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PAMSA COMMENTS ON NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL

We refer to our previous submission of 16 September 2011 on the above Bill which we understand to have been introduced to the National Assembly through an explanatory summary published in the Government Gazette No. 34891 of 30 December 2011. We wish to make further comment in preparation for the public hearings in due course.

Firstly, we fully understand the need to amend the National Environmental Management Act, 1998, the National Environmental Management: Biodiversity Act, 2004, the National Environmental Management: Air Quality Act, 2004, the National Environmental Laws Amendment Act, 2008, and the National Environmental Management: Protected Areas Act, 2009 for all the reasons explained in the Bill.

We note with interest the substitution of various definitions with other definitions which are both sensible and necessary. We are also supportive of the amendment of section 11 of the Act 107 of 1998 and are particularly pleased to note the insertion of section 16 A on an Environmental Outlook report.

We note the amendment of **section 24 of Act 107 of 1998**, as substituted by **section 2 of Act 62 of 2008** by the insertion of subsection 2A(a) on the prohibition or restriction of the granting of an environmental authorisation for a specified or listed activity in a specified geographical area, and are generally supportive of this approach, provided it can be clearly demonstrated that it is really necessary to ensure protection of the environment, conservation of resources for sustainable development or human health and well-being.

The amendment of **section 24 (c)** was reported on in our previous submission, and our concern still remains. For sake of clarity, although we welcome the fact that whenever an MEC fails to take a decision in the time periods prescribed by the Act, the applicant may apply to the national Minister to take a decision, it does appear to us to remove the opportunity to appeal to a different decision maker in that the EIA Regulations currently provide for appeals against

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decisions taken by the MEC, to be appealed to the national Minister. We have previously suggested that an Appeal Tribunal should be required to consider appeals in these circumstances.

With regard to the amendment of **section 24G of Act 107 of 1998,** as substituted **by section 6 of Act 62 of 2008**, we again propose the inclusion of the National Water Act. The inclusion of that Act could incorporate both a failure to have obtained a water use licence and also instances where measures are taken under emergency situations to protect human life, property or a water resource. While we understand that the National Water Act is not legislatively included under the suite of National Environmental Management Acts, it does appear to us to be a serious omission, and a way forward to include it in **section 24G** (and elsewhere) should be investigated. After all, the Minister or MEC responsible for mineral resources has been included under **section 24G** – why not the Minister responsible for water resources?

The draft bill provides that *no* exemption may be granted from the requirement to obtain an environmental authorisation as contemplated in **section 24(2)(a) and (b**). We believe that removal of exemptions is premature. We suggest that exemptions should be permitted in instances where an integrated process is to be followed, or in circumstances where an equivalent authorisation and process is required for the same activity e.g. a water use licence for a stream flow reduction activity required under the National Water Act.

We note the proposed amendments to **Section 28 – the duty of care**. Out previous comment is still valid although we note the removal of the word "significant". While the meaning of "significant" may be contentious, we urge that it not be omitted as the implications can be far reaching. Significant can at least identify that the pollution or degradation of the environment is likely to cause irreversible impacts or serious health risks, and some attention could be paid to perhaps the issuing of a guidance note or advice note on how the use of the term "significant" translates into practice on the ground. Otherwise, the simple act of driving one's car to work causes "pollution" of the environment! Alternatively, it is submitted that the term "significance" should be properly regulated in order to ensure compliance with administrative law requirements.

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We also submit, as done previously, that **directives** which **include an obligation to cease any activity,** operation or undertaking should only be permitted in exceptional circumstances. The ramifications for an operation being required to cease activities may be significant and a balance of interests must be catered for. We recommend that the pre-directive stage be incorporated into legislation and that it be required to take considerations such as potential harm to the affected party into account. Most of our members have integrated operations and in the unlikely event that one of these operations may be issued with a directive instructing part of an operation to cease, cognisance should be taken of the fact that this may result in a total operation shut-down due to the integrated nature of these processes. It is reiterated that economic and social consequence needs to be evaluated against the possible environmental impact. This we believe would be in accordance with the NEMA principles contained in section 2 of the Act.

We also question the addition under **section 28(b**) of "**an administrative head of any relevant organ of state**". We interpret this to have far reaching consequences, unless it is clearly understood what this includes or excludes. For example – is ACSA, TRANSNET etc. included as "any relevant organ of state"?

Section 28A does not include the word "significant" and again, we question how the fact of pollution is to be determined in the absence of any significant threshold. As stated earlier, this should be properly regulated to ensure compliance with administrative law requirements.

Section 30, specifically "a person who fails to comply with a directive" is too subjective to justify an offence. Some legislative guidance on what constitutes "failure" should be incorporated. A directive may contain many requirements – does failure to meet one of those requirements automatically constitute an offence, no matter how trivial?

Amendment of **section 44 of Act 107 of 1998**, as amended by **Act 56 of 1001** envisages the adding of the power to make regulations dealing with the prohibition, control, sale, distribution, import or export of products that may have a substantial detrimental effect on the environment or human health. Pamsa submits that this power be limited to the extent that publication of such Regulations will *not* result in duplication of process or activity. There are regulations already

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in existence which regulate certain products (Hazardous Substances Act) or organisms (Conservation of Agricultural Resources Act and NEM: Biodiversity Act).

We have not commented on the NEM:BA or NEM:PAA, but as far as NEM:AQA is concerned, we accept the alignment of penalties imposed in terms of other specific environmental management Acts.

Should anything not be clear, please contact either myself or Pamsa's Environmental Consultant, Dr John Scotcher (jscotcher@forestlore.co.za).

Yours sincerely

Jane Molony

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EXECUTIVE DIRECTOR

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