

ADDENDUM A

STEPS INVOLVED IN ISSUING AN ATMOSPHERIC EMISSION LICENCE (AEL)

1. Two 'routes' through which an AEL may be granted

The AEL process is guided by the following important principle:

The process for consideration of all issues related to an AEL has, for most cases, been linked to the Environmental Impact Assessment process. Thus, in most cases the process is an 'interrelationship' with the EIA process and thus involves two 'authorities':

- *The EIA Competent Authority (EIA-CA)*
- *The Atmospheric Emission Licensing Authority (AELA)*

Thus, the principle route through which an AEL is issued will be via a joint process, run in association with an EIA process. The interrelationship between the EIA and AEL processes is set out, in Figure 8, in the National Framework for Air Quality Management.

There are two possible 'routes' through which an AEL may be obtained, namely:

- AEL process running parallel with the EIA process (joint process); and
- AEL process (carried out without the EIA process).

2. Route 1: Joint EIA / AEL Processes

2.1. When is it applicable?

This process must be followed in all applications for an AEL for a new facility which will involve a listed activity, and in all applications for a change or amendment to the existing AEL.

From an air quality perspective, this process is applicable in the following cases:

- Section 37 AQA: development of a new facility;
- Section 37 AQA: new 'process' within an existing facility which will result in a 'listed activity' being carried out;
- Section 46(3) AQA: change to emission rates, raw materials which may increase emission levels of key pollutants for listed activities; and
- Section 46(3) AQA: any other changes or amendment of the existing AEL.

2.2. AEL application process

In these cases the applicant must submit an application to:

- The EIA-CA for an environmental authorisation; and
- The AELA for an atmospheric emission licence.

For the AEL process, the relevant metropolitan municipality or district municipality is the licensing authority, except in a situation where the municipality has delegated its licensing function to the province, the province has intervened in terms of section 139 of the Constitution or where the municipality is the applicant for an AEL. In such circumstances, the relevant provincial environmental department is the licensing authority.

For the EIA process, the competent authority is either the DWEA or provincial environmental department depending on the size and nature of the proposed development. However, regarding proposed activities around mining areas, the Department of Minerals is the competent authority for such EIA applications.

2.3. EIA-AEL procedural relationship

There are three main principles which underpin the relationship between the EIA and AEL processes.

Firstly, the EIA process **must proceed and inform the AEL process**. This is a logical sequence for various reasons:

- The EIA process considers **all potential environmental impacts** – not only the impacts of atmospheric emissions. As a result, the EIA activity could result in significant impacts (other than those on the atmosphere) which could result in a negative Record of Decision (RoD) thus no need to issue an AEL;
- The EIA process may require the submission of a **Specialist Air Quality Impact Assessment Study** which should provide information on all the various requirements of AQA and will provide the AELA with all the critical information needed when assessing the AEL application;
- The **EIA environmental authorisation may contain conditions** which may be pertinent to the AEL; and
- The EIA process will require comprehensive opportunities for public participation and input which will also contribute to the understanding of public concerns and comments on the atmospheric impacts of the proposed development or activity.

Secondly, there **must only be one information gathering process** for the two processes. Thus all information required for the AEL process must be gathered through the EIA process – be it technical information or input from public participation. This will ensure that a duplication of effort is avoided and

also that the information required by the AELA is gathered through the much more comprehensive process followed under the EIA process. This is particularly the case for public participation.

Thirdly, there should be a **joint review of information** related to atmospheric impacts by the EIA-CA and the AELA. This is a recommendation from the National Framework and is one which may strengthen the effectiveness of the EIA-AEL procedural relationship and may promote good working inter-governmental relations. Due to the nature of the activity, the **legal onus is on the applicant to ensure** that all interested and affected parties are involved in the review and consideration of the relevant information during the EIA process.

Note: AELA must play an 'active' role in the EIA process

Whilst the EIA process happens first, it is important that the AELA plays a full and active part in consideration of the EIA decision and review of information submitted as part of the 'atmospheric impact' element of the EIA application. In other words, the AELA must be confident that it can proceed to issue the AEL once an Environmental Authorisation has been granted. There should be no instances where an EIA has been approved and the AELA then finds that the EIA has not considered an atmospheric issue or impact sufficiently to allow an AEL to be granted. It is thus up to the AELA to ensure that it participates actively in the EIA consideration and approval process to ensure that the EIA process 'covers' all the issues which must be addressed in order for an AEL to be issued once the EIA Environmental Authorisation has been granted.

2.4 Key steps of the EIA-AEL procedural relationship

The steps below provide detailed guidance for the AELA. They focus on the role of the AELA.

Step 1: Applications

It is the legal responsibility of the applicant to compile and submit two applications:

- An EIA application – which should be submitted to the relevant EIA-CA, in accordance with the EIA regulations; and
- An AEL application – which should be submitted to the relevant AELA, in accordance with the AQA requirements.

Step 2: Initial communication between EIA-CA and AELA

Note: It is the legal responsibility of the applicant, in terms of the EIA regulations, to give notice, in writing of the proposed application to any organ of state which has jurisdiction in respect of any aspect of the activity.

Upon receipt of an application, the EIA-CA and/or AELA should check whether the respective applications comply with the legal requirements in terms of NEMA EIA Regulations and AQA and must also check whether the AELA or EIA-CA visa-a-versa received an application.

In either of these cases, the AELA should contact the relevant EIA-CA to check whether an EIA application has been submitted, if the EIA-CA has not already contacted the AELA in this regard.

At this initial stage, it is recommended that the EIA-CA and AELA discuss the joint process that is to be followed and the stages at which communication must take place between them. It will also be important to discuss the legislated turnaround timeframes involved for each step of the process, and to identify the stages at which the AELA must participate in consideration and review of information.

At this stage, it would also be in the spirit of co-operative governance to share information and/or application documents to ensure that both have an opportunity to view and understand all the information submitted via both processes.

Step 3: Consideration of the applications

At this stage, the EIA-CA and AELA will each review the information submitted by the applicant within their respective applications.

In terms of the AEL, the AELA must check the contents of the applications in order to:

- Confirm that all necessary information has been provided;
- Identify any missing information and request provision of this information by the applicant; and
- Identify any information that it may need to check/verify at a later site visit.

The AELA should then discuss its findings with the EIA-CA **prior to acknowledging receipt of the application** and/or requesting any outstanding information (this will allow the EIA-CA to note the additional information required and to keep abreast of any shortfalls in the AEL application process which may also inform the EIA application).

Upon receipt of additional information requested, the AELA should also forward such information to the EIA-CA for information.

Similarly, if the EIA application is missing information which may relate to the impact on the atmosphere and would therefore be of use to the AELA, such information, once requested and received by the EIACA should be forwarded to the AELA.

Note: The legislated turnaround timeframes for EIA-CA & AELA to acknowledge receipt of the application, if the application is in order or reject the application, if it is not in order, is 14 days of receipt of the application.

Step 4: EIA phase I

This phase includes the basic assessment report, scoping reports, environmental impact assessment reports, specialist reports and reports on specialised processes and initial public participation.

At this stage, the process follows the initial phase of the EIA process in accordance with the EIA regulations whereby the applicant carries out the following:

- Submission of a basic assessment reports (a basic assessment is a stand alone process followed when it is not necessary to do an EIA.);
 - Compilation of scoping reports, Plan of Study for Environmental Impact Report and identification of required specialised studies;
 - Initial public participation;
 - Review and finalisation of scoping report and plan of study for Environmental Impact Report;
- and
- Submission of above to the EIA-CA.

Upon receipt of the above, the EIA-CA is expected to inform the AELA that it has received the required documents and between them, the two authorities should arrange a date / time to review parts of these documents.

It is recommended that during this initial phase, the AELA should carry out a site visit to verify the information that has been provided in the AELA and EIA applications, and to be familiar with the site and the potential air quality issues. Such a site visit may also allow the AELA to represent fully all issues which relate to the AEL application and to determine whether the applicant have fully captured and considered all relevant issues and information.

Step 5: Joint consideration of the scoping reports and plan of study

At this stage, the EIA-CA and the AELA should sit together to cooperatively consider the Scoping Reports and the Plan of Study with a view to determining whether the reports should be accepted (thus allowing the applicant to proceed to the next phase of the EIA process) or whether amendments to the reports are required, such as the provision of additional information or verification of information provided.

From the point of view of the AELA, it must be confident that the reports provide the basis for answering all the concerns which must be addressed before **both the EIA Environmental Authorisation and AEL can be issued.**

The specific factors to be taken into account in the AEL process are set out in **section 39 of the AQA and paragraph 5.5.3 of the National Framework**.

These requirements must be kept in mind by the AELA throughout its involvement in the EIA process so that it can inform the EIACA if additional information or analysis of the EIA application is required in order to provide the insight required by the AEL that the applicant has satisfied the AEL requirements in their application. The AELA will also have to raise and check whether these requirements have been complied with, later in the EIA process once the specialised reports, impact report and management plan have been produced (see step 7 below).

In addition, at this step the AELA must ensure that the rather 'obvious' step of **identifying a Specialist Air Quality Impact Assessment Report** for completion in the next step of the EIA process has been flagged by the applicant within the Plan of Study and that the proposed contents of this report will address all the factors the AELA must take into consideration before both the EIA Environmental Authorisation and AEL can be issued. (The National Framework sets out the **key requirements of the specialist report**).

Following the consideration of the reports, the EIA-CA and AELA may require amendments to be made and once satisfied that these have been carried out, they can accept the reports and notify the applicant of such decision.

Note: The legislated turnaround timeframes for EIA-CA is 30 days of receipt, to either accept or reject the scoping report or plan of study.

Step 6: EIA Phase II

At this stage, the applicant proceeds to the second phase of the EIA process. The tasks include:

- Prepare an environmental impact assessment report;
- Prepare environmental management plan;
- Prepare specialist studies (including a specialist air quality impact assessment study); and
- Conduct phase II of the public participation process.

Once completed, these reports must be submitted to the EIA-CA. The EIA-CA should inform the AELA that it has received the reports, and as indicated earlier, times and dates for joint consideration of these reports are agreed. Therefore, as recommended by the National Framework, it would be in the spirit of co-operative governance for both authorities to jointly review the reports.

Step 7: Joint consideration of the environmental impact assessment report, environmental management plan and specialists studies

This step is similar in nature to step 5 above, i.e. the EIA-CA and AELA jointly consider the detailed environmental impact assessment report, environmental management plan and specialist air quality impact assessment report.

Important for the AEL process is for the AELA to ensure that it is satisfied that the reports and specialist study under consideration contain all the information required to enable it to fully assess the impact of the proposed activity to the atmosphere, and that it complies with the requirements contained in section 39 of AQA.

Please note: if the AEL feels that, based on the EIA information, it would not issue an AEL –

then the EIA should not be granted as there should never be an instance where an EIA is issued but an AEL is later refused. Thus, the AELA must be satisfied at this point that all the information it needs to make a decision on the AEL application has been submitted by the applicant.

It is also important for the EIA-CA and AELA to assess whether the specialist air quality impact assessment report comply with the requirements set out in the National Framework, and the NEMA EIA regulations.

Note: The legislated turnaround timeframes for EIA-CA is 60 days of receipt, to either accept or reject the environmental impact assessment report, environmental management plan or specialist studies.

Step 8: Environmental authorisation decision

The EIA-CA, in terms of the NEMA EIA Regulations, **has 45 days**, after accepting the reports and studies, to either grant the environmental authorisation in respect of all or part of the activity applied for; or refuse the environmental authorisation in respect of all or part of the activity.

Step 9: Issuing or refusal of an AEL

In terms of section 40(3) of the AQA, if the step above results in the issuing of an Environmental Authorisation, then the **AELA has 60 days** from the date of issue of the Environmental Authorisation to make a decision in respect of the AEL application.

If an EIA Environmental Authorisation is not granted then the application for the AEL becomes irrelevant, as the development or activity will not have been given the necessary environmental authorisation to proceed.

In a situation where **the Environmental Authorisation is granted** then the AELA can proceed to consider the AEL application.

The AELA has two options:

- (a) Issue a provisional AEL (which in time will be converted to a final AEL); or
- (b) Issue a final AEL.

The provisional AEL must, in terms of section 41(2) of the AQA, be issued subject to **certain conditions and requirements as the AELA may determine, and/or as the Minister or MEC has prescribed for the listed activity of the kind in question**. It is the responsibility of the AELA to ensure that whatever condition or requirement relevant to air quality, which were agreed to during the EIA process, are included in the provisional AEL.

In terms of section 40(4) of the AQA and in accordance with the administrative justice requirements, the AELA must, **within 30 days**, once it has reached a decision on the AEL application:

- (a) Notify the applicant of the decision, and give written reasons if the application was unsuccessful;
- (b) In a manner determined by the AELA, notify any persons who have objected to the application; and
- (c) At the request of any person who has objected to the application, give written reasons for its decision or make public its reasons.

In deciding whether to grant or refuse an application, the AELA must **assess the application against the sections 39 and 40 of the AQA**. Section 39 sets out the relevant matters that must be taken into account by the AELA when considering an application. Section 40 provides a checklist of matters that must guide the decision of the AELA during the licensing process.

3. Route 2: AEL Process (without EIA process)

3.1. When is it applicable?

This process is applicable in the following cases:

- Transfer of an existing AEL to new owners (section 44 of the AQA); and
- Renewal of an existing AEL where the renewal does not result in the variation or amendment of the existing AEL (section 47 of the AQA).

3.2. Application procedure

In each of the abovementioned cases, the applicant must submit its completed application form to the relevant AELA.

3.3 Key steps in the AEL licensing procedure

3.3.1 Transfer of an existing AEL to new owners (section 44 of the AQA)

Step 1: Application for the transfer

In terms of section 44, the applicant must apply, in the prescribed application form, to the relevant AELA. In this type of application, section 44 is applicable. The application must be accompanied by additional documentation and the prescribed processing fee.

Step 2: Checking of application for compliance with formal requirements

Upon receiving the application, the AELA must check the following:

- Whether the application is accompanied by the prescribed transfer processing fee;
- Proper description of previous owners and new owners; and
- Proper description of new owners, contact details, physical postal addresses.

If the application does not comply with the abovementioned requirements and / or contains insufficient information, the AELA must inform the applicant. Any additional information that the AELA may require must be requested at this stage. The AELA must indicate in the letter to the applicant that, failure to comply with the above requirements and / or legal request from the AELA, may result in refusal of the application.

The suggested turnaround time for AELA to acknowledge receipt and/or requesting any further information from the applicant is 14 days after the receipt of the application.

Step 3: Notification of the interested person and the public regarding the application for a transfer

In terms of section 44(4) of the AQA, the applicant is required to take certain steps to bring the application to the attention of the interested person and the public. Section 44(4) (b) fully sets out the requirements.

It is important to **note that the AELA cannot process the application until such requirements have been fulfilled**. It may be vital for the AELA to insist on the applicant submitting proof regarding compliance with section 44(4) (b) requirements.

Step 4: Consideration of the application

The AELA **must proceed to consider the application** after the following requirements are complied with:

- Application form properly completed;
- Outstanding additional information submitted;
- Proof whether the application was brought to the attention of interested and affected parties;
- Proof whether objections were lodged or not; and
- Prescribed transfer processing fee paid.

When considering an application for a transfer, the AELA is required to take into account whether the person to whom the licence is to be transferred is a **fit and proper person as contemplated in section 49 of the AQA**. In determining whether a person is a fit and proper person, the provisions of section 49 are applicable.

Step 5: Decision

If all of the abovementioned requirements are met, the AELA must transfer the AEL to the new owners.

This is implemented by recording the necessary changes and issuing the new owner with an amended AEL with effect from date of issue.

What happens if the applicant does not meet the fit and proper person test?

Unfortunately, the AQA does not provide clear answers. However, they may be **two options available to the AELA**. **Firstly**, the AELA can refuse the application. The basis of refusing the application can be the failure of the new owner to meet the requirements of a fit and proper person. However, the AELA runs the risks of being challenged on the administrative justice requirements.

Secondly, the AELA may approve the application subject to certain strict conditions that the new owner may have to comply with. This must be additional conditions to the existing licence conditions. The AELA must determine such additional conditions. Again, if there were objections to the application, the AELA runs the risks of being challenged on the administrative justice requirements by an interested and/or affected party.

The AELA must weight its options.

The suggested turnaround time to issue an amended AEL is 10 days after the submission of all required information.

3.3.2 Renewal of an existing AEL (section 47 of the AQA)

NOTE: It is important for all AELA to note that the type of application anticipated here are all applications that are **due for renewal after expiry**, and those **applications in terms of the transitional arrangements** as contemplated in section 61 of the AQA.

All **holders of provisional registration certificates / AEL**, at the time of the repeal of the APPA, i.e. 1 April 2010, have a period of **two years to apply for a renewal of their licences to AEL**.

All **holders of final registration certificates**, at the time of the repeal of the APPA, i.e. 1 April 2010, have **a period of three years to renew their registration certificates into AEL**. Failure by the applicant to comply with section 61 will result in those licences being **invalid after 2 and 3 years** respectively.

Step 1: Application for a renewal

Before the expiry date of the licence, the applicant must submit to the relevant AELA an application to renew its AEL. Sections 38, 40, 43 and 47 of the AQA are applicable to the application for a renewal of the licence. These sections set out the legal requirements that the applications for renewal must comply to.

Step 2: Checking of application for compliance with legal requirements

Upon receiving the application, the AELA must check the following:

- Whether the application is accompanied by the prescribed processing fee;
- Whether all relevant sections of the application form has been completed; and
- Proof that the relevant provincial air quality officer has been notified of the application.

If the application does not comply with any of the abovementioned requirements and/or contains insufficient information, the AELA must inform the applicant accordingly. Any additional information that the AELA may require must be requested at this stage. The AELA must indicate in the letter to the applicant that, failure to comply with the above requirements and / or legal request from the AELA, may result in the refusal of the application.

The suggested turnaround time for AELA to acknowledge receipt and/or requesting any further information from the applicant is 14 days after the receipt of the application.

Step 3: Notification of the relevant organs of state, interested persons and the public regarding the application

In terms of section 38(3) of the AQA, the applicant is required to take certain steps to bring the application to the attention of the relevant organ of state, interested persons and the public.

It is important to **note that the AELA cannot process the application until such requirements have been fulfilled** and that no objections have been received against the application. It may be vital for the AELA to insist on the applicant submitting proof regarding compliance with section 38(3)(b) requirements.

Step 4: Consideration of the application

The AELA **must proceed to consider the application** after the following requirements are complied with:

- Application form properly completed;
- Outstanding additional information submitted;
- Proof whether the application was brought to the attention of interested and affected;
- Proof whether objections were lodged or not; and
- Prescribed processing fee paid.

If the AELA is satisfied that all the required information has been submitted, then it can proceed to consider and take a decision on the application.

Step 5: Decision

The AELA has two options, namely, (a) **to grant an application**; or (b) **refuse an application**.

In terms of section 40(2) of the AQA, any decision of the AELA to grant an application must be consistent with certain factors. AELA are urged to carefully consider those issues as set out in section 40(2) of the AQA.

It is important for the AELA to note that if they refuse an application for renewal that **its decision must be based on technically sound reasons**. Failure to comply with these requirements will result in its decision being challenged on **judicial review**. Section 40(2) requirements provide a good basis for such technical reasons.

The suggested turnaround time to issue a renewed AEL is 60 days after the submission of all required information.