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CONFIDENTIAL MEMORANDUM

POTENTIAL ENVIRONMENTAL LEGAL REMEDIES AVAILABLE TO ASPASA TO DEAL WITH THE ILLEGAL AGGREGATE AND SAND MINING ACTIVITIES AFFECTING ASPASA MEMBERS

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A. INTRODUCTION

1. Warburton Attorneys has been instructed by the Aggregate and Sand Producers Association of Southern Africa (hereinafter referred to as "ASPASA") to draft a legal memorandum advising ASPASA on the potential environmental legal remedies available to ASPASA in terms of the relevant national environmental and mining legislation to deal with the illegal aggregate and sand mining activities affecting ASPASA members.

2. ASPASA is a voluntary membership private sector association and represents members across Southern Africa who are involved in the production of aggregate and sand and in particular, the operation of lawful quarries, sand pits and crushing operations. ASPASA is actively involved in working with its members, as well as government authorities, in trying to promote improved environmental regulation of the aggregate and sand mining industry and in order to deter illegal sand mining operations.

3. The need for this legal memorandum has arisen as a result of the increase in illegal aggregate and sand mining activities being conducted throughout South Africa in rivers, riverbeds, wetlands, valleys, estuaries and in coastal dunes. It is estimated that more than 200 illegal sand mining operations have been established in the Kwa-Zulu Natal Province and in the Eastern Cape Province.[1] The majority of these unlawful sand mining operations utilise open pit methods and extract sand directly from main river channels and adjacent sandbanks, estuaries or coastal dunes.[2] Without proper environmental legal regulation and monitoring in the form of mining and environmental authorisations, permits and water use licences as well as Environmental Management Programmes ("EMPr") in place, the uncontrolled extraction of sand results in devastating and long term effects on the environment and exacerbates the cumulative environmental impacts, and damages the reputation of lawful sand mining operations.

4. In 2008 the eThekwini Municipality commissioned the Council for Scientific and Industrial Research ("CSIR") to conduct a cost–benefit assessment of sand mining in 18 rivers situated within its municipal jurisdiction, extending from the Tongati to the Mahlongwa Rivers.[3] The findings of the CSIR's report highlighted that the current rates of sand extraction from both upstream lawful and unlawful sand mining operations exceeded the natural sediment yield and / or natural regenerative capacity of the river systems and estimated that approximately one-third of the sediment in the eThekwini Municipal river system is being depleted. According to the article "*Illegal Sand Mining in South Africa*" by Romy Chevallier, a senior researcher at the South African Institute of International Affairs ("SAIIA")[4], sand extraction in quantities higher than what is sustainable results in the following *inter alia* adverse environmental impacts:

> "*Changes take place in the river's ecosystem, such as in its channel form, physical habitats and food webs. The removal of sand from the riverbed increases the speed of flowing water, which in turn erodes the riverbanks. Sand also acts as a sponge, which helps in recharging the water table. Thus the progressive depletion of a river is accompanied by sinking water tables, which has an adverse impact on nearby communities*".

[1] Coastal Care Non-Profit Organization, "*Environmental Loss of Illegal Sand Mining in South Africa*," dated January 2017 available at http://coastalcare.org/2016/01/the-environmental-loss-of-illegal-sand-mining-in-south-africa/

[2] Romy Chevallier from the South African Institute of International Affairs "*Illegal Sand Mining in South Africa*" dated November 2014 available at http://www.saiia.org.za/policy-briefings/645-illegal-sand-mining-in-south-africa/file

[3] CSIR, "*Sand Supply from Rivers within the eThekwini Jurisdiction, Implications for Coastal Sand Budgets and Resource Economics*" CSIR Report, CSIR/NRE/ECO/ER/2008/0096C, September 2008.

[4] http://www.saiia.org.za/policy-briefings/645-illegal-sand-mining-in-south-africa/file

5. Further common adverse environmental impacts associated with negligent and mostly unlawful sand mining activities include but are not limited to[5]*:*

- The destruction of flood plains and riparian vegetation and the loss of associated habitats due to high levels of disturbance associated with the removal of vegetation to access the natural sand deposits underneath as well as the construction of access roads and the continual movement of large trucks and earth moving equipment through such flood plains and riparian vegetation;
- The removal of soil and the lack of concurrent rehabilitation measures being implemented cause the disturbed areas to become vulnerable to colonization by invasive species;
- Destruction of aquatic habitats caused by the use of dredging equipment and mechanical diggers;
- The release of fine sediments into the water column which flows downstream reducing water clarity and resulting in the settling of sediment on plants and benthic animals; and
- The contamination of soil and the pollution of water resources caused by fuel and oil spillages from trucks and heavy earth moving equipment used on site.

6. In addition to the above, Mr Nico Pienaar, the Director of ASPASA, in an article titled "*Dealing with illegal mining in the quarry industry*"[6] dated 27 January 2016, identifies that illegal mining operations also create significant health and safety risks not only for those involved in undertaking the illegal activities but also for employees of lawful mining operations in the area and the surrounding community. Furthermore, illegal mining operations have serious reputational and financial implications for the aggregate and sand mining industry as a whole.

7. In consideration of the above potential adverse impacts associated with illegal aggregate and sand mining operations, this memorandum covers the following pertinent issues:

7.1. **The national environmental statutory authorisation requirements for undertaking lawful aggregate and sand mining activities.** This section will assist ASPASA and its members on identifying key national environmental statutory authorisations required to undertake lawful aggregate and sand mining activities in South Africa. Where ASPASA or its members observe irresponsible mining activities been undertaken by an entity, ASPASA or its members may refer to this section for guidance on what national environmental statutory authorisations should be requested from the entity in order to determine if such mining activities are being undertaken lawfully. The following national mining and environmental legislation is considered and discussed in further detail below:

(a) The Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA"):
(b) The National Environmental Management Act 107 of 1998 ("the NEMA");
(c) The National Water Act 36 of 1998 ("the NWA");
(d) The National Environmental Management: Waste Act 59 of 2009 ("the NEM:WA");
(e) The National Environmental Management: Biodiversity Act 10 of 2004 ("the NEM:BA"); and
(f) The National Forests Act 84 of 1998 ("the NFA").

[5] WESSA, Ezemvelo KZN Wildlife, *Investigational Report: An Inventory of Sand Mining Operations in KwaZulu Natal Estuaries, Thukela to Mtamvuna*, September 2007.

[6] available on ASPASA's website http://www.aspasa.co.za

7.2. **The avenues for input and participation of ASPASA in the environmental statutory authorisation and subsequent monitoring process required for lawful aggregate and sand mining activities.**

(a) ASPASA's involvement as an Interested and Affected Party ("I&AP) in the public participation process regulated by the 2014 Environmental Impact Assessment ("EIA") Regulations (published in GN R 982 on 4 December 2014) with regards to applications for environmental authorisation for new proposed aggregate and sand mining operations, as well as, applications for substantial amendments to existing environmental authorisations;

(b) The possible submission of an appeal by ASPASA against environmental authorisations issued by the competent authority for new aggregate and sand mining operations in terms of section 43 (2) of the NEMA and the 2014 National Appeal Regulations published in GN R993 on 8 December 2014 ("the 2014 National Appeal Regulations");

(c) Monitoring of compliance with the conditions of environmental authorisations and Environmental Management Programmes ("EMPr") for existing aggregate and sand mining operations in terms of the auditing requirements under the 2014 EIA Regulations; and

(d) ASPASA's right to request access to certain environmental information from aggregate and sand mining operations in terms of the Promotion of Access to Information Act 2 of 2002 ("the PAIA").

7.3. **The national environmental legal remedies available to ASPASA to deal with the illegal aggregate and sand mining activities affecting ASPASA members which include the following:**

(a) A directive to be issued in terms of section 19 of the NWA;
(b) A directive to be issued in terms of section 28 of the NEMA;
(c) A compliance notice to be issued in terms of section 31L of the NEMA; and
(d) Court proceedings which include criminal proceedings, private prosecution, high court applications for interdicts, and delictual damages claims.

8. Any matters that fall outside of the scope of the issues listed in paragraph 7 above and any legislation that is not mentioned in paragraph 7.1 above has not been considered in terms of this memorandum and as such there may be other issues and requirements in terms of certain other environmental legislation, such as provincial and municipal legislation, that has not been considered in terms of this memorandum. In addition, contractual environmental issues as well as mine health and safety legislation, property law and land title and town and regional planning legislation have also not been specifically reviewed.

9. Prior to proceeding with the main body of this memorandum please take note that, due to budgetary and time constraints, the intention of this memorandum is to present the complex environmental legal issues and legal remedies referred to in this memorandum in a summarised manner. This will assist with the information being easily accessible and understandable to ASPASA and its members. Further more detailed environmental legal advice may therefore be required by ASPASA and its members when dealing with a specific set of circumstances and the environmental legal remedies applicable to those specific issues of non-compliances.

B. NATIONAL MINING AND ENVIRONMENTAL STATUTORY AUTHORISATION REQUIREMENTS FOR AGGREGATE AND SAND MINING ACTIVITIES

10. The environmental right contained in section 24 of the Constitution of the Republic of South Africa of 1996 ("the Constitution") specifically provides in subsection 24 (1)(b) that the protection of the environment from pollution and ecological degradation must be achieved through reasonable legislative and other measures. In light thereof, national environmental legislation such as the NEMA and other specific environmental management acts have being promulgated to give effect to this environmental right.

11. In the context of mining, which involves undertaking activities of such a nature and / or scale that will result in harm to the environment from pollution and ecological degradation, a number of environmental as well as mining statutory authorisation requirements have to be complied with in order to avoid or minimise harm to the environment. In terms of ASPASA's goal to ensure that sustainable and environmentally responsible mining activities are undertaken in the aggregate and sand mining industry, the below section will assist with identifying key national environmental and mining statutory authorisations required to undertake lawful aggregate and sand mining activities. This section also provides an indication of the statutory penalties associated with undertaking unlawful mining activities without the prerequisite mining and environmental authorisations, permits and licences in place.

12. ASPASA and its members may therefore refer to this section for guidance purposes, when suspicion of irresponsible and / or unlawful mining activities by a non-member mining company arises. ASPASA and its members should request the specific entity undertaking the irresponsible mining activities to provide copies of the environmental authorisations, permits or licences discussed in the below section in order to determine if the entity is undertaking the mining activities unlawfully.

13. **LICENCING AND PERMITTING REQUIREMENTS IN TERMS OF THE MPRDA**

13.1. In accordance with the definitions for a "***mine"*** and "***mineral***" in section 1 of the MPRDA[7], the extraction of sand for purposes of searching, winning, extraction or processing of such a mineral resource constitutes a mining activity. Section 5A (b) of the MPRDA prohibits any mining activities from being undertaken without a mining right (for large scale mining activities) or a mining permit (for smaller scale mining operations, where the mineral can be mined optimally within a period of two years, and the mining area does not exceed 5 hectares in extent), as the case may be.

13.2. The implication of section 5A (b) of the MPRDA is that any person or entity wishing to extract sand for purposes of searching, winning, extracting or processing of such a mineral resource, must apply to the Minister of Mineral Resources for a mining permit or mining right, depending on the scale of the proposed mining activities. The failure to do so amounts to a contravention of the MPRDA which is deemed to be an offence in terms of section 98 (a)(viii) of the MPRDA. Upon

[7] Section 1 of the MPRDA defines a "*mine*" as when-

(a) "*used as a noun-*

(i) any excavation in the earth, including any portion under the sea or under other water or in any residue deposit, as well as any borehole, whether being worked or not, made for the purpose of searching for or winning a mineral;

*(ii) any other place where a mineral resource is being extracted, including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or extraction or processing of such mineral resource**; and***

(b) *used as a verb, in the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area".*

The MPRDA, further defines a ***"mineral"*** as *"any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process,* ***and includes sand, stone, rock, gravel, clay, soil*** *and any mineral occurring in residue stockpiles or in residue deposits but excludes -*

(a) water, other than water taken from land or sea for the extraction of any mineral from such water;

(b) petroleum; or

(c) peat"

conviction of such an offence a person may be liable to pay a **fine** or to imprisonment for a period not exceeding **six months** or to both a fine and such imprisonment. Set out below is the procedure and timeframes associated with applying for a mining right and mining permit.

13.3. Application process and timeframes for a mining right

13.3.1. Where large scale sand mining activities are to be undertaken, the applicant must apply in terms of section 22 (1) of the MPRDA to the Minister of Mineral Resources for a mining right simultaneously with an environmental authorisation.[8]

13.3.2. The application must be lodged at the office of the Regional Manager in whose region the land is situated and the Regional Manager must, **within 14 days of receipt of the application**, either accept or reject the application for a mining right. In terms of section 22 (4) (a) and (b) of the MPRDA, where the Regional Manager accepts the application, the Regional Manager must, **within 14 days from the date of acceptance of the application**, request the applicant to:

(a) Submit the relevant environmental reports, as required in terms of Chapter 5 of the NEMA, **within 180 days from the date of the notice**; and

(b) Consult in the prescribed manner with the landowner, lawful occupier and any I&AP and include the results of the consultation in the relevant environmental reports.[9]

12.3.3. **Within 14 days of receipt of the environmental reports and results of the consultation with I&APs**, the Regional Manager must forward the application to the Minister of Mineral Resources for consideration. In this regard section 23 (1) of the MPRDA provides that the Minister of Mineral Resources must grant a mining right if:

(i) "*the mineral can be mined optimally in accordance with the mining work programme;*
(ii) *the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;*
(iii) *the financing plan is compatible with the intended mining operation and the duration thereof;*
(iv) ***the mining will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued;***
(v) *the applicant has provided for the prescribed social and labour plan;*
(vi) *the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996);*
(vii) *the applicant is not in contravention of any provision of this Act; and*
(viii) *the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan*"

[8] In terms of section 38A of the MPRDA, the Minister of Mineral Resources is the responsible authority for implementing environmental provisions in terms of the NEMA as it relates to prospecting, mining, exploration, production or activities incidental thereto on a prospecting, mining, exploration or production area.

[9] Section 10 of the MPRDA provides that **within 14 days after accepting an application** for a mining right or mining permit, as the case may be, the Regional Manager must in the prescribed manner -
(a) make known that an application for a mining right or mining permit has been accepted in respect of the land in question; and
(b) call upon I&APs to submit their comments regarding the application **within 30 days from the date of the notice**.

12.3.4. Where the Minister of Mineral Resources grants the mining right, the holder thereof in terms of section 25 (2)(a) of the MPRDA must lodge the right for registration at the Mineral and Petroleum Titles Registration Office **within 60 days**, upon which, the mining right becomes effective. The holder is then obligated in terms of section 25 (2)(b) of the MPRDA to commence with mining operations within **one year** from the date on which the mining right becomes effective.

12.4. Application process and timeframes for a mining permit

12.4.1. Where small scale sand mining activities are to be undertaken, the applicant must apply in terms of section 27 (1) and (2) of the MPRDA to the Minister of Mineral Resources for a mining permit simultaneously with an environmental authorisation.

12.4.2. The application must be lodged at the office of the Regional Manager in whose region the land is situated. The Regional Manager must, **within 14 days of receipt of the application**, either accept or reject the application for a mining permit. In terms of section 27 (5) (a) and (b) of the MPRDA, where the Regional Manager accepts the application, the Regional Manager must, **within 14 days from the date of acceptance of the application**, request the applicant to:

(a) Submit the relevant environmental reports, as required in terms of Chapter 5 of the NEMA, **within 60 days from the date of the notice**; and
(b) Consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports.

12.4.3. **Within 60 days of receipt of the application from the Regional Management**, the Minister of Mineral Resources must grant a mining permit if:

(a) "the requirements contemplated in subsection 27 (1) of the MPRDA are satisfied;
*(b) **the required environmental authorisation is issued**; and*
(c) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996)"

12.5. Requirements relating to the EMPr

12.5.1. One of the key / principle mechanisms for managing the environmental impacts of a mining operation on the environment is the EMPr. The EMPr contains crucial information regarding the proposed management, mitigation, protection or remedial measures that will be undertaken to address the environmental impacts of a mining operation.

12.5.2. Section 24N (1A) of the NEMA provides that where an environmental impact assessment in terms of the 2014 EIA Regulations (discussed below at paragraph 11) has been identified as the environmental instrument to be utilised as the basis for a decision on an application for environmental authorisation, the Minister of Mineral Resources must require the submission of an EMPr before deciding an application for an environmental authorisation.

12.5.3. Due to the fact that mining activities trigger either a Basic Assessment or Full Scoping and EIA in terms of the 2014 EIA Regulations (as discussed in further detail below in paragraphs 11) an applicant for a mining right or a mining

permit, as the case may be, will need to submit an EMPr to the Minister of Mineral Resources in order for the Minister of Mineral Resources to decide an application for environmental authorisation for the proposed mining activities.

12.5.4. Section 24N of the NEMA read together with Appendix 4 of the 2014 EIA Regulations, set out the requirements for what information must be contained in an EMPr. Accordingly, an applicant for a mining right or a mining permit, will need to ensure that its EMPr is complaint with the information requirements provided for in section 24N and Appendix 4 of the 2014 EIA Regulations.

12.5.5. Where ASPASA and / or its members observe an entity undertaking irresponsible mining activities which is causing environmental harm and degradation, ASPASA and / or its members should call upon the entity undertaking the mining activities to produce a copy of its EMPr. Where the entity is not complying with the conditions contained in the EMPr or does not have an approved EMPr, the entity will be committing an offence in terms of section 49A (1)(c) of the NEMA. Upon conviction of such an offence, an entity may be liable to a fine not exceeding **R10 million** or to imprisonment for a period not exceeding **10 years**, or to both such fine or such imprisonment.

12.5.6. It is important to note that where an EMPr needs to be amended due to a change in the impact management outcomes or objectives of an EMPr, approval from the Minister of Mineral resources of the amendment to the EMPr is required in terms of both section 102 of the MPRDA and regulation 37 of the 2014 EIA Regulations. It is also worth mentioning that regulation 37 (2) of the 2014 EIA Regulations requires the holder of the environmental authorisation to invite comments on the proposed amendments to the impact management outcomes or objectives of the EMPr ***from potentially interested and affected parties***, including the Minister of Mineral Resources. The period for submitting comments on the proposed amendments to the EMPr must be for at least 30 days.

12.5.7. In light of the fact that EMPrs are crucial instruments for managing environmental impacts on a mining operation, ASAPSA and / or its members should utilise the opportunity afforded in regulation 37 (2) of the 2014 EIA Regulations to submit written comments on any proposed amendments to an EMPr, especially in circumstances where there is concern that the entity applying for amendments to its EMPr is mining irresponsibility and / or undertaking aggregate and sand mining activities in a sensitive, threatened or protected environment.

13. **EIA ENVIRONMENTAL AUTHORISATION REQUIREMENTS IN TERMS OF THE NEMA:**

13.1. The 2014 EIA Regulations and their associated Listing Notices (published in GN R983, GN R984 and GN R985 of 4 December 2014) identify activities that require environmental authorisation prior to the commencement of that activity. In terms of section 24F read with section 49A of the NEMA, it is an offence to commence with an EIA listed activity without an environmental authorisation. Any person found guilty of committing such offence would be liable on conviction to a fine not exceeding **R10 million** or to imprisonment for a period not exceeding **10 year**s, or to both such fine or such imprisonment.

13.2. The 2014 EIA Regulations regulate the procedure and criteria, as provided for in Chapter 5 of NEMA, pertaining to the preparation, submission, processing and consideration of, and decision on, applications for environmental authorisation. A **Basic Assessment** and a **Full Scoping and EIA** are the two key processes for obtaining environmental authorisation. To determine whether a Basic Assessment process or a Full Scoping and EIA process is required, one would need to review the listed activities that are to be undertaken and determine in which Listing Notice the identified listed activities fall within i.e. Listing Notice 1 (GN R983), Listing Notice 2 (GN R984) or Listing Notice 3 (GN R985).

13.3. Activities which trigger a Basic Assessment are typically activities that have the potential to impact negatively on the environment, but due to the nature and scale of such activities, the impacts are generally known and therefore do not require a Full Scoping and EIA process. Such activities fall within Listing Notice 1 (GN R983) or Listing Notice 3 (GN R985). Mining activities that require a mining permit in terms of section 27 of the MPRDA trigger a Basic Assessment in terms of Listing Notice 1 (GN R983).

13.4. Activities which trigger a Full Scoping and EIA process are typically large scale and / or highly impacting and the full range of potential impacts need to be established through a scoping exercise prior to a full and detailed assessment in the EIA process. Such activities fall within Listing Notice 2 (GN R984). Mining activities that require a mining right in terms of section 22 of the MPRDA trigger a Full Scoping and EIA process in terms of Listing Notice 2 (GN R984).

13.5. In light of the above, it is noted that mining activities have been included in both Listing Notice 1 (GN R983) and Listing Notice 2 (GN R984) of the 2014 EIA Regulations. Furthermore, section 38A (2) of the MPRDA makes it a condition that an environmental authorisation be issued by the Minister of Mineral Resources prior to the issuing of a mining permit or the granting of a mining right. An environmental authorisation is therefore a key statutory authorisation requirement for mining activities to be undertaken lawfully, and as such ASPASA and / or its members should request any non-member conducting mining activities which appear to be irresponsible and have the potential to cause significant environmental harm or degradation, for a copy of their environmental authorisation to confirm whether such mining activities are being undertaken lawfully.

13.6. The requirements pertaining to the Basic Assessment process and the Full Scoping and EIA process and their associated timeframes are discussed further below.

13.7. <u>Basic Assessment Process and Associated Timeframes</u>

13.7.1. Listed activity 21 in Listing Notice 1(GN R983) is triggered by mining activities that require a mining permit in terms of section 27 of the MPRDA.

LISTED ACTIVITY	DESCRIPTION OF LISTED ACTIVITY
Activity 21	Any activity including the operation of that activity which requires a **mining permit** in terms of section 27 of the MPRDA, including associated infrastructure, structures and earthworks, directly related to the extraction of a mineral resource, including activities for which an exemption has been issued in terms of section 106 of the MPRDA.

13.7.2. Please note that aggregate and sand mining operations may also trigger other non-mining listed activities that require a Basic Assessment. For example, the development of infrastructure or structures with a physical footprint of 100 square metres or more within a watercourse or within 32 metres of a watercourse where there is no development setback (**listed activity 12 of GN R983**), the development of facilities or infrastructure for the storage and handling of hazardous substances where the combined capacity is 80 cubic metres or more but not exceeding 500 cubic metres (**listed activity 14 in GN R983**), the clearance of 1 hectares or more of indigenous vegetation (**listed activity 27 in GN R983**), the dredging, excavation, removal or moving of soil, sand, shells, shell grit, pebbles or rock of more than 5 cubic metres from a watercourse, the seashore or an estuary or a distance

of 100 metres inland of the high-water mark of the sea or an estuary, whichever distance is the greater (**listed activity 19 in GN R983**).

13.7.3. Furthermore, listed activities in Listing Notice 3 (GN R985) may also be triggered. Listing Notice 3 deals with listed activities for which a Basic Assessment is required in respect of certain geographical areas only. Geographical areas differ from Province to Province. An example of a listed activity that may be triggered in Listing Notice 3 is the development of a road wider than 4 metres with a reserve less than 13.5 metres (**listed activity 4 of GN R985**) in an estuary, protected area, sensitive area, or a critical biodiversity area, the development of facilities or infrastructure for the storage and handling of a dangerous good with a combined capacity of 30 cubic metres but not exceeding 80 cubic metres in an estuary, protected area, sensitive area, or a critical biodiversity area (**listed activity 10 of GN R985**), or the development of infrastructure or structures with a physical footprint of 10 square metres or more within a watercourse or within 32 metres of a watercourse where there is no development setback (**listed activity 14 of GN R985**).

13.7.4. A thorough review of all the NEMA EIA listed activities that may be triggered by the aggregate and sand mining operation is therefore required to ensure that no other applicable non-mining related listed activities are omitted. Should the listed activities fall within a combination of Listing 1 (GN R983), Listing Notice 2 (GN R984) and / or Listing Notice 3 (GN R985), a Full Scoping and EIA process must be undertaken.

13.7.5. Regulation 19 of GN R982 prescribes the process and timeframes for undertaking a Basic Assessment and the submission of the Basic Assessment Report ("BAR") to the competent authority.[10]

13.7.6. Regulation 19 (1)(a) of GN R982 provides that the applicant is required to submit **within 90 days <u>of receipt</u>** of the application for environmental authorisation by the competent authority, a BAR which must be inclusive of all relevant specialist reports and an EMPr.[11] The BAR must have been subjected to a public participation process of at **least 30 days,** prior to the submission of the BAR to the competent authority. The final BAR must incorporate the comments received from all I&APs as well as comments received from the competent authority[12].

13.7.7. In terms of regulation 19 (1)(b) of GN R982, should any significant changes be made to the BAR or EMPr or significant new information be included in the BAR or EMPr where such changes or new information was not contained in the BAR or EMPr consulted on in the initial public participation process, then the applicant may notify the competent authority in writing, that the BAR and EMPr will be submitted **within 140 days of receipt** of the application by the competent authority.

13.7.8. The competent authority must **within 107 days of receipt** of the BAR and EMPr make a decision to either grant the environmental authorisation in respect of all or part of the activity applied for or refuse the environmental

[10] Regulation 3 (1) of GN R982 provides that timeframes shall be calculated according to calendar days and in terms of regulation 3 (2) the period between the 15th of December and the 5th of January must be excluded in the reckoning of days.
[11] The definition of "*receipt*" is important as it determines when a particular timeframe specified in the regulations relating to basic assessments and full scoping and EIA process is triggered. The 2014 EIA Regulations (GN R982) defines "receipt" to mean "*receipt on the date indicated -*
(a) on a receipt form if the application or document was hand delivered or sent via registered mail;
(b) in an automated or computer generated acknowledgment of receipt;
(c) on an acknowledgment in writing from the competent authority as the date of receipt if the application or document was sent via ordinary mail; or
(d) *on an automated or computer generated proof of transmission in the case of facsimile message*."
[12] The public participation process may not take place between the 15th of December and the 5th January, unless justified by exceptional circumstances.

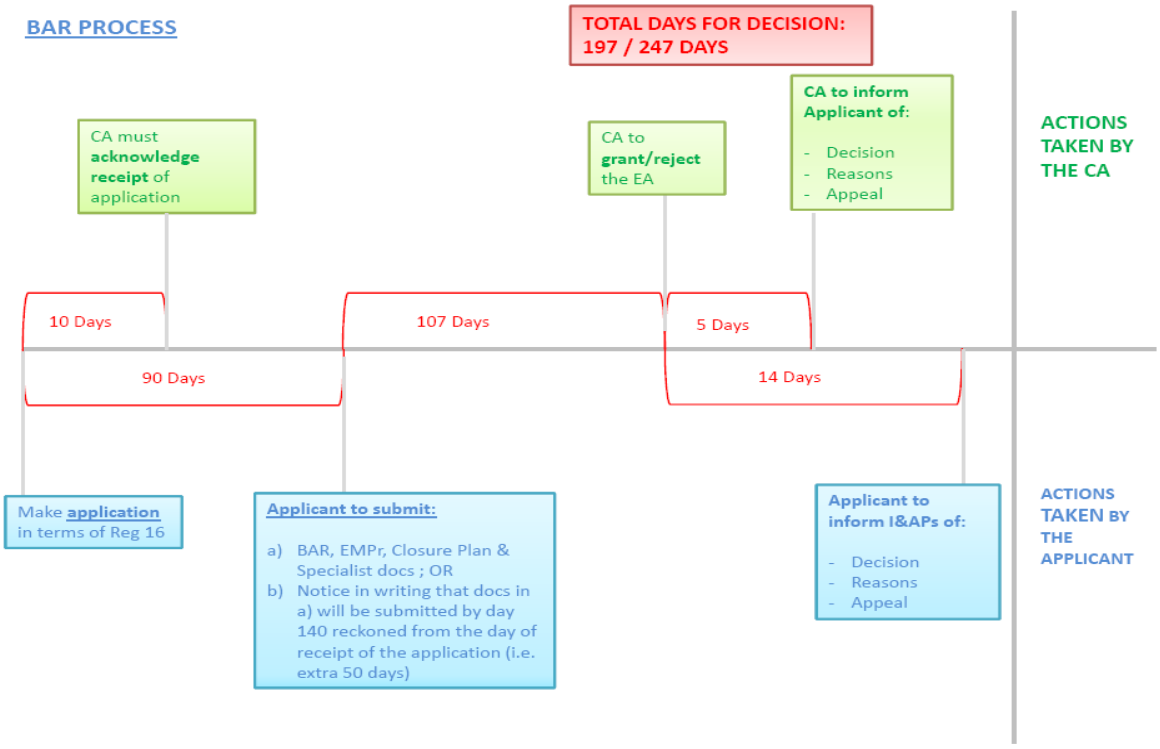
authorisation.

13.7.9. The total days for the BAR process envisaged under regulation 19 (1)(a) of GN R982 is **197 days.** However, where written notification in terms of regulation 19 (1)(b) of GN R982 is given to the competent authority to submit the BAR within 140 days of receipt of the application by the competent authority, the total days for the BAR process is **247 days.**[13]

13.7.10. Any non-compliance with the prescribed timeframes for a basic assessment will result in the lapsing of the application and a new application will need to be submitted to the competent authority and the applicable processes described above will need to start afresh. The fees prescribed for an application for environmental authorisation for which a basic assessment is required is **R2000.00** in terms of the Notice of the Fees for Consideration and Processing of Applications for Environmental Authorisations and Amendments published in GN 141 on 28 February 2014 ("GN 141").

13.7.11. In light of the above, we have included a flow diagram on the next page, highlighting the abovementioned timeframes applicable to the submission of a BAR to the competent authority and the timeframes applicable for a competent authority to make a decision on the BAR:

[13] The 30 day period for the public participation process must have been complied with prior to the submission of the BAR to the competent authority and is therefore not included in the calculation of the total days required for the submission and decision on the BAR. Furthermore, the timeframes for a Basic Assessment may be extended for a further period in terms of regulation 3 (7) of GN R982 "*where the scope of work must be expanded based on the outcome of an assessment done in accordance with these Regulations, which outcome could not be anticipated prior to the undertaking of the assessment, or in the event where exceptional circumstances can be demonstrated, the competent authority may, prior to the lapsing of the relevant prescribed timeframe, in writing,* ***extend the relevant prescribed timeframe and agree with the applicant on the length of such extension."*** The same is applicable for the Full Scoping and EIA process.



13.8. Full Scoping and EIA Process and Associated Timeframes

13.8.1. Listed activity 17 of Listing Notice 2 (GN R984) is triggered by mining activities that require a mining right in terms of section 22 of the MPRDA.

LISTED ACTIVITY	DESCRIPTION OF LISTED ACTIVITY
Activity 17	Any activity including the operation of that activity which requires a mining right in terms of section 22 of the MPRDA, including associated infrastructure, structures and earthworks, directly related to the extraction of a mineral resource, including activities for which an exemption has been issued in terms of section 106 of the MPRDA.

13.8.2. Please note that aggregate and sand mining operations may also trigger other non-mining listed activities that require a Full Scoping and EIA process. For example, the development of facilities or infrastructure for the storage and handling of hazardous substances where the combined capacity is 500 cubic metres (**listed activity 4 of GN R984**), the clearance of 20 hectares or more of indigenous vegetation (**listed activity 15 of GN R984**), or the extraction or removal of peat or peat soils, including the disturbance of vegetation or soils (**listed activity 24 of GN R984**).

13.8.3. Regulation 21 of GN R982 prescribes the process and timeframes for undertaking a Full Scoping and EIA process and the submission of a Scoping Report to the competent authority.

13.8.4. In terms of regulation 21 (1) of GN R982, the Applicant is required to submit **within 44 days of receipt** of the application by the competent authority a Scoping Report. The Scoping Report must have been subjected to a public participation process of at **least 30 days,** prior to the submission of the Scoping Report to the competent authority**.**

13.8.5. The competent authority must **within 43 days of receipt** of the Scoping Report, either accept the Scoping Report, with or without conditions, or refuse environmental authorisation. Thereafter, the applicant, in accordance with regulation 23 (1) (a), must **within 160 days of the acceptance of the Scoping Report** submit to the competent authority an Environmental Impact Report ("EIR") which must include any specialist reports and an EMPr.

13.8.6. Where significant changes have been made or significant new information has been included in the EIR or EMPr where such changes and / or new information, was not contained in the EIR or EMPr consulted on in the initial public participation process, then the applicant in terms of regulation 23 (1) (b) must submit written notification to the competent authority that the EIR and EMPr will be submitted **within 156 days of acceptance of the Scoping Report** by the competent authority.

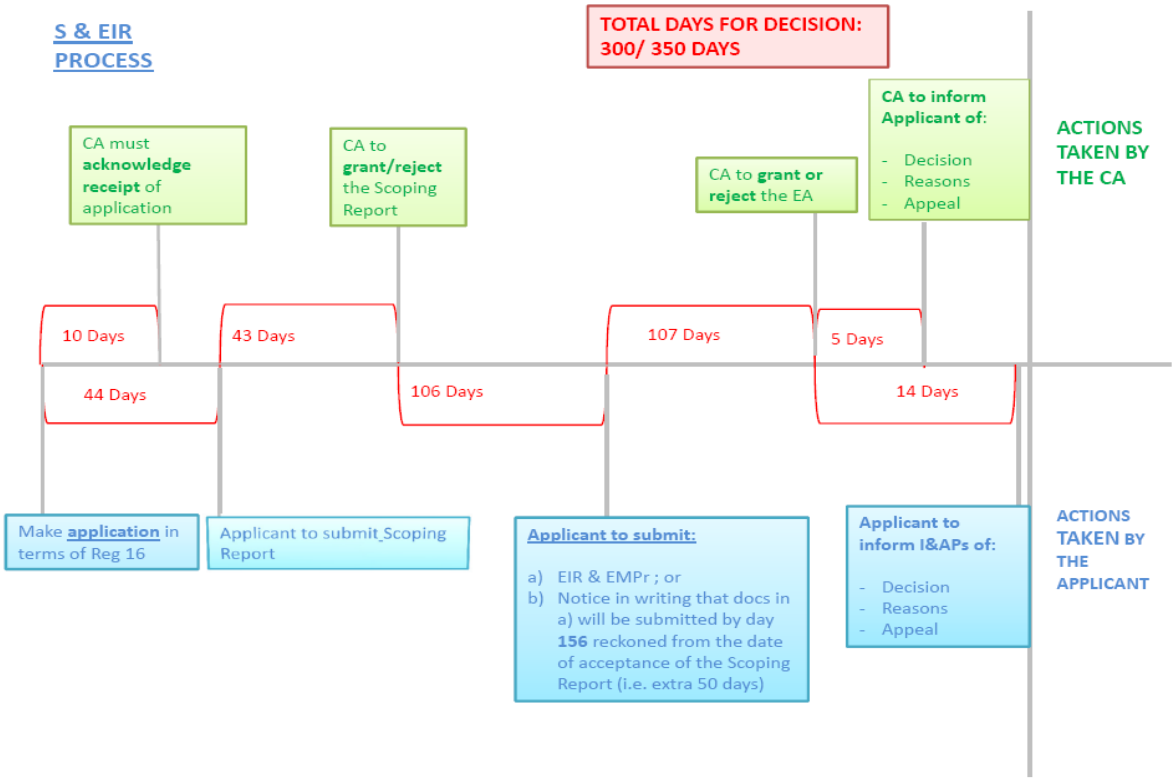
13.8.7. The competent authority must **within 107 days of receipt** of the EIR and EMPr either grant environmental authorisation in respect of all or part of the activity applied for or refuse environmental authorisation.

13.8.8. The total days for the scoping and EIA process envisaged under regulation 23 (1)(a) of GN R982 is **300 days.** However, where written notification in terms of regulation 23 (1)(b) of GN R982 is given to the competent authority to submit the EIR and EMPr within 156 days of receipt of the application by the competent authority, the total days for the entire scoping and EIA process is **350 days.**[14]

13.8.9. Any non-compliance with the prescribed timeframes for a Full Scoping and EIA will result in the lapsing of the application. Accordingly, a new application will need to be submitted to the competent authority and the applicable processes described above will need to start afresh. In terms of GN 141 the fees prescribed for an application for environmental authorisation for which a Scoping and Environmental Impact Report ("S&EIR") is **R10 000.00.**

13.8.10. In light of the above, we have included a flow diagram below, highlighting the abovementioned timeframes applicable to the submission of a S&EIR to the competent authority and the timeframes applicable for a competent authority to make a decision on the S&EIR:

[14] The 30 day period for the public participation process must have been complied with prior to the submission of the Scoping Report, EIR and EMPr and is therefore not included in the calculation of the total days required for the submission and decision on the Scoping and Environmental Impact Report ("S&EIR").



13.9. The Financial Provision Requirements for Remediation of Environmental Damage

13.9.1. In relation to new proposed aggregate and sand mining operations, section 24P of the NEMA requires an applicant for an environmental authorisation relating to mining activities, to demonstrate upfront compliance with the prescribed financial provisions set out in the Financial Provisioning Regulations, 2015 published in terms of GN R1147 on 20 November 2015 ("GN R1147") for the rehabilitation, closure and on-going post decommissioning management of the negative environmental impacts associated with the proposed mining operation **before** the Minister of Mineral Resources may issue an environmental authorisation.

13.9.2. GN R1147 repealed and replaced the financial provisions for prospecting, exploration, mining or production operations set out in regulations 53 and 54 of the MPRDA Regulations published under GN R527. The transitional provisions set out in regulation 17 of GN R1147 are therefore important to bear in mind when dealing with existing holders of mining permits or mining rights, who undertook any actions relating to financial provisions in terms of the MPRDA Regulations under GN R527 prior to GN R1147 coming into effect. A holder of a mining right or permit **who applied for such right or permit prior to the commencement of GN R1147 but who obtained such right or permit after the commencement of GN R1147**, must within **39 months** of the commencement of GN R1147 (i.e. **February 2019**) comply with GN R1147. All new applicants for mining rights or permits are required to immediately comply with the financial provisions set out in GN R1147.

13.9.3. For all new applications for a mining right or permit, the Minister of Mineral Resources can only grant environmental authorisation in terms thereof after compliance by the applicant with regulation 10 of the GN

R1147. Regulation 10 of GN R1147 requires an applicant for a mining right or mining permit to ensure that a determination is made of the financial provision and the annual rehabilitation plan as well as the final rehabilitation, decommissioning and mine closure plans are submitted as part of the information required by the Minister of Mineral Resources for consideration of an application for environmental authorisation and a mining right or permit in terms of the MPRDA. The applicant for a mining right or a mining permit must also provide proof of payment or arrangements to provide the financial provision prior to commencing with any mining operations.

13.9.4. In terms of regulation 6 of GN R1147, the determination of the financial provision required in regulation 10, is achieved through "*a detailed itemisation of all activities and costs, calculated based on the actual costs of implementation of the measures required for-*

(a) annual rehabilitation, as reflected in an annual rehabilitation plan;
(b) final rehabilitation, decommissioning and closure of the mining operation at the end of the life of the operation, as reflected in a final rehabilitation, decommissioning and mine closure plan; and
(c) *remediation of latent or residual environmental impacts which may become known in the future, including the pumping and treatment of polluted or extraneous water, as reflected in an environmental risk assessment report*".

13.9.5. The applicant or holder of a mining right or mining permit must in accordance with regulation 7 of GN R1147, ensure that the financial provision is, at any given time, equal to the sum of the actual costs of implementing the annual rehabilitation plan as well as the final rehabilitation, decommissioning and mine closure plans for a period of at **least 10 years forthwith**. It is worth noting that the financial provision liability associated with annual rehabilitation, final closure or latent or residual environmental impacts may not be offset against mining assets at the mine closure phase or the mine infrastructure salvage value in terms of regulation 9 (2) of GN R1147.

13.9.6. It is also important to take cognisance of section 24P (5) of the NEMA which states that the requirement to maintain and retain the financial provision remains in force **notwithstanding** the issuing of a closure certificate by the Minister of Mineral Resources in terms of the MPRDA. Moreover, the Minister of Mineral Resources may retain such portion of the financial provision as may be required to rehabilitate the closed mining or prospecting operation in respect of latent, residual or any other environmental impacts, including the pumping of polluted or extraneous water, for a prescribed period.

13.9.7. Regulation 15 of GN R1147, sets out the timeframes for the acknowledgement and consideration of plans and reports related to financial provision. In terms thereof, the Minister of Mineral Resources must-

(a) acknowledge receipt of all plans, reports and findings of reviews and assessments submitted in terms of these Regulations **within 10 days of receipt thereof**; and
(b) assess any plans, reports and findings of determinations, reviews and assessments of a financial provision submitted in terms of GN R1147, and must approve or reject such a plan, report or financial provision **within 60 days of receipt thereof**.

13.9.8. In the event that a plan, report or financial provision is rejected, the Minister of Mineral Resources must provide reasons for the rejection and indicate a timeframe, not exceeding **45 days**, within which a revised plan,

environmental risk assessment report, audit report or financial provision must be re-submitted for approval.

14. LICENSING REQUIREMENTS IN TERMS OF THE NWA

14.1. In most cases, aggregate and sand mining activities are undertaken either within or in close proximity to a watercourse. In this regard the NWA provides the following two important definitions which should be noted upfront:

> **"watercourse**" means -
>
> *(a) "a river or spring;*
>
> *(b) a natural channel in which water flows regularly or intermittently;*
>
> *(c) a **wetland**, lake or dam into which, or from which, water flows; and*
>
> *(d) any collection of water which the Minister may, by notice in the Gazette, declare to be a watercourse,*
>
> *a reference to a watercourse includes, where relevant, its bed and banks.*"
>
> "**wetland**" means "*land which is transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil.*"

14.2. It must be further noted that the 2014 EIA Regulations (in Listing Notice 1 (GN R983), Listing Notice 2 (GN R984) and Listing Notice 3 (GN R985)) expand upon the definition of a watercourse in the NWA, by including "*pans*" in the definition of "*watercourse*".

14.3. Section 21 of the NWA provides a list of water uses that have the potential to have a significant impact on a watercourse and requires a Water Use Licence ("WUL"). Where sand mining activities are to be undertaken within a watercourse, it is likely that a number of water uses listed in section 21 of the NWA will be triggered. The most likely water uses to be triggered include but are in no way limited to *inter alia* section 21 (c) ***impeding or diverting the flow of water in a watercourse*** and section 21 (i) ***altering the bed, banks, course or characteristics of a watercourse***.

14.4. The abovementioned water uses under section 21 (c) and (i) of the NWA are subject to the General Authorisation published in terms of GN 509 of 26 August 2016 (which repealed and replaced the previous General Authorisation in GN1199 of 18 December 2009).[15] Section 39 of the NWA provides that where a water use listed under section 21 of the NWA is subject to a general authorisation, a WUL will not be required.

14.5. In order to determine whether GN 509 is applicable, the specific exclusions under regulation 3 of GN 509 must be taken into consideration. One of the crucial exclusions is regulation 3 (b), which provides that GN 509 will not applicable where

[15] GN 509 under the NWA provides the following useful definitions when considering whether a section 21 (c) and / or (i) water use in terms of the NWA is triggered:

"***diverting***" means to "*cause the instream flow of water to be rerouted temporarily or permanently*";

"***flow-altering***" means to, "*in any manner, alter the instream flow route, speed or quantity of water temporarily or permanently*"; and

"impeding" means to, *"in any manner, hinder or obstruct the instream flow of water temporarily or permanently, but excludes the damming of flow so as to cause storage of water".*

the risk class / rating of the impact of the water use on the water resource is medium or high.[16] Only water uses with a low risk impact on a watercourse may be generally authorised in terms of GN 509. Accordingly, section 21 (c) and (i) water uses with a medium to high risk impact on a water resource will require a WUL in terms of section 22 of the NWA.

14.6. Low, medium and high risk water uses are defined in Appendix A of GN 509 as follows:

Rating	Class	Management Description
1 – 55	Low	Acceptable as is or consider requirement for mitigation. Impact to watercourses and resource quality small and easily mitigated.
56 – 169	Medium	Risk and impact on watercourses are notable and require mitigation measures on a higher level, which cost more and requires specialist input.
170 – 300	High	Watercourses impacts by the activity are such that they impose a long-term threat on a larger scale and lowering of the Reserve.

14.7. In light of the above definitions, it is arguable that the nature of aggregate and sand mining activities is such that at the very least, the risk and impact on the watercourse would be classified as medium. Accordingly, section 21 (c) and (i) water uses triggered by aggregate and sand mining activities would be excluded from the application of GN 509 and would require authorisation in terms of a WUL.

14.8. Should it be possible that the risk and impact of a small scale aggregate and sand mining operation on a water resource be determined as low, the exclusion in regulation 3 (c) of GN 509 must be considered. Regulation 3 (c) of GN 509 provides that the general authorisation will not be applicable in circumstances where an application must be made for a WUL for the authorisation of any other water uses as defined in section 21 of the NWA. In this regard, it is possible that other water uses under section 21 of the NWA may be triggered by undertaking sand mining activities in a watercourse. Examples of other water uses that may be triggered include but are not limited to section 21 (a) ***taking water from a water resource***, and section 21 (g) ***disposing of waste in a manner which may detrimentally impact on a water resource.*** In such circumstances a WUL will be required.

14.9. The process outlined in sections 40 and 41 of the NWA for applying for a WUL would then need to be followed. Section 41 (5) of the NWA specifically requires that the Minister of Water and Sanitation must align and integrate the process for consideration of a WUL with the timeframes and processes applicable to applications for licences, permits or rights for **mining** in terms of the MPRDA, and environmental authorisations in terms of **NEMA** and any specific environmental management act.

14.10. The Regulations regarding the Procedural Requirements for Water Use Licence Applications and Appeals were published under GN R267 on 24 March 2017 under the NWA. These Regulations prescribe the process and requirements for WUL applications as contemplated in section 41 of the NWA and seek to align the specific timeframes associated with assessing, processing and making a decision on a WUL application with the timeframes for the scoping and EIA process (**300 days)** applicable to environmental authorisations for **mining activities.** Regulation 3 (6) of GN R267 confirms that "*the process of water use licence application, consideration and decision shall be undertaken within a period of **300 days** of submitting such application*". Annexure A of the Regulations provides a summary in a table format of the different stages of the WUL application process and the associated timeframes. We have included the table contained in Annexure

[16] The risk class / rating is to be determined by a suitably qualified SACNASP professional member by completing the Risk Matrix Assessment attached as Appendix A to GN 509

A below for ease of reference:

Regulation	Steps in processing of water use licence applications	Maximum Days allocated	Cumulative days
0	**Pre-application enquiry**	0 days	0 days
1	**Application submitted**	1 day	1 day
2	**Responsible authority acknowledges receipt of application**	10 days	11 days
3	**Applicant confirms arrangements for site inspection with an allocated case officer**	5 days	16 days
4	**Site inspection to confirm water uses, determine information requirements and the need for public participation**	20 days	36 days
5	**Confirm requirements for water use licence application technical report based on site visit and meeting**	5 days	41 days
6	**Compilation, consultation and submission of water use licence application technical report by applicant**	105 days	146 days
7	**Reject / Accept water use licence application technical report**	10 days	156 days
8	**Assessment**	139 days	295 days
8	**Decision and communication to applicant**	5 days	**300 days**

14.11. The forms and reports to be completed and submitted in respect of a particular WUL application are set out in Annexure B of the Regulations and Annexure D provides a list of the technical reports to be submitted. These technical reports are regarded as minimum information requirements for submitting a WUL application. Of particular relevance is the requirement for a technical report to be prepared on mine closure / rehabilitation plan.

14.12. Commencing with a water use without a WUL, where a WUL is required, is an offence in terms of section 151 of the NWA. Upon conviction of such an offence, a person may be held liable to pay a fine or face imprisonment charges not exceeding five years or both a fine or imprisonment, and in the case of a second or subsequent conviction, to a fine or imprisonment for a period not exceeding ten years or to both a fine and imprisonment in terms of section 151 (2) of the NWA. Furthermore, damages may be awarded against a person convicted of an offence in terms of section 151 of the NWA for the loss or harm suffered by a third party in terms of section 152 of the NWA. In addition, the convicted person may be ordered to undertake the necessary remedial measures and pay the costs associated with any such remedial measures in terms of section 153 of the NWA.

15. LICENSING REQUIREMENTS IN TERMS OF THE NEM: WA

15.1. In terms of section 20 of the NEM:WA, no person may commence, undertake or conduct a listed waste management activity, except in accordance with the relevant norms and standards applicable to that activity or a waste management licence ("WML") issued in respect of a activity, where a licence is required.

15.2. The list of waste management activities published in GN 921 on 29 November 2013 under the NEM:WA, include a number of possible waste management activities that may be triggered by an aggregate and sand mining operation. In particular, the listed waste management activities relating to the establishment and reclamation of residue stockpiles or residue deposits are mostly likely to be triggered. Residue stockpiles and residue deposits are included as listed waste management activities in Category A and Category B of GN 921. Waste management activities listed in Category A and Category B of GN 921 require WMLs.

15.3. Residue stockpiles and residue deposits are defined in section of the MPRDA as:

> **"residue deposit"** means "*any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right, production right or an old order right"; and*
>
> **"residue stockpile"** means "*any debris, discard, tailings, slimes, screening, slurry, **waste rock**, **foundry sand**, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit, production right or an old order right*'

15.4. A person who wishes to commence, undertake or conduct a waste management activity listed under Category A of GN 921, must conduct a Basic Assessment process set out in the 2014 EIA Regulations as part of a WML application. Listed waste management activity 3 (15) under Category A relates to the establishment or reclamation of a residue stockpile or residue deposit resulting from activities which require a **mining permit** in terms of the MPRDA.

15.5. A person who wishes to commence, undertake or conduct a waste management activity listed under Category B of GN 921 must conduct a Full Scoping and EIA process set out in the 2014 EIA Regulations as part of a WML application. Listed waste management activity 4 (11) under Category B relates to the establishment and reclamation of a residue stockpile or residue deposit resulting from activities which require a **mining right** in terms of the MPRDA.

15.6. Where residue stockpiles or residue deposits are to be established on site as a result of the aggregate and sand mining activities to be undertaken, a WML must be applied for prior to undertaking the mining activities. The failure to obtain a WML, where a licence is required, prior to the establishment and recovery of residue stockpiles and residue deposits, would amount to the unlawful commencement of such activity and is deemed to be an offence in terms of section 67 (1)(a) of the NEM:WA. Upon conviction of such an offence, a person may liable to a fine not exceeding **R10 000 000.00** or to imprisonment for a period not exceeding **10 years**, or to both such fine and such imprisonment, in addition to any other penalty or award that may be imposed or made in terms of the NEMA.

15.7. The residue stockpiles and residue deposits must also be managed in accordance with the Regulations regarding the Planning and Management of Residue Stockpiles and Residue Deposits, 2015 published under GN R632 ("GN R632"). In terms of regulation 3 of GN R632, the identification and assessment of the environmental impacts arising from residue stockpiles and residue deposits must be done as part of the EIA process conducted in terms of the 2014 EIA Regulations under the NEMA. Furthermore, the management of residue stockpiles and residue deposits must be in accordance with any conditions set out and any identified measures in the environmental authorisation issued in terms of the NEMA, an EMPr and a WML.

15.8. The procedure for WML applications is set out in section 47 of the NEM:WA. Section 44 (1) of the NEM:WA specifically requires that the licensing authority (who is the Minister of Mineral Resources) must as far as practicable in the circumstances co-ordinate or consolidate the application and decision-making processes for WMLs with the decision-making process in Chapter 5 of NEMA (discussed above in paragraph 12).

16. **LICENSING REQUIREMENTS IN TERMS OF THE NEM:BA**

16.1. Aggregate and sand mining activities typically involve the clearance of a large portion of vegetation, the removal of the top layer of soil and the extraction of the sand and other aggregate minerals underneath. As such these mining activities have significant biodiversity impacts on surrounding habitats and ecosystems.[17] In addition thereto, the sand to be extracted often falls within sensitive or threatened habitats and ecosystems such as in rivers, estuaries, valleys and coastal dunes. It is therefore possible that aggregate and sand mining activities will significantly impact on vulnerable, threatened or protected species, habitats and ecosystems and will trigger **restricted activities** in terms of the NEM:BA.[18] Section 57(1) of NEM: BA prohibits a person from carrying out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued in terms of Chapter 7 of the NEM:BA.

16.2. A "*restricted activity*" in relation to a specimen of a listed threatened or protected species is defined in section 1 of the NEM:BA to include:

> *(i) "hunting, catching, capturing or killing any living specimen of a listed threatened or protected species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injuring with intent to hunt, catch, capture or kill any such specimen;*
> *(ii) gathering, collecting or plucking any specimen of a listed threatened or protected species;*
> ***(iii) picking parts of, or cutting, chopping off, uprooting, damaging or destroying, any specimen of a listed threatened or protected species;***
> *(iv) importing into the Republic, including introducing from the sea, any specimen of a listed threatened or protected species;*
> *(v) exporting from the Republic, including re-exporting from the Republic, any specimen of a listed threatened or protected species;*
> *(vi) **having in possession or exercising physical control over any specimen of a listed threatened or protected species;***
> *(vii) growing, breeding or in any other way propagating any specimen of a listed threatened or protected species, or causing it to multiply;*
> *(viii) **conveying, moving or otherwise translocating any specimen of a listed threatened or protected species;***
> *(ix) selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or disposing of any specimen of a listed threatened or protected species; or*
> *(x) any other prescribed activity which involves a specimen of a listed threatened or protected species"*

16.3. The Threatened or Protected Species Regulations published in terms of GN R152 of 23 February 2007 ("TOPS Regulations") under the NEM: BA regulates the permitting system set out in Chapter 7 of the NEM:BA insofar as that system applies to restricted activities involving specimens of listed threatened or protected species.

16.4. In terms of regulation 8 of the TOPs Regulations, the issuing authority must consider and decide on the application within **20 working days**. Please note that there is potential for this timeframe to be extended where an issuing authority

[17] Dr Esham Palmer, the Director of the Compliance and Enforcement division at the Western Cape Department of Environmental Affairs and Development Planning" *Illegal sand mining in South Africa"* video discussion in Mining Weekly, dated 17 April 2015. The video discussion is available at http://www.miningweekly.com/article/illegal-sand-mining-a-serious-concern-for-sa-2015-04-17/rep_id:3650

[18] Section 1 of the NEM:BA defines "***biodiversity***" as the "*variability among living organisms from all sources including, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and also includes diversity within species, between species, and of ecosystems."* Section 1 of the NEM:BA also defines a "**ecosystem**" *as "a dynamic complex of animal, plant and micro-organism communities and their non-living environment interacting as a functional unit*".

requests additional information. In this instance, the issuing authority must **within 14 working days** of receipt of the application request an applicant to furnish such additional information as the issuing authority may require for the proper consideration of the application. The issuing authority must consider and decide on the application **within 20 working days** from the date of receipt of such additional information.

16.5. In addition to the above potential permitting requirements, it is also possible that certain restricted activities in relation to alien species and / or listed invasive species may be triggered. This is due to the fact that the clearance of indigenous vegetation for purposes of extracting the mineral sand underneath, leaves the environment vulnerable to the potential spreading of alien species and / or invasive species to ecosystems and habitats where they do not naturally occur. On-going rehabilitation measures should therefore be implemented during the life of the aggregate and sand mining operation to manage and control or eradicate alien species and listed invasive species to prevent or minimize harm to the environment and to biodiversity in particular. In doing so, there is the potential for a restricted activity in relation to alien species and / or invasive species being triggered. A "***restricted activity***" in relation to an alien species or a listed invasive species is defined in section 1 of NEM:BA to include:

> *(i)* *"importing into the Republic, including introducing from the sea, any specimen of an alien or listed invasive species;*
>
> *(ii)* ***having in possession or exercising physical control over any specimen of an alien or listed invasive species****;*
>
> *(iii)* ***growing, breeding or in any other way propagating any specimen of an alien or listed invasive species, or causing it to multiply****;*
>
> *(iv)* ***conveying, moving or otherwise translocating any specimen of an alien or listed invasive species****;*
>
> *(v)* *selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or* ***disposing of any specimen of an alien or listed invasive species;*** *or*
>
> *(vi)* *any other prescribed activity which involves a specimen of an alien or listed invasive species"*

16.6. Where a restricted activity in relation to an alien species or listed invasive species needs to be undertaken, a permit under Chapter 7 of the NEM:BA will need to be obtained in terms of section 65 and section 71 of the NEM:BA. The Alien and Invasive Species Regulations, 2014 published under GN R598 of 1 August 2014 regulates the permitting system set out in Chapter 7 of the NEM:BA insofar as that system applies to restricted activities involving alien and invasive species.

16.7. In terms of section 101 (1) of the NEM:BA, it is an offence for a person to commence with a restricted activity involving specimens of listed threatened or protected species without a permit in terms of Chapter 7 of the NEM:BA. A person convicted of such an offence may be liable to a fine not exceeding R10 million, or an imprisonment for a period not exceeding ten years, or to both such a fine and such imprisonment. Section 102 (2) of the NEM:BA further notes that if a person is convicted of an offence involving a specimen of a *listed threatened or protected species*, or *an alien species* without the required permit, a fine may be determined, either in terms of subsection 102 (1) or equal to "***three times the commercial value of the specimen or activity in respect of which the offence was committed, whichever is the greater".***

16.8. Furthermore, section 102 (3) of the NEM:BA provides that if a person is convicted of an offence involving a specimen of a listed invasive species, a fine may be determined, either in terms of subsection 101 (1) or ***equal to the estimated cost associated with the control of the specimen in respect of which the offence was committed or both.***

17. **LICENSING REQUIREMENTS IN TERMS OF THE NFA**

> **Section 7 (1) of the NFA** provides "*no person may-*
> *(a)* ***cut, disturb, damage or destroy any indigenous tree in a natural forest****; or*
> *(b) possess, collect,* ***remove, transport****, export, purchase, sell, donate or in any other manner acquire or* ***dispose*** *of any tree, or any forest product derived from a tree contemplated in paragraph (a),*
> *except in terms of-*
> *(i)* ***license issued under subsection (4) or section 23****; or*
> *(ii) an exemption from the provisions of this subsection published by the Minister in the Gazette on the advice of the Council."*
>
> **Section 15 (1) of the NFA** provides "*no person may -*
> *(a)* ***cut, disturb, damage or destroy any protected tree****; or*
> *(b) possess, collect,* ***remove, transport,*** *export, purchase, sell, donate or in any other manner acquire or* ***dispose*** *of any protected tree, or any forest product derived from a protected tree,*
> *except –*
> *(i)* ***under a licence granted by the Minister****; or*
> *(ii) in terms of an exemption from the provisions of this subsection published by the Minister in the Gazette on the advice of the Council.*

17.1. In light of the above sections, where the proposed aggregate and sand mining activities will result in the ***cutting, disturbing, damaging or destroying*** or the ***removal, transportation or disposal*** of any indigenous tree species in a natural forest or a listed protected tree species, a licence would need be obtained prior to undertaking any such activities.

17.2. The licensing requirements for ***cutting, disturbing, damaging or destroying*** or the ***removal, transportation or disposal*** of any indigenous tree species or a listed protected tree species are regulated in terms of the Regulations under the NFA published in GN R466 on 29 April 2009 ("GN R466"). No specific timeframes associated with the preparation, submission, processing and consideration of, and decision on such licences under the NFA are provided for in the NFA or GN R466.

17.3. Contravention of section 7 (1) of the NFA in relation to trees in natural forests is deemed to be a second category offence in section 62 (2)(a) of the NFA. Upon conviction of such an offence, a person may be sentenced on a first conviction for that offence to a fine or imprisonment for a period of up to two years or to both such fins and such imprisonment.

17.4. Contravention of section 15 (1) of the NFA in relation to protected tree species is deemed to be a first category offence in terms of section 62(2)(c) of the NFA. A person convicted of such an offence may be sentenced to a fine or imprisonment for a period of up to three years, or to both a fine and such imprisonment.

B. AVENUES FOR INPUT AND PARTICIPATION OF ASPASA IN THE NEMA EIA STATUTORY AUTHORISATION PROCESS FOR AGGREGATE AND SAND MINING ACTIVITIES

18. One of the key areas in which ASPASA seeks to support its members, is achieving environmental legal compliance with their mining operations and to work with government authorities on improving environmental monitoring and enforcement actions in order to stop illegal aggregate and sand mining operations.

19. Based on a review of the information provided on ASPASA's website, it would appear that ASPASA is already engaging with its members to achieve better environmental awareness and compliance in the industry through a number of means, which include but are not limited to: establishing working committees, providing access to information on its website such as Best Practice Guidelines used in the industry, as well as articles dealing with pertinent environmental issues (such as illegal aggregate and sand mining), and providing links to government department websites such as the Department of Environmental Affairs ("DEA"), the

Department of Mineral Resources ("DMR") and the Department of Water and Sanitation ("DWS"). It is also noted that ASPASA adopted the South African About Face Environmental Audit Process Programme, which has been in operation since 1990. Members of ASPASA are required to be audited in terms the Audit Programme on an annual basis. The Audit Process Programme is used by ASPASA to monitor how members are dealing with their environmental impacts on site.

20. In addition to the above efforts by ASPASA, we have highlighted below other potential avenues provided for in terms of environmental legislation that ASPASA may utilize to become more involved in and have meaningful input into the statutory authorisation and subsequent monitoring processes that aggregate sand mining operations need to comply with.

21. **ASPASA'S INVOLVEMENT IN THE NEMA EIA PUBLIC PARTICIPATION PROCESS**

21.1. Public participation is a critical element of the environmental authorisation process required in terms of the NEMA. It is the only requirement for which an exemption cannot be applied for in terms of section 24M of the NEMA. The advantages of an effective public participation process includes *inter alia*:[19]

> (a) It provides an opportunity for I&APs to gain access to key information about the environmental impacts associated with the proposed activity;
> (b) I&APs are provided an opportunity to bring their questions, concerns and objections to a particular project application in a formal manner to the attention of the applicant as well as the competent authority;
> (c) The applicant is required to consider, address and incorporate the needs, preferences and values of I&APs into its application and further requires the competent authority to consider such needs, preferences and values in its decision on the application;
> (d) Provides for a possible mechanism of further investigating and explaining technical issues regarding the proposed project as well as resolving disputes and conflicting interests; and
> (e) Promotes transparency and accountability in the decision-making process.

21.2. In order for ASPASA to participate in the public participation process regulated by the 2014 EIA Regulations, ASPASA will need to register as an I&AP with the Environmental Assessment Practitioner ("EAP") for the project. When registering as an I&AP, ASPASA will be required to disclose any direct business, financial, personal or other interest which ASPASA may have in the approval or refusal of the application for environmental authorisation.

21.3. Once registered as an I&AP, regulation 43 of the 2014 EIA Regulations provides that a registered I&AP is entitled to receive and submit written comments on all reports or plans such as the BAR, S&EIR, EMPr, and where applicable the closure plan, submitted to I&APs during the public participation process. When submitting such written comments, an I&AP may bring to the attention of the applicant any issues which the I&AP believes to be of significance to the consideration of the application. I&APs are required to submit their written comments within the prescribed period set out in terms the 2014 EIA Regulations, which is 30 calendar days.

21.4. In terms of regulation 44 of the 2014 EIA Regulations, all written comments received from an I&AP must be recorded in the reports and plans to be submitted to the competent authority, including responses to such comments and records of meetings.

21.5. The public participation process therefore allows ASPASA to be involved in and engage with a mining company in the beginning stages of the application process for an environmental authorisation to undertake aggregate and sand mining

[19] The Department of Environmental Affairs' *Integrated Environmental Management Guideline Series (Guideline 7): Public Participation in the Environmental Impact Assessment Process* published in GN 807 on 10 October 2012.

activities. This provides ASPASA with the opportunity to provide guidance to the applicant mining company on the importance of complying with its environmental legal obligations right from the beginning, which will go a long way in trying to ensure that all the stages of mining is done responsibly in accordance with the relevant environmental legislation.

22. SUBMISSION OF APPEALS BY ASPASA

22.1. The Constitution provides in section 33, that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. This right is given further effect by the provisions of the Promotion of Administrative Justice Act 3 of 2000 and the common law.

22.2. In addition to the above, section 43 (2) of the NEMA provides "*Any person may appeal to an MEC against a decision taken by any person acting under a power delegated by that MEC under this Act or a specific environmental management Act*". In the context of mining, section 43 of the NEMA designates the Minister of Environmental Affairs as the appeal authority for a decision made by the DMR.

22.3. The opportunity to submit an appeal against a decision by the DMR to issue an environmental authorisation to a mining company wishing to undertake aggregate and sand mining activities is important for the following reasons:

(a) It holds the competent authority accountable for the decisions they make, which in turn will hopefully lead to the competent authority making better and more informed environmental decisions; and

(b) An appeal suspends an environmental authorisation in terms of section 43 (7) of the NEMA. This has far reaching consequences for a mining company as they will not be able to commence with activities on site until such time that the appeal is dismissed. Where the appeal is upheld, the environmental authorisation may be set aside.

22.4. Where ASPASA is a registered I&AP for a particular project, ASPASA may use the appeal process as a mechanism to try stop irresponsible mining activities from taking place in sensitive, threatened or protected environments where the competent authority has failed to do so.

22.5. The 2014 National Appeal Regulations regulate the procedure relating to the submission, processing and consideration of, a decision on an appeal. Regulation 4 (1) provides that an appellant must submit an appeal to the Appeal Administrator, and a copy of the appeal to the applicant (the person to whom a decision has been issued to), any registered I&AP and any organ of state with interest in the matter, within **20 days** from the date that the notification of the decision on an application for an environmental authorisation was sent to the registered I&Ps by the applicant, or from the date that the notification of the decision was sent to the applicant by the competent authority.

22.6. In terms of regulation 5 (1) of the National Appeal Regulations, the applicant, the decision-maker, I&APs and relevant organs of state must submit their responding statement, if any, to the appeal authority and the appellant within **20 days** from the date of receipt of the appeal submission.

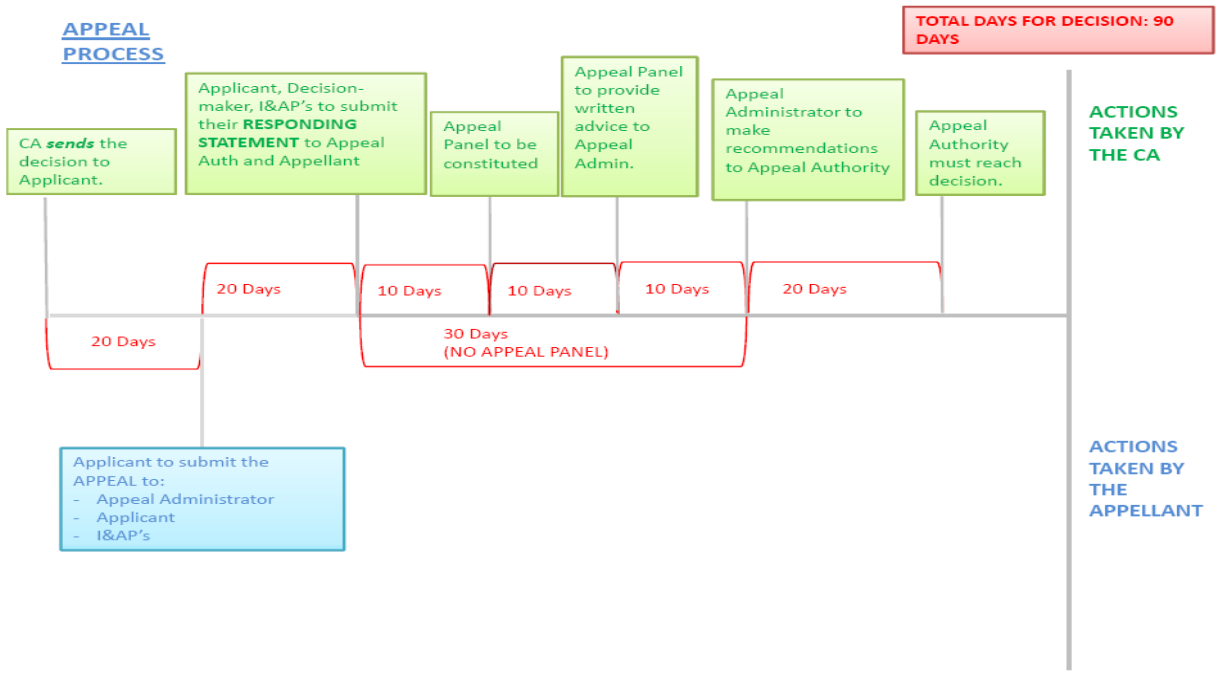
22.7. In accordance with regulation 7 of the National Appeal Regulations, the appeal administrator must consider and decide on the appeal within **60 days** of receipt of the appeal. The 60 days make provision for:

(a) The appeal administrator to make a recommendation on the appeal to the appeal authority within **30 days** of receipt of the responding statement, in the event that an independent expert has not been sourced or an independent appeal panel has not been constituted;

(b) The appeal administrator to make a recommendation on the appeal to the appeal authority within **10 days** of receipt of the advice from the appeal panel, in the event that an independent expert has been sourced or an independent appeal panel has been constituted;

(c) The appeal authority to make a decision on an appeal, and notify the appellant, applicant, and any registered I&AP, within **20 days** of the recommendation on the appeal by the appeal administrator.

22.8. In light of the above, we have included a flow diagram on the page below, highlighting the abovementioned timeframes applicable to the submission of an appeal and the timeframes applicable for a competent authority to make a decision on the appeal:



22.9. In addition to the above appeal provisions set out in the NEMA and the 2014 National Appeal Regulations, section 96 of the MPRDA also makes provision for the submission of internal appeals by any person whose rights or legitimate expectations have been materially and adversely affected, or who is aggrieved by any administrative decision in terms of the MPRDA. In terms thereof, an appeal may be submitted within **30 days** of becoming aware of such administrative decision to:

(a) the Director-General, if it is an administrative decision by a Regional Manager or any officer to whom the power has been delegated; or

(b) the Minister, if it is an administrative decision that was taken by the Director-General or the designated agency.

22.10. An appeal in terms of subsection 96 (1) does not, however, suspend the administrative decision, unless it is specifically suspended by the Director-General or the Minister, as the case may be.

23. **MONITORING AND AUDITING REQUIREMENTS UNDER THE 2014 EIA REGULATIONS**

23.1. Section 24Q of the NEMA requires every holder of a mining permit or a mining right to conduct such monitoring and performance assessment of an approved EMPr as may be prescribed. This will ensure that the holder is complying with the conditions of its environmental authorisation and to assess the continued appropriateness and adequacy of its EMPr.

23.2. The 2014 EIA Regulations through regulation 34 (1), provides that the holder of an environmental authorisation must ensure compliance with the conditions of its environmental authorisation and EMPr, and where applicable closure plan, are audited and to submit such audit report to the competent authority, which in the context of mining is the DMR.

23.3. The environmental audit required in regulation 34 (1) and the associated report, must be conducted and submitted to the DMR by an independent person with the relevant environmental auditing expertise, at intervals as set out in the environmental authorisation.[20] The audit report must provide verifiable findings on:

(a) the level of performance against and compliance of the project with the conditions of the environmental authorisation and EMPr and where applicable the closure plan; and
(b) the ability of the measures contained in the EMPr, and where applicable the closure plan, to sufficiently provide for the avoidance, management and mitigation of environmental impacts associated with the undertaking of the activity.

23.4. In terms of regulation 34 (6), the holder of the environmental authorisation must within **7 days** of submission of the environmental audit report to the competent authority, notify all potential and registered I&APs of the submission of the report and make the report **immediately available** to **anyone on request** and on a **publicly accessible website**, where the holder has such a website. This requirement will assist with promoting transparency and accountability of the mining company to the public and to the government authorities. It will also assist ASPASA with monitoring compliance of ASPASA members as well as non-members involved in the aggregate and sand mining industry, with the conditions of their environmental authorisations and EMPrs.

23.5. Although ASPASA requires its members to undertake annual environmental audits in terms of the South African About Face Environmental Audit Process Programme, it is noted that this auditing programme is a voluntary initiative which bears no legal consequences if members fail to comply with the voluntary auditing requirements.

23.6. The environmental legal auditing requirements set out in section 24Q of NEMA and regulation 34 of the 2014 EIA Regulations provide for mandatory legal obligations, which all holders of mining rights or mining permits must comply with. In terms of regulation 48 (1)(d) of the 2014 EIA Regulations, it is an offence to fail to comply with the auditing provisions in regulation 34. A person convicted of such an offence is liable to a fine not exceeding **R5 million** or to imprisonment for a period not exceeding **5 years**, and in the case of a second or subsequent conviction to a fine not exceeding **R10 million** or to imprisonment for a period not exceeding **10 years**, and in both instances to both such fine and such imprisonment in terms of section 49B (2) of the NEMA.

23.7. The auditing requirements in regulation 34 are therefore a very useful mechanism that ASPASA may utilise to monitor

[20] Regulation 34 (2) of the 2014 EIA Regulations

compliance of non-members with the conditions of their environmental authorisations and EMPrs and to hold such entities accountable for any non-compliance identified in the audit reports.

24. **ASPASA's RIGHT TO REQUEST ACCESS TO CERTAIN ENVIRONMENTAL INFORMATION HELD BY MINING COMPANIES**

24.1. Access to information is crucial for the exercise of environmental rights. The Supreme Court of Appeal ("the SCA") in the case of *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance*[21] specifically recognised and upheld that access to information is essential for the exercise of environmental rights in South Africa. The SCA judgement emphasised the importance of corporate transparency in relation to environmental issues, stating that "*Corporations operating within our borders… must be left in no doubt that, in relation to the environment in circumstances such as those under discussion,* ***there is no room for secrecy and that constitutional values will be enforced***".

24.2. The Promotion of Access to Information Act 2 of 2000 ("PAIA") enables citizens to access information from private and public bodies by providing a procedure to request access to information held by a private body (in terms of section 50) or a public body (in terms of section 11).

24.3. Furthermore, sections 14 and 51 of PAIA, respectively, require all state departments and private companies to publish a PAIA Manual. PAIA Manuals are useful documents as they are required to provide sufficient detail to facilitate a request for access to a record of a private or public body, a description of the subjects on which the body holds records and the categories of records held on each subject and who the request for access to information must be submitted to, as well as the relevant contact details of that person. Therefore, when making any requests for access to information held by a mining company or a state department, ASPASA may refer to the PAIA manual of that body for guidance on the process for requesting information.

24.4. In the context of requesting information from a mining company (private body) section 50 (1) of PAIA provides:

> **"** *(1) A requester* ***must be given access to any record of a private body if*** *-*
>
> ***(a) that record is required for the exercise or protection of any rights****;*
> ***(b)*** *that person complies with the procedural requirements in this Act relating to a request for access to that record; and*
> ***(c)*** *access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part*."

24.5. Based on the above, where ASPASA requires access to certain environmental information held by a mining company, such as a WUL or EMPr for example, ASPASA would be entitled to request access in terms of section 50 (1) of PAIA. This is particularly helpful where the mining company which ASPASA requires information from, is not a member of the organization. ASPASA will, however, be required to show that such a request is made in the interest of exercising its environmental rights in section 24 of the Constitution.

24.6. In terms of Chapter 4 of PAIA, a mining company would be able to refuse any request to access to information where such information contains any company or third party trade secrets or sensitive financial, commercial, scientific or technical information. However, it is generally accepted that environmental related information such as an environmental authorisation, EMPr, WUL or a WML do not contain confidential and / or sensitive information. On the other hand, it may

[21] *[2014] ZASCA 184 (26 November 2014)*

be possible for a mining company to refuse access to its full Mining Right and mining works programme where certain financial and technical information is disclosed.

24.7. Should the mining company refuse access to the information requested, ASPASA may submit a PAIA request application to the relevant competent authority (the DMR, DEA or DWS) in terms of section 11 of PAIA.

C. ENVIRONMENTAL LEGAL REMEDIES AVAILABLE TO ASPASA TO DEAL WITH THE ILLEGAL AGGREGATE AND SAND MINING ACTIVITIES AFFECTING ASPASA MEMBERS

25. In terms of section 32 of NEMA, any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of NEMA, including any provision of a specific environmental management Act, such as the NWA, -

(a) in that person's or group of person's own interest;
(b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
(c) **in the interest of or on behalf of a group or class of persons whose interests are affected**;
(d) in the public interest; and
(e) **in the interest of protecting the environment**.

26. Where ASPASA observes irresponsible and / or illegal aggregate and sand mining activities being undertaken by an entity, ASPASA may seek appropriate relief against such an entity in terms of the NEMA and any specific environmental management act, as discussed below, on the basis that ASPASA is acting in the interest of its members whose interests in the aggregate and sand mining industry are affected by illegal aggregate and sand mining activities, as well as in the interests of protecting the environment.

27. In light of the above, we have set out the environmental legal remedies available to ASPASA in terms of NEMA and the NWA, as well as the common law, to stop illegal aggregate and sand mining operations from continuing undertaking unlawful polluting activities.

28. A DIRECTIVE TO BE ISSUED IN TERMS OF SECTION 28 OF THE NEMA

28.1. Section 28 (1) of NEMA provides a duty of care provision, which states:

> "*Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.*"

28.2. As noted further above in this memorandum, sand mining activities pose a real threat for causing significant pollution and harm to the environment.[22] Accordingly, the application of section 28 of NEMA in the context of mining and in particular illegal aggregate and sand mining, is important.

[22] "***environment***" means *the surroundings within which humans exist and that are made up of-*
(i) the land, water and atmosphere of the earth;
(ii) micro-organisms, plant and animal life;
(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and

28.3. Where illegal aggregate and sand mining activities result in significant pollution or degradation of the environment, the mining company or person responsible for undertaking such unlawful activities would be contravening its duty of care in terms of section 28 (1) of the NEMA. In these circumstances, section 28 (4) of NEMA allows for ASPASA to approach the Director–General of the DMR to issue a directive to compel the illegal mining company to take specific reasonable measures by a given date, without ASPASA having to take any litigious steps. In terms of section 28 (5)(e) of NEMA, one of the factors that the Director-General of the DMR must take into consideration when deciding to issue a directive, is the desirability of the State to fulfil its role as custodian of the environment and holding such environment in public trust for the people.

28.4. It must be noted that ASPASA may approach the DMR to commence with proceedings in terms of section 28(4) of NEMA either in conjunction with, or separate to, a directive under section 19 (3) of the NWA. The potential for a directive to be issued under the NWA is discussed in paragraph 30 below.

28.5. Should a directive under NEMA be issued and the illegal mining company fails to comply, or even fails to adequately comply, with the provisions of the directive, the Director-General or provincial head of the DMR may proceed to take reasonable measures to remedy the situation[23] and thereafter recover such reasonable costs from any of the responsible entities[24].

28.6. Section 49A(g) provides that the failure to comply with a directive issued is regarded as an offence in terms of NEMA and a person convicted of an offence listed in terms of section 49A(g) is liable to a fine not exceeding **R10 million** or imprisonment for a period not exceeding **10 years**, or both such fine and imprisonment.[25]

28.7. A disadvantage of the above approach is that the matter is left in the hands of the DMR to resolve. In practice, once a directive has been issued to an entity, the matter may require constant follow-up to ensure that the conditions of the directive have been complied with, or, failing which, that the appropriate steps are taken by the DMR official.

29. **A COMPLIANCE NOTICE TO BE ISSUED IN TERMS OF SECTION 31L OF NEMA**

29.1. An alternative option to a directive being issued in terms of section 28 (4) of the NEMA as or section 19 (3) of the NWA which is discussed below, is for ASPASA to approach an Environmental Management Inspector ("EMI") at the relevant provincial DMR Department to issue a compliance notice to the illegal mining company undertaking the aggregate and sand mining activities unlawfully in terms of section 31L of NEMA.

29.2. A compliance notice can be issued by an EMI in instances where there are reasonable grounds for believing that there is a non-compliance with a provision of the law for which the EMI has been mandated to enforce, or with a permit issued under the law.[26] In light of thereof, ASPASA's request for a compliance notice to be issued to an illegal mining company would be on the basis that the aggregate and sand mining activities are being undertaken without the necessary environmental authorisation required in terms of section 24 of the NEMA and is therefore in contravention of a specific statutory requirement.[27]

(iv) *the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being*."

[23] Section 28(7) of NEMA.

[24] Section 28(8) of NEMA.

[25] Section 49B(a) of NEMA.

[26] Paterson and Kotze. *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*. 2009. Juta Law. Page 234.

[27] Section 31L(1)(a) and (b) of NEMA.

29.3. This approach does not involve ASPASA pursuing any litigious steps and places the burden of compelling the illegal aggregate and sand mining company or person to comply with the compliance notice on the EMI.

29.4. Where the illegal mining company fails to comply with the compliance notice, the EMI is obligated to report the non-compliance to the Minister or MEC of the DMR, as the case may be, and the Minister or MEC may *"take any necessary steps and recover the costs of doing so from the person who failed to comply".*[28]

29.5. Furthermore, the failure to comply with a compliance notice issued in terms of section 31L of NEMA is considered an offence in terms of section 49A(k). Should an illegal mining company be convicted of such offence, it will be liable to a fine of not more than **R5 million** or imprisonment for a period not exceeding **5 years**, or both such imprisonment and fine. However, should the illegal mining company be convicted of a second offence or subsequence offence in terms of section 49A(k), it will be liable to a fine not exceeding **R10 million** or imprisonment for a period not exceeding **10 years**, or both such imprisonment and fine.[29]

29.6. In addition to the penalties set out in section 49B of NEMA, the failure to comply with a compliance notice is deemed to be included as an offence listed in Schedule 1 of the Criminal Procedure Act (51 of 1977)[30].

29.7. Again, the concern regarding the above approach is that the matter is left in the hands of the EMI to resolve. In most instances, it is essential to engage with the EMI throughout the process and ensure that compliance with the conditions of the compliance notices have been adequately undertaken by the illegal mining company. Furthermore, if the illegal mining company fails to comply with its compliance notice, it would again be necessary to ensure that the EMI reports the non-compliances to the relevant authorities and the next stage of the process continues without unnecessary delay.

30. **A DIRECTIVE TO BE ISSUED IN TERMS OF SECTION 19 OF THE NWA**

30.1. Section 19 of the NWA is the duty of care provision and provides the following:

> *(1) An owner of land, a person in control of land or a person who occupies or uses the land on which –*
> (a) any activity or process is or was performed or undertaken; or
> (b) any other situation exists,
>
> *which causes, has caused or is* ***likely to cause pollution*** *of a water resource,* ***must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring***."

30.2. Please note that section 19 of the NWA refers to "*pollution*" of a water resource as oppose to "*significant pollution or degradation*" of the environment required by section 28 of the NEMA. This distinction is important, as the pollution referred to in section 19 of the NWA is less onerous to prove due to the fact that there is no threshold of pollution that needs to be shown. Any pollution of a water resource will be in breach of the duty of care in section 19 of the NWA, in comparison to showing "*significant pollution or degradation*" of the environmental in terms of section 28 of the NEMA. It must, however, be noted that although the duty of care provision in section 28 of the NEMA requires "*significant pollution or degradation*" to be proven, the High Court in the case *Highchange Investments (Pty) Ltd v Cape Products*

[28] Section 31N(2) of NEMA.
[29] Section 49B(2) of NEMA.
[30] Section 31A(3) of NEMA.

Company (Pty) Ltd t/a Pelts Products and Others[31] confirmed that threshold level of *significance* will not be particularly high.

30.3. Where illegal aggregate and sand mining activities cause pollution of a water resource, the mining company or person responsible for undertaking such unlawful activities would be contravening its duty of care provision in section 19 (1) of the NWA. Where such an entity fails to take the reasonable measures required under section 19(1) of the NWA, ASPASA may approach the competent authority, which would be the DWS, and request that a directive be issued in terms of section 19(3) to entity. [32]

30.4. The directive under section 19 (3) may be regarded as a legal instrument that may be utilised by the DWS to compel the entity to take specific reasonable measures by a given date, without having to pursue litigious steps. Should the entity fail to comply with the directive, then the DWS may take the measures it considers necessary to remedy the environmental pollution or harm and recover the costs from undertaking such measures from the entity in terms of section 19 (4) and (5) of the NWA.

30.5. The failure to comply with a directive issued by the DWS is regarded as an offence in terms of section 151(1)(d) of the NWA and accordingly, upon a person's first conviction, they will be liable to a fine or imprisonment not exceeding **5 years** or both such fine and imprisonment. In the event that a person is convicted of a second or subsequent offence, that person will be liable to a fine or imprisonment not exceeding **10 years** or both such fine and imprisonment.[33]

30.6. A concern regarding the above approach is that the matter is left in the hands of the DWS to resolve. In practice, once a directive has been issued to an entity, the matter, may not be followed up by the DWS and accordingly, no further steps may be taken to either confirm compliance with the directive or compel the person or entity to comply with the directive.

31. **COURT PROCEEDINGS**

31.1. Although the above legal remedies do not expressly provide for litigation, it is important to note that in a criminal matter, a penalty prescribed in NEMA can only be imposed on an entity by a criminal conviction in the Magistrate's Court, and in severe matters, by a conviction in the High Court.[34] This essentially entails that should the illegal mining company issued with a directive or compliance notice, fail to comply with the requirements thereof, which is an offence in itself, a criminal conviction would need to follow after a trial which proves guilt beyond reasonable doubt. Without the threat of a criminal sanction, the non-compliance with a compliance notice or directive is merely a hollow and fruitless action.

31.2. In criminal matters, the case is handed over to the National Prosecuting Authority ("the NPA") who will prosecute the illegal mining company on behalf of the State. ASPASA will not be required to contribute financially when the matter is being prosecuted by the NPA. Furthermore, a unique characteristic of criminal proceedings involving environmental

[31] 2004 2 SA 393 (E)

[32] The measures that may be taken include the following:
(a) cease, modify or control any act or process causing the pollution;
(b) comply with any prescribed waste standard or management practice;
(c) contain or prevent the movement of pollutants;
(d) eliminate any source of the pollution;
(e) remedy the effects of the pollution; and
(f) remedy the effects of any disturbance to the bed and banks of a watercourse

[33] Section 151(2) of the NWA.

[34] Section 34H of NEMA.

matters is that the court may award a damages claim as well as impose criminal sanctions. (Discussed in further detail below.)

31.3. Alternatively, an aggrieved party may pursue civil charges, where the aggrieved party proceeds to institute an application against the wrongdoers in terms of an infringement of their own interest. This process is initiated and paid for by the aggrieved party. (Discussed in further detail below.)

32. **CRIMINAL PROCEEDINGS**

32.1. Schedule 3 of the NEMA provides for the provisions of National Legislation that constitute a criminal offence, and includes the offences listed in the whole of section 49A of the NEMA and section 151(1)(i)[35] and (j)[36] of the NWA. The penalties relating to the conviction of such offences are prescribed in terms of section 49B of the NEMA and section 151(2) of the NWA, respectively.

32.2. In terms of section 49A (e) of the NEMA, a person is guilty of an offence if that person or entity "*unlawfully and intentionally or negligently commits any act or omission which causes significant pollution or degradation of the environment or is likely to cause significant pollution or degradation of the environment*". Furthermore section 49A (k) of the NEMA provides that it is an offence if a person fails to comply with or contravenes a compliance notice issued in terms of section 31L of the NEMA.

32.3. The NEMA also provides for certain responsible persons to be held liable in their individual capacity:-

> Section 34(6): "*Whenever any manager, agent or employee does or omits to do an act which it had been his or her task to do or to refrain from doing on behalf of the employer and which would be an offence under any provision listed in Schedule 3 for the employer to do or omit to do, he or she shall be liable to be convicted and sentenced in respect thereof as if he or she were the employer."*
>
> Section 24N(8): *"Notwithstanding the Companies Act, 2008 (Act No. 71 of 2008), or the Close Corporations Act, 1984 (Act No. 69 of 1984), the directors of a company or members of a close corporation or jointly and severally liable for any negative impact on the environment, whether advertently or inadvertently caused by the company or close corporation which they represent, including damage, degradation or pollution."*

32.4. It is therefore possible for criminal charges to be laid against senior managers and directors of a mining company who are undertaking unlawful mining activities. The process for the institution of criminal proceedings is regulated in terms of section 34 of NEMA, the Criminal Procedure Act 51 of 1977[37] ("CPA") and the NWA.

32.5. The process would need to be initiated by the aggrieved party by going to the relevant local police station and laying criminal charges. A case docket will be opened by the police station and investigated by them if there is sufficient evidence the case will be handed over to, and be further investigated by, and prosecuted by the NPA on behalf of the State.

[35] "*unlawfully and intentionally or negligently commit any act or omission which pollutes or is likely to pollute a water resource."*
[36] "*unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect a water resource."*
[37] The provisions of the CPA are very complicated and accordingly, it would be essential to obtain input from a specialist criminal lawyer should this particular legal remedy be appropriate.

32.6. Accordingly, this approach would not involve the high legal costs normally associated with civil litigation, as the costs of Counsel will not be applicable because the NPA will be responsible for the prosecution of the directors of the illegal mining company. Furthermore, Section 34(1) of NEMA provides that even during criminal proceedings, an affected party may be awarded damages:

> *"Whenever any person is convicted of an offence under any provision listed in Schedule 3 and it appears that such person has by that offence caused loss or damage to any organ of state or other person, including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment, the court may in the same proceedings at the written request of the Minister or other organ of state or other person concerned, and in the presence of the convicted person, inquire summarily and without pleadings into the amount of loss or damage so caused."*

32.7. Notwithstanding the prescribed penalties set out in NEMA, section 34H(2) provides that where a competent authority is of the view that a more severe penalty than those set out in section 49B of NEMA should be imposed, the competent authority may request that the NPA institute criminal proceedings in the High Court.

32.8. The institution of criminal proceedings may ensure that the illegal mining operations finally comply with their statutory requirements, as the institution of criminal proceedings could be very effective in holding directors and managers liable, as seen in the judgment of *S v Blue Platinum Ventures (Pty) Ltd and Another*[38]. The Blue Platinum Ventures case involved unlawful mining activities which were permitted to continue unabated and which eventually resulted in severe environmental degradation. After the community laid criminal charges against the mining company and its managing director, the managing director was sentenced to five years imprisonment, which was suspended for five years on condition the affected areas were remediated within three months at an estimated cost of R6.8 million. Accordingly, any irresponsible and / or unlawful mining activities may at least require the threat of criminal sanction for decisive action to be taken. It is important to note that after the charges were laid against the mining company in the Blue Platinum Case, the Centre for Environmental Rights constantly monitored the progress and supported the NPA in its prosecution of the managing director. Therefore this kind of support may need to be provided by ASPASA in some form to ensure the successful conviction of managing directors of mining companies who are involved in unlawful mining activities.

33. **PRIVATE PROSECUTION**

33.1. Despite the default position that the NPA will be responsible for the prosecution of criminal matters on behalf of the State, regulation 33 of NEMA provides for the instance where offences may be privately prosecuted by an individual or entity based on a public interest or in the interests of protecting the environment. In such instances, the private prosecutor may only proceed with the private prosecution in accordance with section 8 of the CPA after consulting with the relevant Attorney General and once the Attorney General has withdrawn his or her right of prosecution in respect of the offence committed. Furthermore, the private prosecutor must comply with the provisions of section 9 – section 17 of the CPA and the below requirements set out in section 33(2) of NEMA.

> *"(a) the person prosecuting privately must do so through a person entitled to practice as an advocate or an attorney in the Republic;*
> *(b) the person prosecuting privately has given written notice to the appropriate public prosecutor that he or she intends to do so; and*
> *(c) the public prosecutor has not, within 28 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence"*

[38] [2015] ZAGPPHC 980.

33.2. It must be cautioned that section 33 (4) of the NEMA provides that the private prosecutor "*shall be liable to pay the accused's costs if the court finds that the private prosecutor did not institute the proceedings in the interest of the public or the protection of the environment or if the prosecution was unfounded, trivial or vexatious*".

33.3. It would be advisable for ASPASA to appoint an advocate that specialises in criminal prosecutions to assist it with such a prosecution. So that you are aware, a Senior Counsel charges approximately R4 000.00 per hour for any *ad hoc* attendances and will charge a day fee for any court related attendances at a rate of approximately R30 000.00. Therefore, it must be borne in mind that this approach would be relatively costly and would also be a time-consuming process.

34. **HIGH COURT APPLICATION FOR AN INTERDICT**

34.1. In addition to the above legislative remedies under the NWA and NEMA, the common law makes provision, for organizations such as ASPASA, to make application to the High Court for a prohibitory and/or mandatory interdict. The interdict would seek to prevent the illegal mining company from continuing unlawfully with a polluting activity and to compel the polluter/s to take specific measures to remediate the environment where harm to the environment has already occurred and to rectify such unlawful activity.

34.2. In terms of an application to the High Court for an interdict, the applicant would need to prove:

(a) A clear right;
(b) An injury was in fact committed; and
(c) No other alternative satisfactory remedy was available in the circumstances.

34.3. This approach would also require that Counsel be instructed. It must be borne in mind that this approach would be costly and time-consuming as, if urgency cannot be shown, it may take many months to have the application heard.

35. **DELICTUAL DAMAGES CLAIM**

35.1. Our law makes provision for delictual claims for damages to be made against alleged wrongdoers for any loss suffered. In this instance, ASPASA could inform any neighbouring property such as lawful mining operations in the area affected by the illegal aggregate and sand mining operation, that they could pursue a delictual claim against the illegal mining company for any pecuniary loss incurred as a result of the unlawful activities which are impacting on their operation. This remedy will require an accurate calculation of the monetary loss incurred by such neighbouring properties or lawful mining operations.

35.2. In South Africa, the Law of Delict is defined as "a civil wrong"[39] or "wrongful and blameworthy conduct which causes harm to a person."[40] In order to lay a delictual claim and be successful in such claim, one must establish the common-law requirements for delictual liability, namely: conduct, wrongfulness, fault, harm and causation.[41]

[39] Boberg. *The Law of Delict* (1984) Volume 1. Juta and Company Ltd. Page 1
[40] Van der Walt and Midgley. *Principles of Delict* (2005) 3rd Edition. LexisNexis. Paragraph 2.
[41] The test for negligence is set out in the case Kruger v Coetzee 1966 (2) SA 428 (A).

35.3. In the event that a delictual claim for damages is made, the plaintiff would need to establish all five elements of delictual liability.

35.4. This approach would also require Counsel to be instructed. Furthermore, an application for delictual damages is primarily concerned with the monetary loss incurred as a result of the wrongful conduct, and not necessarily with the remediation of the pollution caused.

D. CONCLUSION AND RECOMMENDATIONS

36. Based on the environmental impacts associated with negligent and mostly unlawful sand mining activities, as highlighted in Section A of this memorandum, the need to improve environmental regulation of the aggregate and sand mining industry and in particular to deter illegal aggregate and sand mining activities is critical for ensuring the sustainability of the aggregate and sand mining industry.

37. Through ASPASA's efforts thus far (discussed further above in the memorandum), awareness of the environmental, health and safety as well as reputational and financial concerns associated with illegal aggregate and sand mining in South Africa has increased in the aggregate and sand mining industry, particularly among ASPASA'S members. To further build upon the current efforts of ASPASA in this regard, this legal memorandum has dealt with the following pertinent issues in a summarised manner and provides the following initial recommendations:

37.1. **The key national mining and environmental authorisations, permits and water use licences requirements applicable to conducting lawful aggregate and sand mining activities**.

(a) It is recommended that ASPASA refer to this section of the memorandum for initial guidance on identifying what key mining and environmental authorisations, permits and licences are required for undertaking lawful aggregate and sand mining activities. As the first step, ASPASA should call upon non-member mining companies, who appear to be undertaking irresponsible aggregate and sand mining activities, to produce copies of their mining and environmental authorisations, permits and licences to establish whether such mining activities are being undertaken lawfully.

37.2. **The different avenues for ASPASA to have input into and participate in the environmental statutory authorisation and subsequent monitoring process required for lawful aggregate and sand mining activities**.

(a) It is recommended that ASPASA should register as an I&AP for new proposed aggregate and sand mining projects, where the entity applying for authorisation for the mining activities is a non-member of ASPASA and those activities are to be undertaken in a sensitive, threatened or protected environment such as an estuary or watercourse. Once registered as an I&AP, ASPASA must utilise this opportunity to submit written comments on important documents such as a BAR, S&EIR, EMPr, and where necessary a closure plan.

(b) Where the Minister of Mineral Resources fails to stop irresponsible aggregate and sand mining activities by authorising such mining activities in sensitive, threatened or protected environments, it is recommended that ASPASA in the interests of protecting the environment, appeal such a decision in accordance with the procedural requirements in the 2014 National Appeal Regulations.

(c) Where a non-member mining company has been issued with an environmental authorisation for undertaking aggregate and sand mining activities, however, appears to be causing unacceptable pollution and harm to the

environment, it is recommended that ASPASA visit the website of the non-member mining company to gain access to the environmental audit report required in terms of regulation 34 of the 2014 EIA Regulations, or where such report is not available on a website, to request access to the report directly from the mining company, in order to monitor compliance of the mining company with its environmental authorisation and EMPr and to hold the mining company accountable for any non-compliance identified in the audit report.

(d) Where ASPASA requires certain environmental information from a non-member mining company, such as the environmental audit referred to above, which information is not readily available on the entities website, it is recommended that ASPASA make use of the provisions in the PAIA to request access to such environmental information.

37.3. **The national environmental legal remedies available to ASPASA to deal with illegal aggregate and sand mining activities affecting ASPASA members**.

(a) Where it has been established by ASPASA that a mining company is undertaking unlawful mining activities which is causing environmental harm and degradation, it is recommended that ASPASA seek further detailed environmental legal advice on the most appropriate right of recourse pertaining to those specific set of circumstances of non-compliances.

38. In addition to the above specific recommendations, it is noted that there are a number of national and provincial hotlines that may be useful for ASPASA members to have easy access to for purposes of reporting environmental crimes, gathering information and identifying the right authorities and their contact information. Due to ASPASA's role as a representative of the aggregate and sand mining industry, it is suggested that ASPASA include on its website, the information and relevant forms, where required, on how and where to report environmental crimes. In this regard, it may be helpful if ASPASA includes the DEA's booklet on *"Stepping up Enforcement"*, which is available at https://www.environment.gov.za/sites/default/files/docs/publications/steppingupenforcement_againstenvirocrimes.pdf, for further general information on how the DEA handles enforcement.

E. REFERENCES

Case Law

Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance [2014] ZASCA 184 (26 November 2014).

Highchange Investments (Pty) Ltd v Cape Products Company (Pty) Ltd t/a Pelts Products and Others 2004 2 SA 393 (E).

Kruger v Coetzee 1966 (2) SA 428 (A).

S v Blue Platinum Ventures (Pty) Ltd and Another [2015] ZAGPPHC 980.

Articles

Boberg. *The Law of Delict* (1984) Volume 1. Juta and Company Ltd.

Coastal Care Non-Profit Organization, "*Environmental Loss of Illegal Sand Mining in South Africa*," dated January 2017 available at http://coastalcare.org/2016/01/the-environmental-loss-of-illegal-sand-mining-in-south-africa/

CSIR, "*Sand Supply from Rivers within the eThekwini Jurisdiction, Implications for Coastal Sand Budgets and Resource Economics*" CSIR Report, CSIR/NRE/ECO/ER/2008/0096C, September 2008.

Dr Esham Palmer, the Director of the Compliance and Enforcement division at the Western Cape Department of Environmental Affairs and Development Planning" *Illegal sand mining in South Africa"* video discussion in Mining Weekly, dated 17 April 2015. The video discussion is available at http://www.miningweekly.com/article/illegal-sand-mining-a-serious-concern-for-sa-2015-04-17/rep_id:3650

The Department of Environmental Affairs Booklet on *"Stepping up Enforcement*", which is available at https://www.environment.gov.za/sites/default/files/docs/publications/steppingupenforcement_againstenvirocrimes.pdf

The Department of Environmental Affairs' *Integrated Environmental Management Guideline Series (Guideline 7): Public Participation in the Environmental Impact Assessment Process* published in GN 807 on 10 October 2012.

Nico Pienaar, the Director of ASPASA "*Dealing with illegal mining in the quarry industry*" dated 27 January 2016 available at http://www.aspasa.co.za

Paterson and Kotze. *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*. 2009. Juta Law.

Romy Chevallier from the South African Institute of International Affairs "*Illegal Sand Mining in South Africa*" dated November 2014 available at http://www.saiia.org.za/policy-briefings/645-illegal-sand-mining-in-south-africa/file

Van der Walt and Midgley. *Principles of Delict* (2005) 3rd Edition. LexisNexis.

WESSA, Ezemvelo KZN Wildlife, *Investigational Report: An Inventory of Sand Mining Operations in KwaZulu Natal Estuaries, Thukela to Mtamvuna*, September 2007.