



# Effective Engagement in Environmental Impact Assessment

## Frequently asked Questions

The information provided in the BirdLife South Africa's *Guide to Effective Engagement in Environmental Impact Assessment (EIA) Processes* and the associated *Checklist*, focuses primarily on rights and responsibilities with respect to stakeholder engagement. There are a number of other related issues that people often ask about, and that are important in ensuring that an Environmental Impact Assessment (EIA) process is fair and effective. In this document we provide explanations in response to the following Frequently asked Questions (FAQs):

What is the DFFE Screening Tool? .....	1
How does mining fit into the EIA Regulations? .....	3
What happens if a developer proceeds without having undertaken an EIA?.....	5
What other planning measures are relevant to environmental resource protection, and should be referred to in the EIA? .....	6
When is a climate change specialist investigation required?.....	7
Who can take a developer to court for non-compliance with EIA laws? .....	8
What is the role of the Green Scorpions (Environmental Management Inspectorate)? .....	10

## **What is the DFFE Screening Tool?**

In October 2019 it became compulsory for Environmental Assessment Practitioners (EAPs) to submit, with an EIA Application, a report generated from the national web-based environmental Screening Tool (as per Regulation 16(1)(b)(v) of the Environmental Impact Assessment Regulations, 2014). Screening, in the context of EIA, refers to the determination of whether or not a development proposal requires an EIA and what level of assessment is appropriate (DEAT, 2002). The listed activities described in the EIA Regulations are a form of screening, and the web-based Screening Tool is intended to provide additional insight into the sensitivity of the site to ensure the appropriate scope and level of assessment.

The information provided in the Screening Tool draws on some existing sources (such as SABAP<sup>1</sup>) as well as other databases specifically developed or customised for the Screening Tool. It is intended to provide preliminary information about the potential environmental sensitivity of an area, rather than a definitive representation of actual site conditions.

The Tool requires the user to input information about the location and type of project. Environmental sensitivities relevant to the site are categorised into nine main themes, including:

- Agriculture
- Avifauna (specifically in respect of onshore wind and photovoltaic developments)
- Biodiversity (includes distinct themes to do with plant species, animal species, aquatic biodiversity and terrestrial biodiversity)
- Noise
- Defence
- Civil Aviation

The Tool allocates a sensitivity rating to each environmental theme for the area in question. There are four possible environmental sensitivity ratings: Very High

---

<sup>1</sup> South Africa Bird Atlas Project

sensitivity, High sensitivity, Medium sensitivity, and Low sensitivity, although not all four categories are used for each theme. The resultant sensitivity reports have links to relevant specialist 'protocols'.

For example, where the sensitivity of a proposed development site indicated as ‘Very High’ or ‘High’ for the animal species theme, then the associated protocol requires that an assessment must be conducted by the relevant taxon-specific specialist. Where the sensitivity indicated in the screening tool is ‘Medium’, then the presence or likely presence of a species of conservation concern must be confirmed by a specialist. If species of importance are identified on the site, an assessment must be submitted in accordance with the requirements specified for ‘Very High’ and ‘High’ sensitivity in the protocol. However, if a site visit proves that the Screening Tool has incorrectly classified the area, then taxon-specific specialists are not required to perform an assessment, a Terrestrial Animal/Plant Species Compliance Statement must be submitted as part of the EIA Application.

All specialists that undertake studies according to the protocols must be registered with the South African Council for Natural Scientific Professions (SACNASP) with a field of practice relevant to the taxonomic group/s (‘taxa’).

Alongside is a screenshot of a typical map produced by the Screening Tool, with associated guidance. As indicated in this example, the plant layer for this site has a medium sensitivity rating, and a list of floral species that a botanical specialist could expect to find at this locality is provided. A site visit would be required to check if the identified plant species do occur, what their exact distribution is, and how significant the impacts on vegetation are likely to be.

MAP OF RELATIVE PLANT SPECIES THEME SENSITIVITY



Where only a sensitive plant unique number or sensitive animal unique number is provided in the screening report and an assessment is required, the environmental assessment practitioner (EAP) or specialist is required to email SANBI at [piadatarequests@sanbi.org.za](mailto:piadatarequests@sanbi.org.za) listing all sensitive species with their unique identifiers for which information is required. The name has been withheld as the species may be prone to illegal harvesting and must be protected. SANBI will release the actual species name after the details of the EAP or specialist have been documented.

Very High sensitivity	High sensitivity	Medium sensitivity	Low sensitivity
		x	

Sensitivity Features:

Sensitivity	Feature(s)
Low	Low Sensitivity
Medium	Ruschia leptocalyx
Medium	Setaria ramispissima
Medium	Hermannia lavandulifolia
Medium	Sensitive species 633
Medium	Sensitive species 268
Medium	Marsilea schapeensis
Medium	Sensitive species 1024
Medium	Reithania garnotii
Medium	Polygala pubiflora
Medium	Sensitive species 980
Medium	Sensitive species 536
Medium	Sensitive species 800
Medium	Sensitive species 763
Medium	Diosma passerimoides

The Screening Tool also identifies areas of special interest - industrial development zones, protected areas, critical biodiversity areas, or areas designated as sensitive in municipal Environmental Management Frameworks (EMFs) and Bioregional Plans. These should also be taken into account, and described in the EIA report.

Use of the Screening Tool is not limited to EAPs. Anyone with a smart device and access to the internet can go to DFFE's website and access the Tool (<https://screening.environment.gov.za/screeningtool>).

Further information about the screening process and associated protocols is available on the website of the South African National Biodiversity Institute: <https://www.sanbi.org/news/national-protocols-and-guidelines-standardise-requirements-for-specialist-studies-in-eias/>.

Other useful sources of information for finding out more about the location and sensitivity of a site include Google Earth; South African Biodiversity Institute spatial database (<http://bgis.sanbi.org/MapView/>); and for the Western or Eastern Cape, CapeFarmMapper (<http://gis.elsenburg.com/apps/cfm/>).

### **How does mining fit into the EIA Regulations?**

Prior to 2017, all activities related to mineral and energy resources (exploration, reconnaissance, mining) were regulated under the Mineral and Petroleum Resources Act (25 of 2002). However, the 2014 EIA Regulations were amended on 7 April 2017. One of the main reasons for this amendment was to bring mineral and energy related activities under the ambit of National Environmental Management Act (NEMA), such that the environmental impacts associated with such activities could be regulated via the same legal mechanism as other listed activities. However, the Department of Minerals Resources and Energy (DMRE) has not relinquished control over licencing such activities because the relevant case officers still sit within DMRE. This is deemed problematic by many, given the dual-mandate for the DMRE to protect the environment, but also promote the extractive sector and mineral resources development. Nevertheless, it is still possible for the DFFE to intervene, as the

environmental Minister in the DFFE is the sole appeal authority. This means that if a disputed application originally authorised by the DMRE is the subject of an appeal, the appeal is adjudicated by the Minister responsible for the environment (currently Minister Barbara Creecy). As with all EIA approvals, including those for prospecting and mining, it is a legal requirement for the case officer, irrespective of whether they sit in a provincial environmental department, the national DFFE or the DMRE, to include an explanation of the appeal process when I&APs are informed of a decision on an EIA application.

As the above explanation suggests, the relationship between environmental laws and mining laws is complex. Adding to this complexity is an amendment to the EIA Regulations in June 2021, removing the requirement for permission from the relevant landowner before prospecting and mining can be authorised. The application process for mineral rights still requires engagement with I&APs, including landowners and lawful occupiers of land. Whilst ideally applicants and owners should agree on prospecting or mining activities, lack of an agreement will not prohibit the granting of a mineral right by the DMRE.

When it comes to Nature Reserves and National Parks, mining is absolutely prohibited according to section 48 of the National Environmental Management: Protected Areas Act (NEM:PAA). This prohibition is less strict in relation to a Protected Environment. A Protected Environment may be declared by the Environmental Minister in terms of section 28 of NEM:PAA, for the following purposes:

- to regulate the area as a buffer zone for the conservation and protection of a special nature reserve, national park, marine protected area, world heritage site or nature reserve
- to enable owners of the land to take collective action to conserve biodiversity on their land and to seek legal recognition therefore
- to protect the area if the area is sensitive to development due to its biological diversity; natural characteristics; scientific, cultural, historical, archaeological or geological value; scenic and landscape value or provision of environmental goods and services.

Prior to June 2022, the Minister responsible for the Environment and the Minister responsible for minerals and energy had to agree to any mining related activities in Protected Environments. Since amendments introduced by the National Environmental Laws Amendment Act (2 of 2022), the decision to allow mining related activities in a Protected Environment falls within the exclusive competence of the Environment Minister (Minister Barbara Creecy). Written permission is no longer required from the Minerals Minister.

### **What happens if a developer proceeds without having undertaken an EIA?**

Nobody may undertake an activity listed in the EIA Regulations without gaining permission from the Competent Authority. As has been explained in the Engagement Guideline, there may also be other licences requirements such as, a Water Use Licence, an Air Quality Licence, a Waste Licence, various planning approvals, a Mining Right and so forth.

If a project or development proceeds without approval by the Competent Authority it is illegal. However, there is a controversial section of NEMA (section 24G) which allows for a retrospective EIA. This section is included to cater to situations when requirements may have been overlooked. The developer is required to pay an administrative fine (up to R5 million) and follow a retrospective environmental assessment process. The reason why this section is controversial is because the retrospective process is less onerous than the pre-emptive EIA; and the fine is seen as an insufficient deterrent for some developers. The section is, therefore, regarded as opening a loophole for unscrupulous developers to proceed with their activities and then to 'legalise' them afterwards by taking advantage of the section 24G process. There are, nevertheless, several reasons why developers should not proceed in this manner:

- The competent authority has a discretion to accept the section 24G application for processing, and may refuse the application if a good reason is not provided for non-compliance with the EIA Regulations.

- The payment of the fine does not guarantee a positive environmental authorisation decision – only that the application will be considered.
- On receipt of a section 24G application, the competent authority can direct the applicant to stop all activities and undertake remediation measures, while the relevant EIA reports are being compiled
- The submission of the section 24G application does not shield the applicant from prosecution. Environmental management inspectors (also known as the Green Scorpions) and/or the police may undertake their own investigations into non-compliances, which could still lead to a criminal prosecution.
- The maximum fine of R5 million is likely to be imposed where the company, or its directors, have had historical environmental compliance issues.

As with all authorisation processes under NEMA, the applicant applying in terms of section 24G must undertake a public participation process including an admission that it commenced a listed activity without the necessary environmental authorisation and is now applying for ex post facto approval: an I&AP register must be opened and all stakeholders must be kept informed of the process.

**What other planning measures are relevant to environmental resource protection, and should be referred to in the EIA?**

There are several strategic planning documents that must be drafted by local and district municipalities that should help ensure that natural resources in an area are recognised, mapped and protected. The two most important of these are Strategic Development Frameworks (SDFs) which are regulated in terms of the Spatial Planning and Land Use Management Act; and the Environmental Management Frameworks that are regulated in terms of NEMA. The documents provide a long-term vision for the development of municipal areas and districts. Planned developments should align to the visions and objective contained in these strategy documents. It is a good idea to check that these documents are referred to in EIA reports, especially where they explicitly identify certain types of development activity as incompatible with the conservation objectives of the area in question. You may also want to refer to these documents when commenting on a proposal or raising concerns in a public meeting.

The documents and associated maps ought to be available on-line, or from your local or district municipal planning department. If such documents are being prepared for your area or being revised, look out for announcements about how to participate in the development of these local planning tools.

### **When is a climate change specialist investigation required?**

In November 2021, a precedent setting court case, prevented the construction of the proposed 1200 MW Thabametsi coal-fired power station in Limpopo. Key to the final judgement was the result of a climate change assessment, initially not included in the EIA, but subsequently call for. This case has focused the attention of the Minister responsible for the environment on the need to include climate change assessments in EIA reports. On 25 June 2021, a draft National Guideline was gazetted for comment for consideration of climate change implications in applications for Environmental Authorisations, Atmospheric Emission Licenses and Waste Management Licences. The aim of the guideline is to promote the assessment of:

- How a proposed development will likely exacerbate climate change
- The impact of a proposed development on features (natural or built) that are crucial for climate change adaptations and resilience (this could include biodiversity corridors and wetlands)
- The sustainability of a development in the context of climate change projection

The draft Guideline identifies the following types of projects as possibly exacerbating climate change:

- Construction of electricity generation facilities that utilise fossil fuels
- Industrial developments that could contribute to atmospheric emissions
- The extraction and production of fossil fuels
- The development and related operation of feedlots
- The clearing of vegetation, especially where the vegetation is important for carbon capture and where the cleared vegetation is going to be replaced by built infrastructure such as roads, airports or urban development

- Waste disposal facilities
- Treatment of waste through burn technologies such as incinerators.

The draft Guideline also gives examples of developments that may impact on ecological or built infrastructures that is important for climate change adaptations and resilience. These include:

- Developments that will impact on water resources, such as rivers, streams, aquifers, wetlands and water resource systems such as strategic water source areas (both surface and groundwater) and aquifer recharge areas, given the projections that South Africa will likely become drier as a result of climate change
- Developments that will impact on coastal systems and wetlands that will mitigate severe weather events such as storms and floods, that will likely become more severe and frequent
- Activities and projects that will impact on water infrastructure, such as dams and stormwater systems, given the likely drying climate and future severe weather events.

Vulnerable areas are identified as those that are likely to become prone to increased frequency and intensity of fires, storms, flooding, droughts or be affected by sea-level rise. In such cases the draft Guideline recommends that consideration be given to involving climate change specialists in EIA processes. Although it is the responsibility of the EAP to make the final decision about the need for specialist climate change inputs to an EIA process, the Guideline highlights that this determination by the EAP should be influenced by inputs of other stakeholders, address all issues and concerns raised and provide reasons for a decision about whether or not a specialist climate change investigation is included in the EIA.

### **Who can take a developer to court for non-compliance with EIA laws?**

Section 32(1) of NEMA provides that any person or group of persons may approach the court in respect of non-compliance with the provisions of NEMA, the EIA Regulations and other specific Environmental Management Act, or any statutory

provision concerned with the protection of the environment. This includes persons acting in:

- their own individual interest
- a group of person's interest (such as an environmental NGO)
- the interest of or on behalf of a person who is, for practical reasons, unable to institute legal proceedings
- the interest of or behalf of a group or class of persons whose interests are affected
- the public interest the interest of protecting the environment.

In terms of Section 32(2) of NEMA a court may decide *not to award costs* against a person or group of persons, even if the court challenge is not successful (in other words, you will not be liable for the other party's costs), provided that the court is of the opinion that you have acted reasonably out of concern for the public or in the interests of protecting the environment, and that you made a reasonable attempt to avoid litigation (e.g., by previously objecting to the environmental authorisation, and lodging an administrative appeal to the MEC or the Minister)

In addition, Section 32(3) of NEMA provides that where a person or group of persons is successful, a court may allocate costs on an appropriate scale to any person or persons entitled to practice as an advocate or attorney who provided free legal assistances or representation. The court may alternatively order that the party against whom the relief is granted pay to the person or group of persons concerned any reasonable costs incurred in the investigation of the matter and its preparation for the court proceedings. This encourages environmental lawyers to act on behalf of persons or organisations with valid cases even though they may not be able to afford legal fees.

An important pre-requisite before taking a matter to court, is to make use of all other means available for resolving the concern. A court will seldom hear a matter if an internal appeal to the MEC or the Minister has not preceded the matter being brought.

Section 33 of NEMA also makes specific provision for private prosecution for those acting in the public interest or in the interests of protecting the environment.

Certain requirements must be met, before a private prosecution can be brought, including that:

- The person prosecuting privately must do so through a person entitled to practice as an advocate or an attorney in South Africa
- The person prosecuting privately must have given written notice to the appropriate Public Prosecutor that they intend to bring the private prosecution.

### **What is the role of the Green Scorpions (Environmental Management Inspectorate)?**

The Environmental Management Inspectorate (EMI), otherwise known as the Green Scorpions, is a dedicated environmental law enforcement unit. Their role includes monitoring and investigating environmental crimes, conducting site inspections, checking of compliance with permits, instigating anti-poaching operations and so forth. EMI officers have powers to:

- Investigate: question witnesses, inspect and remove articles, take photographs and audio-visual recordings, take samples and remove waste
- Inspect: enter premises to ascertain whether legislation is being followed and seize evidence of criminal activity
- Enforce: search premises, containers, vessels, vehicles, aircraft and pack animals; seize evidence and contraband; establish road blocks and make arrests
- Administrate: issue compliance notices and admission of guilt fines.

The Inspectorate do not usually become involved in EIAs. However, if you are witness to an environmental crime on a site that requires urgent intervention, this can be reported to the EMI (0800 012 322). Examples may include that a developer is proceeding with activities before their EIA application is approved, indigenous vegetation or wildlife is being impacted or destroyed, illegal hunting is taking place, or a water course is being drained or polluted.

Another avenue to urgently report an environmental offence is the Centre for Environmental Right's (CER) Environmental Violation reporting mechanism:

<https://cer.org.za/report-a-violation>.