person and the date on which the notice was posted; and
 - (ii) if the notice was sent by facsimile, a copy of the facsimile report;

- (iii) if the notice was sent by electronic mail, a copy of the electronic mail; and
- (iv) if the notice was hand delivered, a copy of hand delivered.

4.4 Minimum size of notice boards

The EIA Regulations specify that the minimum size of the notice boards must be 60cm by 42cm and that they must display the required information in lettering and in a format as may be determined by the CA.

4.5 Identifying and approaching specific stakeholders

In some instances the regulations identify certain people as being potential I&APS who must be specifically invited to comment contacted whereas in other instances I&APs are identified by more general processes.

Over and above the placement of general notices on site or in the media inviting I&APs to participate in the application process, certain stakeholders should be specifically approached (organs of state, the owner or person in control of the land etc. are automatically regarded as I&AP's). The following means of identifying stakeholders should be used when appropriate:

- Social profiles or probes provide a comprehensive summary of the key characteristics of the people of a community or area and can serve as a starting point for identifying stakeholders.
- Brainstorming sessions with the proponent and/or authorities, based on previous experience, to identify key stakeholders who may be interested or affected by the proposal.
- Established lists and databases, held by consultancies, authorities or research institutions, may hold additional contact details of residents, non-government organisations, community based organisations or constituents.
- Network or chain referral systems according to which key stakeholders are asked to assist in identifying other stakeholders.

4.6 Commenting periods and consultation with state departments and other I&APs

I&APs must be provided with an opportunity to make representations on proposed applications and all written submissions made to the CA by the applicant or the EAP. In this regard it is important that notices to I&APs explicitly indicate the duration of the commenting period, and indicate the timeframes that have been approved or set by the CA or any extension of a timeframe agreed to by the applicant or EAP.

Consultation with organs of state follows an additional process that is conducted by the CA and such organs of state have 40 days to comment (failing which they will be regarded as having no comment). However in the case of Department of Water Affairs (DWA), the days are extended. For example, when requesting comments from DWA, the 40 days must be read as 60 days in the case for waste management activities that also requires approval in terms of the National Water Act, 1998 (Act No. 36 of 1998) from the Department of Water Affairs. In this case, it is suggested that the EAP should first submit the draft report to CA and then the I&APs for comments (legally there is no need to await correspondence from the Competent Authority before awarding interested and affected parties an opportunity to comment. It is however imperative that the Draft report is submitted to the competent authority first). Thereafter, the CA should follow up with the I&APs (including state departments) to indicate that the report has been made available for comments and that state departments have 40 days within which to comment. As such, if the state department fails to comment on the report within 40 days or 60 days as the case may be, it will be regarded as though the state department will not be providing comments on the draft reports to the CA.

Note: Draft reports must first be submitted to the CA before making it available to registered I&AP's for comment. However, in the case of final reports, registered I&APs must be afforded a reasonable opportunity to comment on the report before submission to the CA.

It must be noted that any reference to days means calendar days. When a period of days must 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. The period of 15 December to 2 January must be excluded in the reckoning of days. Where a timeframe is affected by one or more public holidays, the timeframe must be extended by the number of public holidays falling within that timeframe. Public participation must not take place during the period of 15 December to 2 January.

Where a timeframe is affected by one or more public holidays that will affect work days, the timeframe must be extended by the number of public holiday days falling within that timeframe e.g. if the CA must accept and acknowledge a BAR within 14 days and the Monday and Tuesday falling within that 14 day period are public holidays, the time period is extended by two days to cater for the public holidays.

5. GUIDANCE ON THE LEVEL OF PUBLIC PARTICIPATION

The minimum requirements for public participation outlined in the EIA Regulations will not necessarily be sufficient for all applications. This is because the circumstances of each application are different, and it may be necessary in some situations to incorporate extra steps in the public participation process. This section provides guidance for deciding on the required level of public participation.

Three categories of variables need to be taken into account when deciding on the level of public participation and the process to be followed:

- the scale of anticipated impacts of the proposed project;
- the sensitivity of the affected environment and the degree of controversy of the project; and
- the characteristics of the potentially affected parties.

Where I&APs include rural or historically disadvantaged communities or people with special needs (e.g. illiteracy, disability, or any other disadvantage), the following could, inter alia, be considered to facilitate their participation or overcome potential constraints:

- Announcing the public participation process on a local radio station in a local language, at an appropriate time (e.g. peak hours);
- Using participatory rural appraisal and participatory learning and action approaches to build the capacity of the I&APs to engage and participate more effectively;
- Specific approaches to existing community structures, committees and leaders;
- Holding public meetings at times and venues suitable to the community;
- Holding separate meetings with vulnerable and marginalised groups;
- appropriate access to information must be provided; and
- reasonable assistance to people with special needs must be provided.

The following aspects need to be considered in this regard:

<i>Scale of anticipated impacts:</i>
Are the impacts of the project likely to extend beyond the boundaries of the local municipality?
Are the impacts of the project likely to extend beyond the boundaries of the province?
Is the project a greenfields development (a new development in a previously undisturbed area)?
Does the area already suffer from socio-economic problems (e.g. job losses) or environmental problems (e.g. pollution), and is the project likely to exacerbate these?
Is the project expected to have a wide variety of impacts (e.g. socio-economic and ecological)?
<i>Public and environmental sensitivity of the project:</i>
Are there widespread public concerns about the potential negative impacts of the project?
Is there a high degree of conflict among I&APs?
Will the project impact on private land other than that of the applicant?
Does the project have the potential to create unrealistic expectations (e.g. that a new factory would create a large number of jobs)?
<i>Potentially affected parties:</i>
Has very little previous public participation taken place in the area?
Did previous public participation processes in the area result in conflict?
Are there existing organisational structures (e.g. local forums) that can represent I&APs?
What is the literacy level of the community in terms of their ability to participate meaningfully within the public

participation process?
Is the area characterised by high social diversity (i.t.o. socio-economic status, language or culture)?
Were people in the area victims of unfair expropriations or relocation in the past?
Is there a high level of unemployment in the area?
Do the I&APs have special needs (e.g. a lack of skills to read or write, disability, etc)?

In addition to the above variables, the nature and state of the I&APs determines which of the following public participation mechanisms is most appropriate to use -

- Public meetings and open days
- Conferences
- Press releases
- Questionnaires or opinion surveys
- Information desks and/or info lines (helpline)
- Meetings/workshops with constituencies (e.g. national standing committees, non-government organisations/community based organisations)

6 INTERESTED AND AFFECTED PARTIES

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7.1 Distinction between I&APs and registered I&APs

The Regulations distinguish between I&APs and registered I&APs. I&APs include: (a) any person, group of persons or organisation interested in or affected by an activity; and (b) any organ of state that may have jurisdiction over any aspect of the activity.

On the other hand, "registered interested and affected parties" means an interested and affected party whose name is recorded in the register opened for that application.

In this case, only registered I&APs:

- will be notified of the availability of reports and other written submissions made (or to be made) to the CA by the applicant, and be entitled to comment on these reports and submissions; and
- will be notified of the outcome of the application, the reasons for the decision, and that an appeal may be lodged against a decision.

For purposes of an application, an EAP must open and maintain a register which contains the names, contact details and addresses of-

- (a) all persons who have submitted written comments or attended meetings with the applicant or EAP;
- (b) all persons who have requested the applicant or EAP, 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.

An EAP must give access to the register to any person who requests this in writing.

7.2 Access and opportunity to comment on all written submissions

Before submission of the final report to the CA, registered I& AP's must be afforded a reasonable opportunity to comment on the final report. A registered I&AP is entitled to comment on all written submissions made to the competent authority by the applicant or the EAP managing an application, and to bring to the attention of the competent authority any issues which the registered I&AP believe may be of significance in the consideration of the application, provided that:

- (a) comments are submitted within the specified timeframes or any extension of a timeframe agreed to by the applicant or EAP;
- (b) a copy of comments submitted directly to the competent authority is served on the applicant or EAP; and
- (c) the I&AP discloses any direct business, financial, personal or other interest which that party may have in the approval or refusal of the application.

7.3 List of reports to be commented on by Registered I&APs

Before awarding the I&APs an opportunity to comment, the EAP must submit the following draft versions of the report to the CA:-

- basic assessment reports;
- basic assessment reports amended and resubmitted;
- scoping reports;
- scoping reports amended and resubmitted;
- specialist reports and reports on specialised processes compiled;
- environmental impact assessment reports submitted;
- environmental impact assessment reports amended and resubmitted; and
- draft environmental management programmes compiled.

Written comments on draft reports submitted by I&APs must be recorded by the EAP. I&APs must submit written comments on final reports to the CA and provide a copy of such comments to the applicant or EAP.

7.4 Responding to comments

It is best practice that all comments received from I&APs are acknowledged by the EAP, with the EAP indicating how the comments received will be responded to (even if just referring to the fact that a response will be contained in the "comments & response report"). Comments and responses must be recorded in the comments and response report that is submitted with the BAR or S&EIR reports.

Note: The EAP is responsible for ensuring that the issues raised by I&APs are addressed in an objective manner. Where issues are not accepted, the reasons for this must be provided in the comments and response report.

7.5 Disclosure of I&APs' interests

I&APs must disclose any direct business, financial, personal or other interests which they may have in the approval or refusal of an application.

7.6 Notifying I&APs of the Department's Decision

The applicant must, in writing, within 12 days of the date of the decision, notify all registered I&APs of the outcome of the application and the reasons for the decision, and draw their attention to the fact that an appeal may be lodged against the decision.

The applicant must also draw the attention of all registered interested and affected parties to the manner in which they can access the decision.

The applicant must also publish a notice -

- (i) informing interested and affected parties of the decision;
- (ii) informing interested and affected parties where the decision can be accessed; and
- (iii) drawing the attention of interested and affected parties to the fact that an appeal may be lodged against the decision, if such appeal is available under the circumstances of the decision, *[sic]*

8. APPLICATIONS FOR EXEMPTIONS/DEVIATIONS FROM PROVISIONS OF THE REGULATIONS

The EIA Regulations make provision for permission to be requested from the CA to deviate from the specific requirements such as giving notice to potential I&APs. Such permission must be obtained before the deviation can be proceeded with.

Public participation process is considered so important that it is the only requirement for which exemption cannot be given. It is important to note that exemption to apply for any listed activity that may be triggered in terms of these regulations will not be granted. The applicant or EAP must first submit a notice of his or her intention to apply for exemption to the CA and I&APs, and then submit the exemption application to the CA (notification and submission of an application may also happen simultaneously).

9. AMENDMENTS OF ENVIRONMENTAL AUTHORISATIONS

If a holder of an environmental authorisation applies for amendment of an authorisation that is considered to be substantial (i.e. if the proposed amendment is likely to adversely affect the environment or the rights or interests of other parties), the applicant must, to the extent indicated by the CA, conduct a public participation process, open and maintain a register of I&APs, and give registered I&APs an opportunity to submit comments on any reports prepared on the investigations and assessments undertaken for the proposed amendment. This will however depend on the time that has lapsed since the original public participation period. The specific requirements in each instance must be confirmed with the relevant CA.

If the CA on its own initiative intends to substantively amend an environmental authorisation, the CA will notify, in writing, the holder of the authorisation of this and give him/her an opportunity to comment on the proposed amendment. The CA must, where necessary, also conduct a public participation process that may be appropriate to the application.

10. LAPSING OR DELAYS

In terms of the EIA Regulations, an application lapses if the applicant, after having submitted the application, fails for a period of six months, to comply with a requirement of the Regulations relating to the consideration of the application. An EAP must inform the registered interested and affected parties if the application has lapsed or if the CA has accepted delays caused on an application. It is good practice, for example, if an applicant or EAP submits an application and 6 months is about to lapse without any further correspondence by the applicant in terms of submitting the reports to that application, that the CA informs the applicant or EAP that the application will lapse if no action is taken after 6 months.

11. DISQUALIFICATION OF EAP

The regulations require the applicant to appoint an EAP at own cost to manage the application. The regulations also set out general requirements for EAPs compiling specialist reports, and clearly

indicate that EAP should be independent and objective in undertaking the EIA process. If the CA at any stage of considering an application believes that the EAP or specialist may not comply with the requirements in terms of the regulations, the CA must:

- notify the EAP and applicant that the application has been suspended until the matter is resolved and the reasons therefore; and
- afford the EAP and applicant an opportunity to make representations to the CA, in writing.

If after consideration of the matter, the CA is still not convinced that the EAP is independent, the CA must in writing inform the EAP and applicant, and may:

- refuse to accept any further reports or inputs from the EAP;
- request the applicant to commission an external review at own cost;
- request appointment of another EAP at own cost; or
- request the applicant to undertake remedial actions.

Anyone may inform the authority of suspected non-compliance by the EAP and the CA will then have to investigate such allegations. The competent authority will also be carrying out the compliance and monitoring activities to ensure that the applicant is complying with the conditions of the environmental authorisation, if it's issued.

12. CONCLUSION

Public participation is the most important process in environmental impact assessment. It allows interested and affected parties the opportunity to give their viewpoint, influence the process and inform the competent authority to make appropriate environmental decisions. It is important to note that there is no exemption to undertake public participation process in the EIA because people have a right to be informed about potential decisions that may affect them and to be afforded an opportunity to influence those decisions. However, applicants may apply for exemption from certain provisions in the public participation process.

The whole process of public participation is to ensure that there is an alignment between the scope of the public participation and the potential impact of a proposed application to be balanced and aligned with the realities of the application. The guideline will be revised on a regular basis or when there is a need arise. The success will depend largely on good cooperation between all affected stakeholders.

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