Dear Stakeholder

RE: INVITATION TO STAKEHOLDER CONSULTATION WORKSHOP FOR THE DEVELOPMENT OF PROVINCIAL INTEGRATED WASTE MANAGEMENT PLAN REGULATIONS

The Gauteng Department of Agriculture, Conservation and Environment (GDACE) intends to develop Integrated Waste Management Planning Regulations (IWMP Regulations) for the Province. GDACE has appointed Environmental Sciences Associates (ESA) as a lead agent to assist in developing the regulations.

The objective of the proposed IWMP Regulations is to ensure consistency in the submission and revision of IWMPs by Gauteng Local Authorities. You have been identified by GDACE as an important and key stakeholder and are herewith invited to attend a stakeholder workshop.

The main aim of the workshop is to provide Stakeholders with the findings regarding the proposed IWMP Regulations, the process to be followed, investigation undertaken by ESA as well as to provide you with an opportunity to present your comments and input into the process. As a key stakeholder, representatives from your organisation are also cordially invited to the workshop planned as follows:

Date: Thursday 29 November 2007
Time: 8:30 – 15:00
Venue: Pyramid Hotel, Johannesburg

For directions to the venue see attached map, and to confirm your attendance please contact Abdul Ebrahim of Environmental Science Associates at the number given above.

Yours faithfully

Ms Z Shale
Director: Waste Management
Department of Agriculture, Conservation and Environment
BACKGROUND INFORMATION DOCUMENT

FOR

GAUTENG INTEGRATED WASTE REGULATIONS

GAUTENG DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT (GDACE)
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in association with:
NATURE CONSERVATION CORPORATION
JAN PALM CONSULTING

NOVEMBER 2007
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1 BACKGROUND

The Gauteng Department of Agriculture, Conservation and Environment (GDACE) intends to develop Integrated Waste Management Plan (IWMP) Regulations for the Gauteng province. GDACE has appointed Environmental Sciences Associates (ESA) as lead agent of a consortium (comprising of Environmental Science Associates, Nature Conservation Corporation and Jan Palm Civil Engineers) to develop Integrated Waste Management Plan Regulations for the province.

The objective of these regulations is to ensure consistency in the submission and revision of IWMPs by Gauteng Local Authorities. It is envisaged that the regulations will ensure IWMPs are submitted in a specified format and compiled to an acceptable standard.

2 MOTIVATION FOR THE REGULATIONS

The National Waste Management Strategy (NWMS) of 1999 requires all local authorities to develop Integrated Waste Management Plans (IWMPs) in accordance with the national guidelines for submission to provincial government for approval.

In terms of the NWMS guidelines, provincial government must approve the local authority plans once submitted. Local authority IWMPs are then to be condensed and incorporated into a provincial IWMP for submission to the Department of Environmental Affairs & Tourism.

According to the requirements of the NWMS the development of IWMPs should have commenced in 2001 for submission in 2003. In this regard:

- GDACE developed guidelines in 2004 to assist local authorities with the development of their IWMPs. The guidelines were in part intended to ensure that the plans submitted contain a certain minimum level of information in a specified format.
- To date only a limited number of IWMPs of varying quality have been submitted to GDACE for approval.
- As a result Gauteng Department of Agriculture Conservation and Environment is unable to compile a meaningful provincial IWMP for submission to the Department of Environmental Affairs & Tourism.
- The Waste Management Directorate has accordingly identified the need to develop Provincial Regulations to ensure that IWMPs are submitted to the Department for approval.

1 WASTE MANAGEMENT CONSIDERATIONS

The practise of Integrated Waste Management (IWM) is based on the tenet that waste management can be planned in advance because the nature, composition and quantities of waste generated can be predicted.

2.1.1 WASTE GENERATION

Waste generation rates are often considered to reflect the economic status of society, the more affluent the society is, the greater the waste produced per capita. The NWMS Baseline Study (1998) indicates that Gauteng generated the highest volume of general
waste in SA and had the highest per capita waste generation of 2.44 m³/capita/annum (GSoER 2004).

There appears to have been a significant increase in waste disposed to landfill between 1998 and 2003, from a comparison of the statistics collected from the National Censuses conducted in 1996 and 2001. This may be expected to have occurred as a result of the increased level of waste collection service provision, specifically in terms of waste collection from informal settlements, central business areas and industry.

2.1.2 WASTE SERVICE DELIVERY
Most municipalities have a high percentage of weekly households refuse removal service, with the exception of Metsweding and Sedibeng. Notably, statistics collected from the National Censuses conducted in 1996 and 2001 reveal that Sedibeng waste service delivery deteriorated. An increased proportion of households in Sedibeng had no access to refuse removal services, while fewer households were serviced weekly.

With respect to refuse removal, there is generally a significant difference in service delivery between the Metropolitan municipalities (Johannesburg, Ekurhuleni and Tshwane), and the District municipalities (Metsweding, Sedibeng and West Rand). Although, the levels of service delivery in West Rand are substantially equal to Tshwane (GSoER 2004).

2.1.3 WASTE DISPOSAL
Available data indicates that there are approximately 87 recognised landfill sites in Gauteng. Disposal data is available for only 47 of these sites and amounted to approximately 6 200 000 tonnes for 2003 (GSoER 2004).

The available airspace in existing landfill sites in Gauteng appears to be approximately 120 million m³, with an available lifespan of approximately 22 years. However, it is important to note that available landfill sites are not evenly distributed relative to waste generation locations (GSoER 2004).

2.1.4 WASTE RECYCLING AND RECOVERY
Recycling and recovery forms an integral facet of Integrated Waste Management and is key to the achievement of the goals of the Polokwane declaration. The economic viability of recycling wastes is dependent upon composition of the waste; the ability to segregate or treat materials into marketable commodities; costs of treatment and/or segregation (as opposed to disposal costs).

Over 50% of the general waste currently being disposed of in landfills in South Africa has the potential to be recovered for recycling or re-use, specifically paper, glass, beverage cans and metal (DWAF, 1998). At present recycling in Gauteng appears to be less than 10% (GSoER 2004). It is however recognised that it is difficult to segregate waste effectively unless it is done at source, and that a market for the extracted materials must exist to ensure sustainability.

2 STATUS OF WASTE MANAGEMENT IN GAUTENG
The present state of waste management in Gauteng can be significantly improved due to a lack of effective governance capacity and waste service delivery characterised by:

Gauteng Integrated Waste Regulations
• Economic and human resource constraints that limit the ability of local government to provide an optimum waste management service including infrastructure, vehicles and staffing.

• National and municipal laws and regulations are not adequately enforced.

• Ineffective waste legislation does not allow local, provincial and national authorities to effectively and efficiently penalise waste polluters.

• Paucity of waste minimisation programmes to encourage waste minimisation and recycling in the general public as well as in industry

• Uncontrolled scavenging, poor monitoring and maintenance at landfill sites.

• There are limited if any refuse removal services in low income areas

3 PROJECT PROGRAMME & DURATION

The duration of the project is anticipated to be approximately 7 (Seven) months and has been broken down into five project phases of which two concern participation by Gauteng local authorities.

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4 PROJECT METHODOLOGY

1. Mobilisation, Inception Workshop & Work Plan
   • Inception workshop
   • Development of workplan (incl. timeframes, co-ordination, output dates, billing schedule & submission for comment)

2. Situation Analysis Literature Review & Drafting of Background Information Doc
   • Gauteng Guidelines Study internal workshop
   • Drafting of Background Information Document
   • Confirmation of relevant Metro/District contact persons at Local Authorities - circulate BID

3. Drafting and submission of First Draft of Gauteng IWMP Regs
   • Internal workshop to translate Gauteng IWMP Guidelines and align with the impending Waste Act
   • Draft regulations and internal review by Civil Engineer specialised in waste
   • Ad hoc discussions with Gauteng and other relevant stakeholders during process
   • Forward first draft to Gauteng and DEAT and advertise first public workshop
   • Finalise Draft Regulations following internal technical review
4. Presentation and Provincial Workshop

- Preparing Agenda & Presentation Material for first workshop
- First public Workshop presentation
- Finalisation and distribution of Minutes
- Workshop & Feedback meeting to GDACE steering committee
- Workshop review and incorporation of comments into Pre-Draft Regulations
- Forward draft Regulations to Gauteng (and other stakeholders) for comment

5. Second Contact meeting and Public Workshop following Gazetting of Draft Regulations

- Preparing Agenda presentations and other materials for second and workshop
- Second public Workshop presentation
- Workshop & Feedback meeting to GDACE steering committee
- Finalisation and distribution of Minutes
- Review and incorporation of comments into Final Regulations

5 LEGISLATIVE FRAMEWORK

A review of the legal framework relevant to the promulgation of the proposed Gauteng Integrated Waste Regulations has been compiled. The purpose thereof is to inform the drafting and consultation processes specifically relating to the objectives of GDACE to:

- legally compel the Gauteng local authorities to submit IWMPs to GDACE for approval;
- specify the format and contents of IWMPs
- specify the date of submission and intervals at which revised IWMP’s should be submitted;
- provide for adjudication of the contents of such IWMP’s;
- monitor the achievement of IWMP objectives and implementation of IWMP action plans;
- provide for measures dealing with the implementation of IWMP’s, as well as compliance and enforcement measures; and
- set the framework for the development and implementation of a provincial waste minimisation programme detailing incentives and other measures to ensure minimisation of waste.

The right to have the environment protected, inter alia through measures that “prevent pollution and ecological degradation” in terms of section 24 of the Constitution, as well as the principle of co-operative governance, serve as the broad background to the proposed regulations. The Local Government Municipal Systems Act 32 of 2000, is another legislative measure which should guide the process in so far as it sets out the rights and duties of municipalities; and the Waste Bill, referred to below, specifies that an IWMP must be included in the Integrated Development Plan (IDP) of municipalities. This Act also makes provision for regulations on certain waste matters, but its provisions are too limited to be of any assistance in this context.

There are two possible tools for the publication of the proposed regulations, namely the Environment Conservation Act 73 of 1989 (“ECA”) and the proposed Waste Act,
Currently in the format of a National Environmental Management: Waste Bill ("the Waste Bill").

Although ECA makes provision for regulations on waste matters, large parts of ECA have already been repealed as it is steadily being replaced by the National Environmental Management Act 107 of 1998, ("NEMA") and the specific environmental management Acts (SEMA"s) under NEMA. The Waste Bill repeals all the existing provisions on waste matters contained in ECA. ECA is therefore not an appropriate tool for the publishing of the proposed regulations, especially as it is envisaged that at the time that these regulations will be ready for publication, the Waste Bill will already be in place.

The Waste Bill is intended to be a SEMA under NEMA, and therefore not only incorporates the principles and mechanisms in NEMA, but brings waste management under the broad umbrella of integrated environmental management. It contains detailed and modern provisions on integrated waste management, including a provision that municipalities are obliged to submit IWMP’s to the provincial authorities. It sets out certain requirements as to the content of such IWMP’s, and further prescribes annual performance reports by municipalities on the implementation of IWMP’s. Most importantly, it provides for regulations to be published by the MEC on a variety of matters. This clearly gives MECs the authority to regulate the matters envisaged to be included in the proposed regulations.

It is therefore submitted that the Waste Bill is the only appropriate tool for the publication of these regulations. The regulations will however, only be published once the Waste Act comes into operation, and while no major changes from the current version contained in the Bill are expected, the draft version of the regulations will be re-examined to determine that it is in accordance with the provisions of the Waste Act as soon as the Waste Act comes into operation.

For a detailed review of legislation applicable please refer to Appendix 1: Detailed Review of Applicable Legal Framework.

6 SUGGESTED FRAMEWORK FOR GAUTENG INTEGRATED WASTE REGULATIONS

It is proposed that the waste regulations will include, but not be limited to, the following sections:

1) Applicability / Scope of the regulations
2) Roles and Responsibilities of Provinces
3) Roles and Responsibilities of Local and District Municipalities
4) Integration into the IDP process
5) Cooperative governance
6) Preparation of IWMPs
7) Format of IWMP required at different levels of government
8) Contents of IWMPs,
   i. Action plans
   ii. Waste avoidance
   iii. Waste Reduction
   iv. Waste Disposal
   v. Cleansing
vi. Education
vii. Resources
viii. Capacity development

9) Period and triggers for Internal and External review and updating
10) Submission of IWMPs
11) Approval of IWMPs
12) Principles of IWM to be applied in these regulations or alternatively minimum standards against which the contents of IWMP’s are adjudicated
13) Implementation of IWMPs

   a. Monitoring of implementation and compliance
   b. Auditing and reporting of implementation - scorecard
   c. Compliance
   d. Offences
   e. Penalties
   f. Action plans
   g. Internal auditing
   h. Integration into IDP
   i. Incentives
      i. cleanest city competition,
      ii. participation in inter authority waste disposal site audits
      iii. Job creation potential
      iv. sustainability of waste recovery market
         1. internalising externalities - (incentives for landfill space saved)
         2. Municipal Infrastructure Grant funds for recovery facilities
   j. Annexure 1 – Matrix of contents of IWMPs Province, Metropolitan, District and Local Authorities
   k. Annexure 2 – Contents of IWMPs
   l. Annexure 3 – Format

For a more comprehensive discussion of certain sections of the proposed regulations please refer to Appendix 2: Suggested Framework for the Gauteng Integrated Waste Regulations.

7 INVITATION TO STAKEHOLDER CONSULTATION WORKSHOP

The Gauteng Department of Agriculture, Conservation and Environment (GDACE) intends to develop Integrated Waste Management Plan Regulations for the Gauteng Province. GDACE has appointed Environmental Sciences Associates (ESA) as lead agent of a consortium (comprising of Environmental Science Associates, Nature Conservation Corporation and Jan Palm Civil Engineers) to develop the regulations.

The objective of the proposed Integrated Waste Management Plan (IWMP) Regulations is to ensure consistency in the submission and revision of IWMPs by Gauteng Local Authorities. It is envisaged that the regulations will ensure that Integrated Waste Management Plans are submitted by Gauteng Local Authorities in an agreed format and time intervals.

The National Waste Management Strategy (NWMS) of 1999 requires all local authorities to develop IWMPs, in accordance with the national guidelines, for submission to provincial government for its approval.
According to the requirements of the NWMS, the development of IWMPs should have commenced in 2001 for submission in 2003. In this regard:

- GDACE developed guidelines in 2004 to assist local authorities with the development of IWMPs. The guidelines were in part intended to ensure that the plans submitted contain a certain minimum level of information in a specified format.
- To date only a limited number of IWMPs have been submitted to GDACE for approval.
- As a result, GDACE is unable to compile a meaningful provincial IWMP for submission to the Department of Environmental Affairs and Tourism.
- The Waste Management Directorate of GDACE has accordingly identified the need to develop Provincial Regulations to ensure the IWMPs are submitted to the Department for approval.

In order to allow for meaningful participation at an early stage in the development of the proposed IWMP Regulations, all Gauteng Local Authorities, other Stakeholders and Interested and/or Affected Party (I&AP) are herewith invited to attend a Stakeholder Consultation Workshop.

The main aim of the workshop is to provide Stakeholders and I&APs with more information regarding the proposed IWMP Regulations, the process to be followed, as well as provide Local Authorities and other I&APs with an opportunity to provide their comments and input into the process. As a key stakeholder, representatives from your organisation are cordially invited to the workshop planned as follows:

### 7.1.1 Workshop Details

**Date:** Wednesday 29 November 2007  
**Time:** 09:00 - 12:00  
**Venue:** Pyramid Conference Centre, 96 Eloff Street Extension, Village Deep, Jhb.  
**Directions:** Refer to map on the next page.

To confirm your attendance please contact Abdul Ebrahim of Environmental Science Associates at E-mail: abdul@escience.co.za, Tel: 011 728 2683, Cell: 072 268 1119, or Fax: 0866 106 703

### 7.1.2 Proposed Agenda

I. Welcome & Attendance Register  
II. Motivation For The Regulations  
III. Gauteng State Of Waste Management  
IV. Status Of Waste Management In Gauteng  
V. Project Programme & Methodology  
VI. Legislative Framework  
VII. Proposed Framework For Gauteng Integrated Waste Regulations  
VIII. Participating and Providing Comment  
IX. The Way Ahead  
X. Closing Remarks
From Sandton/Pretoria take the M1 JHB highway. Follow the M2 City signs to the M9 Rissik Street offramp. Take the Rissik Street offramp. Turn right into Albert Street. Turn right at the traffic lights into Eloff Street. The Pyramid Venue is 1km on the left side, on the service road which runs parallel to Eloff Street Extension.

Or...

From JHB International / Benoni / Germiston take M2 Johannesburg. Follow the M2 City signs to the M9 Rissik Street offramp. Turn right into Albert St. Turn right at the traffic lights into Eloff Street. The Pyramid Venue is 1km on the left hand side, on the service road which runs parallel to Eloff Street Ext.
APPENDIX 1: DETAILED REVIEW OF EXISTING LEGISLATION & POLICIES PERTAINING TO INTEGRATED WASTE MANAGEMENT IN GAUTENG

**List of Acronyms:**

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<th>Description</th>
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<td>AQ Act</td>
<td>National Environmental Management: Air Quality Act, Act 39 of 2004</td>
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<tr>
<td>DWAF</td>
<td>Department of Water Affairs and Forestry</td>
</tr>
<tr>
<td>ECA</td>
<td>Environment Conservation Act 73 of 1989</td>
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<tr>
<td>GDACE</td>
<td>Gauteng Department of Agriculture, Conservation and Environment</td>
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<tr>
<td>IDP</td>
<td>Integrated Development Plan</td>
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<tr>
<td>IWMP</td>
<td>Integrated Waste Management Plan</td>
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<tr>
<td>IPWMP</td>
<td>Integrated Provincial Waste Management Plan</td>
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<tr>
<td>LGMSA</td>
<td>Local Government Municipal Systems Act, Act 32 of 2000</td>
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<tr>
<td>MEC</td>
<td>Member of the Executive Council</td>
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<td>NEMA</td>
<td>National Environmental Management Act, Act 107 of 1998</td>
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<td>NWMS</td>
<td>National Waste Management Strategy</td>
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<tr>
<td>SEMA</td>
<td>Specific environmental management Act</td>
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<tr>
<td>Waste Bill</td>
<td>National Environmental Management: Waste Bill</td>
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Abstract:
Various legislation, policy documents and guidelines serve as the background to the legal aspects of waste management. These are discussed in the context of the proposed integrated waste management regulations for GDACE, the purpose of which is to legally compel Gauteng local authorities to submit IWMP’s to GDACE for approval at a specified date and specific intervals thereafter, as well as to specify the contents and format.

The Bill of Rights in the Constitution guarantees every person the right to an environment that is not harmful to their health or well-being and to have the environment protected through legislative and other measures that must, inter alia, prevent pollution and ecological degradation. This provision is given substance via various legislative measures, including those dealing with waste management. The Constitution also sets out the functional areas of legislative competence of the national, provincial and local spheres of government, as well as the executive authority of the different organs of government. National parliament and provincial legislature have concurrent legislative powers over the environment and pollution control. Solid waste disposal is however, contained in Schedule 5, falling within exclusive provincial competence. Although only provincial legislature can pass legislation over the matters listed in Schedule 5, Parliament can in certain circumstances, e.g. to ensure uniform national standards, pass legislation regarding those matters.

Municipalities may make by-laws on matters listed in Part B of Schedule 4 and 5, which includes solid waste disposal. Each of the three spheres of government also has distinct executive authority over the environment. This overlap in legislative and executive authority over the subject matter of pollution control and solid waste disposal therefore requires effective co-operation between the different spheres of government. Another aspect of co-operative governance is that all role players within government and organs of State must avoid “legal proceedings” against one another. The term “legal proceedings” is not defined and whilst it will clearly include civil litigation, there is a difference of opinion as to whether it includes criminal prosecution. The one factor that might dictate against prosecution of an organ of State is the fact that such institutions are public institutions being financed by public funds and that costs, fines and accessory orders will indirectly be paid by the public. The use of the criminal sanction to deal with non-compliance with the proposed regulations should therefore be the last resort, and an alternative mechanism for ensuring compliance would be preferable.

ECA is still the principal act dealing with land pollution and waste. Many of the provisions of this Act have however, been repealed by NEMA and the SEMA’s, which replace, or are in the process of replacing, ECA. The provisions on waste are still in force, but these provisions are intended to be replaced by the Waste Bill which will also be a SEMA and is envisaged to come into force in the near future. ECA and its regulations contain provisions on littering, waste disposal sites, identification of certain matter as waste and waste management. It is interesting to note that section 40 determines that the State is not bound by ECA in so far as criminal liability is concerned. The disposal of waste was also identified as an activity which may have a substantial detrimental effect on the environment in terms of the now repealed section 21, therefore requiring written authorisation in terms of section 22 subsequent to the undertaking of an environmental impact assessment. This matter is now being dealt with under NEMA.
NEMA has introduced a new and comprehensive underlying legal framework to give effect to the environmental rights contained in the Constitution. The polluter-pays principle, the preventive principle and the precautionary principle contained in NEMA lay down fundamental principles relevant to integrated pollution control. Another important principle is “that waste is avoided, or where it cannot be altogether avoided, minimised and reused or recycled where possible and otherwise disposed of in a responsible manner”. The concepts of environmental justice and intergovernmental coordination and harmonisation are also of relevance here. NEMA also introduces the SEMA’s which regulate specific aspects of the environment. It is important to note that some provisions of NEMA have general application whilst others only apply to the enforcement of NEMA itself and the SEMA’s. Of further importance is the fact that section 24 of NEMA now provides for listed activities that may not commence without an environmental authorisation.

These include various activities relating to waste management. NEMA also contains two administrative enforcement measures, being directives in terms of section 28, and compliance notices in terms of section 31L. While a compliance notice may be issued to a municipality for failure to submit an IWMP as is prescribed by the Waste Bill, and NEMA is generally binding on the State, it is not binding on the State as far as criminal liability is concerned. Prosecution for non-adherence to such a compliance notice is therefore not an option to enforce the proposed GDACE regulations. The provincial environmental MEC may, however, “take any necessary steps and recover the costs of doing so from the person who failed to comply”. This could possibly be a tool to enforce compliance by municipalities, but it is proposed that a specific enforcement mechanism is provided for in the proposed regulations.

The Waste Bill intends to reform the law regulating waste management and to provide for national norms and standards for regulating the management of waste. It determines that municipalities must submit their IWMP to the provincial MEC. However, no time frames nor intervals for revision are prescribed. These issues will therefore have to be dealt with under the proposed GDACE regulations. Municipalities must include their IWMPs in their IDPs. Each IWMP must contain a situational analysis and set out how the objects and specific prescriptions of the Act will be given effect to. The proposed regulations will therefore serve to provide more detailed provisions in this regard. Annual performance reports on the implementation of the municipal IWMP’s must be submitted to the provincial MEC and the Bill specifies broad guidelines as to the contents of such reports.

Again it should be noted that the proposed GDACE regulations should include these requirements but in a more detailed format. The failure by a municipality to submit an IWMP is not a criminal offence and it is unclear whether a municipal manager can be prosecuted. The Bill grants powers to MEC’s to make regulations on waste matters and these are adequately wide to cover the proposed regulations. Such regulations may by reference incorporate guidelines, codes or standards, creating the possibility of the Gauteng provincial guidelines and policies to be incorporated into the regulations, at least as a tool to guide interpretation. The Act also specifies a consultative process with other departments as well as a public participation process prior to such regulations being published.

The LGMSA inter alia determines that national and provincial government must, within the system of co-operative governance, exercise their executive and legislative authority in a manner that does not compromise or impede a municipality’s ability or
right to exercise its powers. Municipal councils have a duty to ensure that municipal services are provided to the community in a financially and environmentally sustainable manner, to provide equitable access to municipal services and to promote a safe and healthy environment. Each municipal council must adopt an IDP, and the Waste Bill determines that the IWMP must form part of the IDP. The LGMSA does provide for regulations to be published but this power is too restricted to be of assistance in the drafting of the proposed GDACE regulations.

Some other national legislation might be relevant to a very limited extent. In particular, the NWA is relevant in so far as waste generally, and waste sites in particular, may pollute water resources, and the NEM: AQA is relevant in so far as landfill sites and activities such as waste incineration might cause offensive odours and air pollution.

The only current Gauteng provincial legislation on waste management is the 2004 Waste Information Regulations published in terms of ECA. These regulations prescribe the establishment of a waste information system for the province, inter alia in an effort to improve integrated waste management in the province. It also provides for certain generators and transporters of waste, as well as landfill site operators and waste treatment facilities to register with and report certain information to GDACE.

Other background documents include the 1999 Action Plan for Integrated Waste Management Planning, which inter alia states the setting of time frames for the development of IWMP’s as a priority. The 2004 GDACE Guidelines for the Development of Integrated Waste Management Plans for Local Government restates the requirement in the NWMS that local authorities must develop IWMP’s in accordance with national guidelines. In terms of the NWMS guidelines, provincial government must approve the local authority plans once submitted, and these must then be incorporated into the provincial waste management plan. This therefore requires a common format, another aspect to be addressed in the proposed regulations. These first generation IWMP’s are developed for general waste only. The three A and three C municipalities have the responsibility of developing and submitting IWMP’s to GDACE, but input will be required from B Municipalities.

Although the IWMP should be seen as an integral part of the IDP, it must be submitted to GDACE as a stand-alone document. The IWMP should be reviewed, updated and expanded on a regular basis. The 2006 Gauteng Provincial Integrated Waste Management Policy acknowledges the fact that NEMA is steadily replacing ECA, and that the forthcoming Waste Bill will provide an overarching framework for the management of waste.

It is therefore submitted that the Waste Bill is the only appropriate tool for the publication of the proposed regulations, which can then be published as soon as the Waste Act comes into operation. While no major changes from the current version of the Bill are expected, the final draft of the regulations will at publication of the Waste Act, need to be re-examined to determine that it is in accordance with the provisions of that Act.
LEGAL REVIEW:

1 BACKGROUND

The following provides a background to the legal aspects of waste management, and more specifically the responsibilities of provincial and local government in this regard. In particular, it has been discussed with the focus on the drafting of integrated waste management regulations for the Gauteng Department of Agriculture, Conservation and Environment (“GDACE”), the purpose of which is to:

- legally compel the Gauteng local authorities to submit Integrated Waste Management Plans (“IWMP”) to GDACE for approval;
- specify the format and contents of IWMP’s;
- specify the date of submission and intervals at which revised IWMP’s should be submitted;
- provide for adjudication of the contents of such IWMP’s; and
- provide for measures dealing with the implementation of IWMP’s, as well as compliance and enforcement measures.

2 THE CONSTITUTION, ACT 108 OF 1996

2.1.1 THE BILL OF RIGHTS

Section 24 of the Bill of Rights in the Constitution reads as follows:

Everyone has the right -
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The following aspects should be noted:

- Pollution and ecological degradation must be prevented and every person has the right to an environment that is not harmful to their health or well-being. To achieve this not only requires effective waste management, but also highlights the importance of the concept of environmental justice. Environmental justice requires that “nature’s environmental bounty should be equitably distributed and that certain sectors of society should not bear an unequal brunt of negative environmental impacts”\(^1\). It is an unfortunate reality that poorer

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communities often suffer under a lower quality of waste collection and management services, and are often located closer to waste disposal sites.

- The principle of intergenerational equality finds application: it is not only a right of the current generation, but also of future generations, at least in so far as that the current generation have a right to have the environment protected for the benefit of future generations. The proper management of waste is paramount to ensure the health and well-being of current and future generations and to avoid environmental degradation.

- Economic development, responsible also for waste generation, must be promoted, provided that such development is ecologically sustainable.

The Constitution therefore serves as the basis for the protection of the environment. This right is given substance via various legislative measures which will be discussed below.

### 2.1.2 LEGISLATIVE COMPETENCE AND EXECUTIVE AUTHORITY

Legislative competence and executive authority within the spheres of government is discussed here. 2 Note that the different functions and powers, and more specifically the functional areas of legislative competence of the national, provincial and local spheres of government which are distinctive, interdependent and interrelated3, as well as the executive authority of the different organs of government, serve as a basic framework for the proposed regulations.

National parliament and provincial legislature have concurrent legislative powers (as reflected in Schedule 4) over, amongst other things, the environment, pollution control and nature conservation. Matters relevant to the environment falling within exclusive provincial competence as reflected in Schedule 5, include provincial planning and solid waste disposal. Although only provincial legislature can pass legislation over the matters listed in Schedule 5, Parliament can in certain circumstances by way of intervention, pass legislation regarding those matters and thereby override any provincial legislation on the same matter.

Parliament may intervene when national legislation, inter alia, is necessary to maintain national standards or to prevent unreasonable action taken by a province that is prejudicial to the interests of another province or the country as a whole4. With regard

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2 The compilers acknowledge additional insights gained from the studying of material from The Constitution and Environmental Protection, a presentation by Tshepo Madlingozi, Centre for Human Rights, University of Pretoria and Melissa Fourie, Department of Environmental Affairs and Tourism, at Prosecuting Environmental Crimes, Workshop No: P.17/2006 presented by Justice College and DEAT, 31July-4 August 2006, Pretoria.

3 Section 40(1) of the Constitution.

4 Section 44(2) of the Constitution.
to the areas of concurrent jurisdiction, section 146 of the Constitution provides that
national legislation falling within a functional area in Schedule 4 which applies uniformly
to the country as a whole and which requires national uniformity, prevails over
conflicting provincial legislation if such national legislation is, inter alia, necessary for the
protection of the environment5.

Municipalities may make by-laws on matters listed in Part B of Schedule 4 and 56, as
long as such legislation is consistent with national or provincial legislation. Part B of
Schedule 5 includes solid waste disposal. The above overlap in legislative authority over
the subject matter of solid waste disposal therefore requires effective co-operative
government, which includes the co-ordination of actions and legislation between the
different spheres of government, as is required by the Constitution7.

Each of the three spheres of government has distinct executive authority over the
environment. The national government’s executive authority over the environment is
derived from chapter 5 of the Constitution. Provincial government’s executive authority
and duties are derived from section 125. One of these functions is the duty to administer
national legislation outside the functional areas listed in Schedule 4 and 5, the
administration of which has been assigned to the provincial executive in terms of an

Municipalities have, in terms of section 156(1), executive power and the right to
administer local government matters listed in the respective Part B’s of Schedule 4 and
5 and any other matter assigned to them by national or provincial legislation. They may,
in terms of section 156(2) as was pointed out above, also make and administer by-laws
on any such matter. Section 99 further provides that a Cabinet member may assign any
power or function that is to be exercised or performed in terms of an Act of Parliament
to a member of a Provincial Executive Council or to a Municipal Council9.

5 Section 146(2)(c)(vi) of the Constitution.
6 Section 156(2) of the Constitution.
7 Section 41 of the Constitution.
8 Section 125(2) (c) of the Constitution.
9 E g section 24 of the Environment Conservation Act 73 of 1989 determines that the Minister (of
Environmental Affairs and Tourism) has the power to make regulations with regard to waste
management. The Minister has however, in some cases assigned that authority to provincial
governments.
2.1.3 CO-OPERATIVE GOVERNANCE AND THE AVOIDANCE OF LEGAL PROCEEDINGS

Section 41 of the Constitution determines that all role players within government and organs of State must adhere to the principle of cooperative governance by, inter alia, avoiding “legal proceedings” against one another. This is echoed by the preamble to NEMA which determines that it is desirable “that the law should establish procedures and institutions to facilitate and promote cooperative government and intergovernmental relations”.

The term “legal proceedings” is not defined. Whilst this will clearly include civil litigation\(^{10}\) there is a difference of opinion as to whether this was meant to include criminal prosecution. One can argue that the literal meaning would include criminal prosecutions. On the other hand a criminal prosecution cannot be described as a “dispute as is referred to in section 41(3)”.

Furthermore, whereas in particular situations the spirit of co-operative governance might dictate that criminal prosecution of an organ of the state must be avoided if there are other suitable alternatives, the decisive principle should rather be that everyone, which will include juristic persons, is equal before the law as is confirmed by section 9(1) of the Constitution. Section 8(1) prescribes that the Bill of Rights also applies to all organs of State, and section 8 (2) determines that it also binds a juristic person. All persons, including juristic persons, are equal before the law, and it can be argued that organs of the State must in no way be given preferential treatment when it comes to decisions whether to prosecute or not. Loyalty to the constitution, and respect for the different functions (in this case referring to the function of the National Prosecuting Authority), as is provided for in section 41(1)(d) and (e) respectively, should be the overriding factors.

The one factor that might dictate against prosecution of an organ of state, and the one way in which the principle of co-operative governance could find practical application regarding this, is the fact that such institutions are public institutions being financed by public funds. The costs of defending such a prosecution are therefore indirectly paid by the public, and a possible fine or other orders at conviction, will again be borne by the public, very often the same people who are the victims of such offences. In cases where non-compliance by a municipality may bring about losses to the public in excess of that which may be expended in the legal processes and other orders, a cost benefit approach should dictate that prosecution should take place, albeit as a last resort. It should be emphasized that there is no prohibition on such legal proceedings against organs of state, but simply a duty to avoid such legal proceedings.

\(^{10}\) No case law or academic opinion could be found on this issue.
The above should therefore be kept in mind during the drafting of the regulations, especially when deciding as to which mechanism non-compliance with the proposed regulations should be dealt with. It is an unfortunate reality that municipalities are often the transgressors of environmental legislation. The use of a criminal sanction should be the last resort, and an alternative mechanism for ensuring compliance would be preferable.

2 THE ENVIRONMENT CONSERVATION ACT, ACT 73 OF 1989 ("ECA")

The purpose of ECA was to provide for effective protection of the environment, but many of the provisions of this Act have been repealed by the National Environmental Management Act 107 of 1998 ("NEMA"), although the provisions on waste are still in force.

The intention is to replace them with the Waste Bill, (discussed in more detail below), when it comes into force. Provisions on waste in this Act include the following:

- Section 19(1) prohibits littering and section 19A places an obligation on a person or authority in control of a place to which the public has access to remove litter within a reasonable time after it has been discarded. A contravention of this is an offence under section 29(3) and punishable with an unspecified fine or three months imprisonment.

- Section 20(1) provides that no person may establish, provide or operate a waste disposal site without a permit. (This was previously administered by the Department of Water Affairs and Forestry, but the Act was amended in January 2006 and it now falls under the Department of Environmental Affairs and Tourism’s jurisdiction). Section 29(4) provides that it is an offence to do so and provides for a maximum penalty of R100 000.00 and/or imprisonment for 10 years. Section 1 of the ECA provides, in addition to a general definition of waste, for the Minister to identify certain matter as “waste” by notice in the Gazette, as has indeed been done.

- Section 24 of the ECA also provides for the Minister to make regulations regarding waste management and littering.

- Section 20(2) provides that a person who wishes to operate a disposal site, must apply for a permit. The permit may be issued subject to conditions, may be altered or cancelled or may be refused. According to section 20(6), the issuing of a waste...

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11 Section 1 of Act 50 of 2003 with effect from 3 January 2006
13 GN 1196 in GG 15832 of 8 July 1994 (Waste Disposal Sites)
14 Section 20(3) of ECA.
disposal site permit is also subject to the concurrence of the Minister of Water Affairs and Forestry.

- The Minister (of Environmental Affairs and Tourism) may also issue directions with regard to the control and management of waste disposal sites\textsuperscript{15}. This was indeed done\textsuperscript{16} in GN 91 in GG23053 of 1 February 2002, which contains directions regarding the control and management of general communal and general small waste disposal sites. These directions make provision for the registration of these disposal sites, whether for the development, operation, closure or rehabilitation thereof. The directions also prescribe that these sites may only be used for the disposal of waste types and quantities according to the classification in the Minimum Requirements for Waste Disposal by Landfill (1998 edition),\textsuperscript{17} and further that the planning, design, construction, commissioning and operation shall be in accordance with the Minimum Requirements for Waste Disposal by Landfill (1998 edition)\textsuperscript{18}. It also provides for access control\textsuperscript{19}, monitoring of groundwater quality\textsuperscript{20} and for the closure and rehabilitation of such disposal sites\textsuperscript{21}. In terms of section 20(9) no person may discard or dispose of waste other than at a permitted disposal site or by means of a facility or method prescribed by the Minister.

- Section 24 provides for the Minister to make regulations regarding waste management, including the classification of different types of waste and the handling, storage, transport and disposal of such waste, the reduction of waste, the utilization of waste and the location, planning and design of disposal sites. This power is specifically assigned to the Minister, although the Minister may delegate these powers to the provincial legislature\textsuperscript{22}.

- Section 24A provides that the “competent authority” may make regulations regarding littering. The “competent authority”, in terms of section 1, means the authority to which the administration of ECA has been assigned in that province under the Constitution\textsuperscript{23}.

\textsuperscript{15} Section 20(8) of ECA.
\textsuperscript{16} Actually in terms of section 20(5)(b) as it was before the amendment by Act 50/2003 with effect from 3 January 2006, which had the effect of moving the contents of section 20(5)(b) to section 20(8)(b).
\textsuperscript{17} Regulation 4 of the Directions.
\textsuperscript{18} Regulation 5 and 7 of the Directions.
\textsuperscript{19} Regulation 6 of the Directions.
\textsuperscript{20} Regulation 8 of the Directions.
\textsuperscript{21} Regulation 10 of the Directions.
\textsuperscript{22} See R29 in GG 16346 of 7 April 1995 and R43 in GG 17354 of 8 August 1996 concerning the extent of the assignment of the administration of ECA to the provinces.
\textsuperscript{23} This still refers to the 1993 Interim Constitution.
• Section 28A provides that local authorities may apply to be exempted from the application of certain provisions of the Act.

• Section 29(4) also provides that the contravention of section 20(6) or a contravention of a direction issued under section 20(5) is an offence. This is however, problematic. The Environment Conservation Amendment Act 50 of 2003, inter alia amended section 20 substantially to make provision for the Department of Environmental Affairs and Tourism (“DEAT”) to take over the waste management functions from the Department of Water Affairs and Forestry (“DWAF”). Section 29 was however, not amended accordingly and the provision regarding section 20(6) and directives under section 20(5) is now nonsensical. Before the amendments brought about by Act 50 of 2003, section 20(6) of the ECA contained a prohibition on discarding or disposing of waste other than at a permitted site or prescribed manner. After the amendments, the identically worded provision is now contained in section 20(9) for which no offence is created. Section 20(6) now refers to issues regarding the issue of waste disposal site permits. Similarly, section 20(5) previously contained the powers of the Minister to issue directions; this is now contained in section 20(8).

• Section 29(4) further provides that the failure to comply with a condition of a permit, authorisation or direction issued or granted under the said provisions is an offence. With reference to the apparent oversight in the failure to amend section 29 accordingly, permits are still being issued under section 20(1) as it read before the amendment, and failure to comply with such permit conditions will therefore still be an offence. Directions are however, now issued in terms of section 20(8) and failure to comply with the conditions of a direction will not be an offence.

• The disposal of waste was also identified as an activity which may have a substantial detrimental effect on the environment in terms of the now repealed section 21, therefore requiring written authorisation in terms of section 22 subsequent to the undertaking of an environmental impact assessment. These provisions have been repealed and such matters are now being dealt with under NEMA, as will be discussed below.

• Section 40 determines that the State is not bound by the ECA in so far as criminal liability is concerned.

Should the proposed regulations be published under the current legal regime, the ECA would be the only available tool for this. It is however a reality that the ECA is being

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replaced by NEMA and that while a huge part of the ECA has already been repealed, the rest of the ECA will soon follow suit\textsuperscript{25}. It is foreseen that at the time these regulations will be ready for publishing, the Waste Bill will already be in place and the provisions in the ECA on waste management, repealed.

3 NATIONAL ENVIRONMENTAL MANAGEMENT ACT, ACT 107 OF 1998

NEMA has introduced a new and comprehensive underlying legal framework to give effect to the environmental rights contained in section 24 of the Constitution. It also prescribes detailed procedures for co-operative governance and provides for integrated environmental management, including procedures for the undertaking of environmental impact assessments in order to consider issuing environmental authorisations for certain listed activities that could potentially have a detrimental effect on the environment.

The polluter-pays principle, the preventive principle and the precautionary principle, as defined in NEMA, lay down “fundamental principles relevant to integrated pollution control”\textsuperscript{26}. The polluter-pays principle holds that those responsible for environmental damage should carry the costs of mitigation and rehabilitation of such damage. The preventive principle prescribes that pollution and environmental degradation should be avoided, and where that is not possible, minimised and remedied. The precautionary approach stipulates that a risk-averse and cautious approach must be applied, taking into account the limitations of current knowledge\textsuperscript{27}. Most of the other principles in NEMA also find application in the current context, but most importantly the principle in section 2(4)(a)(iv) “that waste is avoided, or where it cannot be altogether avoided, minimised and reused or recycled where possible and otherwise disposed of in a responsible manner”: The concepts of environmental justice\textsuperscript{28} and intergovernmental coordination and harmonisation\textsuperscript{29} are also of relevance here.

NEMA also introduced specific environmental management acts (“SEMA’s”), which regulate specific aspects of the environment. It is important to note that some provisions of NEMA have general application whilst others only apply to the enforcement of NEMA itself and the SEMA’s. Part 2 of Chapter 7 creates the Environmental Management Inspectorate, whose duties and powers are limited to the enforcement of NEMA and the SEMA’s. Provisions on awards to informers, the cancellation of permits at conviction, prescriptions as to the handling of seized items and the regulation of admission of guilt fines, also only apply to NEMA and the SEMA’s.

\textsuperscript{25} See the discussion of the Waste Management Bill below.

\textsuperscript{26} Glazewski: 553

\textsuperscript{27} See section 2(4) of NEMA

\textsuperscript{28} See section 2(4)(c) of NEMA

\textsuperscript{29} See section 2(4)(l) of NEMA
Chapter 9 deals exclusively with the administration of NEMA and the SEMA’s. This interaction between NEMA and the SEMA’s must therefore be kept in mind in the discussion of the Waste Bill, intended to become a SEMA, below.

Of further importance is the fact that section 24 of NEMA now provides for listed activities that may not commence without an environmental authorisation. Included in the activities under the Environmental Impact Assessment Regulations are activity 1(o) in R. 386 of 21 April 2006 which lists the construction of facilities for the recycling, re-use, handling, temporary storage or treatment of general waste with a daily throughput capacity of 20 cubic meters or more, but less than 50 cubic meters. R. 387 of 21 April 2006 lists the construction of waste facilities which require a permit or licence in terms of legislation (but excluding the activity identified in R. 386 of 2006) as activity 1(e). Non-compliance with these will therefore be an offence in terms of section 24F(2) and punishable with a maximum fine of R5 million and/or imprisonment of 10 years in terms of section 24F(4). Note however that in terms of section 48 the State is not bound by NEMA in so far as criminal liability is concerned.

NEMA contains two administrative enforcement measures, being the following:

- The National or Provincial environmental departments may in terms of section 28 of NEMA, direct a person who causes, has caused or may cause “significant” pollution or degradation of the environment to take certain measures. Failure to comply with such a directive is not an offence, but the government department may then take the necessary measures to remedy the situation themselves and can recover all costs from the perpetrator. Note that this obligation is not limited to a contravention of any specific act or only applicable to obligations under NEMA and the SEMA’s, but applies generally to any pollution or degradation of the environment. This provision is not of assistance in the context of enforcement of the proposed provision that municipalities must submit IWMP’s with a specified content on a specified date and thereafter submit revised versions at specified intervals;

- An Environmental Management Inspector with the necessary mandate may issue a compliance notice in terms of section 31L of NEMA to a person who has not complied with the provisions of NEMA or any of the SEMA’s, or who has not complied with the terms and conditions of a permit or authorisation. Non-compliance is a criminal offence in terms of section 31N(1), but the current situation is that no penalty has been prescribed. While a compliance notice may certainly

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30 See section 34A-34G of NEMA.
31 EMI’s are appointed on different levels and only Grade 1 EMI’s, a designation usually reserved for senior personnel, have the authority to issue these notices. See GN R494 of GG 28869 of 2 June 2006.
32 See however, the opinion expressed on this issue under Part C:2
be issued to a municipality for failure to submit an IWMP as is prescribed by the Waste Bill\textsuperscript{33}, and NEMA is generally binding on the State, it is not binding on the State as far as criminal liability is concerned\textsuperscript{34}. Prosecution for non compliance with such a compliance notice is therefore not an option to enforce the proposed GDACE regulations. The provincial environmental MEC may however, in terms of section 31N(2)(b), also “take any necessary steps and recover the costs of doing so from the person who failed to comply”. This provision is probably wide enough to allow the MEC to step in and compile an IWMP for a municipality which has failed to do so, but this is not quite clear. It is therefore proposed that a specific enforcement mechanism is provided for in the GDACE regulations as NEMA’s provisions might be inadequate to serve as enforcement tools. It should further be noted that while NEMA is not binding on the State as far a criminal liability is concerned, none of the current SEMA’s, nor the Waste Bill in its current format, excludes criminal liability of the State.

4 NATIONAL ENVIRONMENTAL MANAGEMENT: WASTE BILL (AUGUST 2007 VERSION)\textsuperscript{35}

The Waste Bill intends to reform the law regulating waste management and to provide for national norms and standards for regulating the management of waste.\textsuperscript{36} It provides for a national waste management strategy, national provincial and local standards\textsuperscript{37}, and integrated waste management plans\textsuperscript{38}. As was stated above, it is intended to be a SEMA under NEMA.

Waste management measures include the identification of priority wastes and measures to be prescribed for dealing with such wastes. They also cover the storage, collection and transportation of waste. Recovery, re-use and recycling, or where this is not possible, treatment, processing and disposal of waste are also regulated via this Bill. Additional to “industry waste management plans” and measures for remediation of contaminated land (which include the issue of “remediation orders”), the principle of “producer responsibility” also finds application\textsuperscript{39} (the cradle to grave principle). Central to the Bill is the requirement of a “waste management licence” to undertake waste management activities\textsuperscript{40}. The licensing of waste management activities is dealt with in

\textsuperscript{33} Provided of course that it becomes an Act and a SEMA, as is clearly the intention.
\textsuperscript{34} See section 48 of NEMA.
\textsuperscript{35} The November 2006 version was titled NEM: Waste Management Bill.
\textsuperscript{36} From the long title of the Waste Bill
\textsuperscript{37} Chapter 2 of the Waste Bill.
\textsuperscript{38} Chapter 3 of the Waste Bill.
\textsuperscript{39} Chapter 4 of the Waste Bill.
\textsuperscript{40} Chapter 4 of the Waste Bill.
detail and a waste management officer may require a “waste impact report” in certain circumstances, such as suspected non-compliance with the provisions of the Act.\textsuperscript{41} Waste information is dealt with in Chapter 6, compliance and enforcement in Chapter 7 and the issuing of regulations by the Minister and MEC’\textsc{\textquoteright}s in Chapter 8.

A number of offences are created by section 67, including the following:

- the import, manufacturing, processing or selling of priority wastes not complying with prescribed measures;
- undertaking a waste management activity without a waste management licence;
- contravention or failure to comply with a condition or requirement of a waste management licence;
- unauthorised disposal of waste or disposal of waste in a manner likely to cause pollution or harm to human health\textsuperscript{42};
- failure to submit an industry waste management plan;
- failure to submit a waste impact report when required to do so;
- failure to comply with a remediation order.

Section 68 makes provision for a maximum fine of R10 million and/or 10 years imprisonment for some offences\textsuperscript{43}, and an unspecified fine, taking into consideration “legislation regulating maximum fines for criminal offences”, and/or 15 years imprisonment for others\textsuperscript{44}. It is promising to see that the Adjustment of Fines Act will not apply in the first mentioned provision, and quite absurd to see that it will apply in the second. Due to the effect of the Adjustment of Fines Act, Act 101 of 1991, the maximum fine in that instance will be R300 000, 00. This means that some offences will carry a maximum penalty of R10 million and/or 10 years imprisonment whilst others a maximum penalty of R300 000, 00 and/or 15 years imprisonment. However strange that might be, it is of no further consequence in this context\textsuperscript{45}. In a further unfortunate omission, no provision is made for the increased jurisdiction for magistrate’s courts.

The most important and applicable provisions of this Bill in the current context are the following:

- Section 11(2) determines that municipalities, which are defined in section 1 to mean “a municipality established in terms of the Local Government: Municipal Structures Act, Act 117 of 1998, must submit their IWMP to the provincial MEC. It is interesting to see that no time frame is prescribed, making this provision virtually

\begin{footnotesize}
\begin{itemize}
\item Section 5 of the Waste Bill.
\item Section 32(1) of the Waste Bill.
\item See section 68(1) of the Waste Bill.
\item See section 68(2) and (5) of the Waste Bill.
\item The compilers have alerted DEAT of this issue, and they have undertaken to re-examine the provision.
\end{itemize}
\end{footnotesize}
unenforceable. The prescription of a date of submission in the proposed provincial legislation is therefore of paramount importance;

- Section 11(5) obliges municipalities to include its IWMP in the Integrated Development Plan ("IDP") as contemplated in the Local Government Municipal Systems Act46;

- Section 12 determines that the IWMP must contain a situational analysis, containing certain details, and set out how the objects and specific prescriptions of the Act will be given effect to. The proposed GDACE regulations will therefore serve to provide more detailed provisions in this regard;

- Section 13 prescribes that annual performance reports by municipalities on the implementation of the IWMP must be submitted to the provincial MEC, and specify broad guidelines as to the contents of such reports. Again it should be noted that the proposed GDACE regulations should include these requirements, but in a more detailed format;

- Section 67 creates certain offences. Of relevance here is the fact that the failure by a municipality to submit an IWMP as is prescribed in section 11(2), is not a criminal offence. Section 67(2) however provides that a municipal manager is guilty of an offence if he/she fails to ensure that the municipality delivers general waste collection services, or fails to ensure compliance with waste management licences or "a provision of this Act". It is submitted that this provision would therefore include a contravention of section 11(2), but only the municipal manager can be prosecuted. Section 68, dealing with penalties, has already been discussed above, but another problem regarding the prescribed penalties arises here: no penalty is prescribed for the contravention of section 67(2). Although this seems to be an accidental oversight, DEAT has confirmed that the intention was to delete criminal liability for municipal managers47. It is however respectfully submitted that that be DEAT's intention, the only way to do that is to amend section 67(2) as the mere absence of a prescribed penalty does not mean that no offence has been created48.

- Section 70 is of high relevance in the context of the proposed GDACE regulations. Section 70(1) provides that the MEC may regulate on certain issues listed in section 69 (which deals with regulations by the Minister) and these inter alia include "the management of waste streams", "requirements for monitoring", "waste management planning", "measures ...required for the environmentally sound management of waste", "the utilisation of waste by way of recovery, reuse and recycling", "control over waste management facilities", "the location, planning and design of waste management activities",

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46 See the discussion of this Act below.

47 Personal communication with Linda Garlipp, Director: Litigation, Policy and Law Reform, DEAT.

“institutional arrangements for the administration of waste minimisation programmes” and finally section 69(1)(dd) that specifies “any matter that may or must be prescribed in terms of this Act”. It is therefore submitted that the powers of MEC’s to make regulations are wide enough to cover the proposed GDACE regulations. It is however, also important to note which matters are to be regulated exclusively by the (national) Minister. These deal mainly with issues such as the identification and categorisation of waste, packaging and manufacturing of products, producer responsibilities and the import and export of waste. All of these clearly require a uniform national standard. In respect of regulations on a matter referred to in section 69(1)(cc) dealing with contracts between a municipality and a waste management service provider, consultation with the Minister of Provincial and Local Government is obligatory; and in the case of regulations dealing with site assessments and waste management licences, consultation with the Minister of Water Affairs and Forestry must take place.

- Section 71(1) provides for regulations to restrict or prohibit any act, to apply either generally to the province, or only in specified areas; to apply generally to all persons or only to specified categories; and to differentiate between types, classes or categories of waste. Section 71(1)(d) explicitly provides that regulations may by reference incorporate guidelines, codes or standards. The Gauteng provincial guideline and policies can therefore be incorporated into the regulations, at least as a tool to guide their interpretation.

- Section 71(2) provides that regulations under the Act may specify offences and maximum penalties for imprisonment for a period not exceeding 15 years and/or “an appropriate fine”. As no maximum fine is specified, the question arises as to whether the Adjustment of Fines Act, Act 101 of 1998, will also limit the maximum fine that can be specified in the regulations. It is respectfully submitted that this is not the case as the Waste Bill itself also specifies a higher amount than the Adjustment of Fines Act’s ratio for some of the offences in the Bill. What is of the utmost importance in setting a maximum fine in terms of the regulations is that should high fines be deemed necessary, such an amount must be specified. If the amount is not specified, the Adjustment of Fines Act will apply, meaning a ratio of R20 000, 00 for each year of imprisonment prescribed. That would mean that the highest fine, which would be where a maximum period of imprisonment of 15 years is prescribed, would be R300 000, 00. Similarly important would be for the GDACE regulations to make provision for extended penalty jurisdiction for the lower courts (magistrate’s and regional courts). If this is not done, the magistrate’s court will be limited to a maximum fine of R60 000, 00 and the regional court to a maximum fine of R300 000, 00. As was mentioned

49 Section 68(1) of the Bill. Also see the discussion above under this heading.
above, the failure of the Bill itself to make provision for increased jurisdiction of the lower courts is a serious omission.

- **Section 71(3)(a)** specifies that before publishing any regulation under the Act, the consultative process prescribed in sections 72 and 73 must be followed. Section 72 specifies that the MEC must consult all members of the Executive Council whose areas of responsibility will be affected, the Minister of Environmental Affairs and Tourism and all other national organs of State that will be affected, and further provides for public participation in accordance with section 73. It is therefore clear that all of the above parties in provincial and national government will have to be consulted prior to the publication of the proposed regulations, and that a public participation process will have to be followed. The public participation process prescribed in section 73 is quite simple and in essence consists of giving notice in the Gazette and at least one newspaper, and to allow written representations by the public.

5 **LOCAL GOVERNMENT MUNICIPAL SYSTEMS ACT, ACT 32 OF 2000 (“LGMSA”)**

The purpose of this Act is inter alia to provide for core principles, mechanisms and processes that give meaning to developmental[50] local government and to empower municipalities to ensure social and economic upliftment of communities, and the provision of basic services to all, and in particular to the disadvantaged communities.[50]

Of relevance regarding the right and duties of municipalities are the following:

- A municipality is an organ of State within the local sphere of government[51];
- Municipalities must exercise their executive and legislative authority within the constitutional system of co-operative government[52];
- National and provincial government must, within the system of co-operative governance, exercise their executive and legislative authority in a manner that does not compromise or impede a municipality’s ability or right to exercise its powers[53];
- Municipal councils have a duty to ensure that municipal services are provided to the community in a financially and environmentally sustainable manner[54], provide equitable access to municipal services[55] and promote a safe and healthy environment[56];

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50 From the preamble to the Act.
51 Section 2(a) of the Act.
52 Section 3(1) of the Act.
53 Section 3(2) of the Act.
54 Section 4(2)(d) of the Act.
55 Section 4(2)(f) of the Act.
56 Section 4(2)(i) of the Act.
• Each municipal council must adopt an integrated development plan ("IDP"), which is a single, inclusive and strategic plan for the development of the municipality. Each district municipality (Category C) must adopt a framework for integrated development planning.57

Chapter 8 deals with municipal services and sets certain principles and standards for providing municipal services through internal or external mechanisms. Section 94(1)(e) provides that the Minister (national Minister responsible for local government) may make regulations that may regulate incentives and penalties to encourage inter alia "the recycling of waste". Although this power is vested in the national Minister, it may be assigned to municipalities through the process described in Chapter 3. However, the purpose here is clearly to regulate this issue on a national level and to prescribe national norms and standards, and is therefore not of assistance in this context. It is also limited to the subject matter of waste recycling, and both provincial and local government may regulate this in terms of the Constitution.

6 OTHER NATIONAL LEGISLATION

Some other national legislation might be relevant to a very limited extent58. More specifically, the National Water Act 36 of 1998 ("NWA") is relevant in so far as waste generally, and waste sites in particular, may pollute water resources. The National Environmental Management: Air Quality Act, Act 39 of 2004 (NEM:AQA), is relevant in so far as landfill sites and activities such as waste incineration might cause offensive odours and air pollution.

7 GAUTENG PROVINCIAL LEGISLATION

The only current provincial legislation on waste management, as was confirmed during the meeting between the service provider and GDACE on 27 August 2007, is the Waste Information Regulations contained in Notice 3034 of 2004 in Provincial Gazette Extraordinary No. 372 of 15 September 200459. These were published in terms of the ECA. These regulations prescribe the establishment of a waste information system for the province, with the objective of gathering data and information regarding waste in the province, inter alia in an effort to improve integrated waste management in the

57 Chapter 5 of the Act.
58 See Glazewski: 571-576 for a comprehensive list. Most of those listed however, have no application in the current context. One can now add the National Environmental Management: Air Quality Act, Act 39 of 2004 to the list. Also see Annexure 3 of the Action Plan (Version D).
59 There are also the Gauteng Health Care Waste Management Regulations in Notice 3035 of 2004 in the same Gazette, but these are not of direct relevance here.
province\textsuperscript{60}. It also provides for certain generators and transporters of waste, as well as landfill site operators and waste treatment facilities to register with GDACE\textsuperscript{61} and for similar categories of persons to report to GDACE on the amounts of waste removed or received for disposal or treatment\textsuperscript{62}.

8 OTHER BACKGROUND DOCUMENTS

2.8.1 ACTION PLAN FOR INTEGRATED WASTE MANAGEMENT PLANNING

The historical importance of the Action Plan for Integrated Waste Management Planning (October 1999), as well as the White Paper on Integrated Pollution and Waste Management for South Africa (2000), cannot be underestimated. The issues addressed therein are however, being dealt with in the much more recent guidelines and policy documents below, and of course reflected in the contents of the Waste Bill which was discussed in detail above. The proposed law reform process is indeed ongoing, and the GDACE regulations will further these objectives.

The setting of time frames for the development of integrated waste management plans are specifically listed as a priority\textsuperscript{63}, as well as the responsibility of provincial governments to review and incorporate waste management plans submitted by local government as part of the implementation process\textsuperscript{64}. The action plan acknowledges the need for legislative reform to reduce the problem of legislative fragmentation\textsuperscript{65}. This has now become a reality with the imminent enactment of the Waste Bill.

2.8.2 GDACE GUIDELINES FOR THE DEVELOPMENT OF IWMPs

Key aspects of Integrated Waste Management Plans for Local Government (April 2004), from a legal perspective, are as follows:

- In terms of Chapter 7 of the Constitution, provincial government is required to support local government with respect to matters listed in Schedule 5 of the Constitution, which includes waste management.
- The National Waste Management Strategy (NWMS) developed by DEAT and DWAF, requires local authorities to develop IWMP’s in accordance with national guidelines. At the time it was envisaged that the development of such plans would commence in 2001 and submitted to provincial government in 2003.

\textsuperscript{60} See Regulation 2 and 3 of the Regulations.
\textsuperscript{61} Regulation 4 read with Schedule 1 of the Regulations.
\textsuperscript{62} Regulation 5 read with Schedule 3 of the Regulations.
\textsuperscript{63} See p.18 of Version C of the action plan.
\textsuperscript{64} See p.26, 27 of Version C of the action plan.
\textsuperscript{65} See p.76, 77 of Version D of the action plan.
In terms of the NWMS guidelines, provincial government must approve the local authority plans once submitted, and these must then be incorporated into the provincial waste management plan. This therefore requires a common format and the purpose of the guidelines was to assist local authorities to produce high quality IWMP's in the required format.

These first generation IWMP's are developed for general waste only.

The three metropolitan municipalities (A municipalities) and three District Municipalities (C municipalities) have the responsibility of developing and submitting IWMP's to GDACE. Input will however be required from Local Municipalities (B Municipalities) located within the area of jurisdiction of District Municipalities with respect to the waste management services rendered by them. The IWMP's of Local Municipalities will therefore be integrated with that of the other Metropolitan and District Municipalities into the Integrated Provincial Waste Management Plan (IPWMP). The IWMP should be seen as an integral part of the Integrated Development Plan (IDP) that needs to be developed by Municipalities as stipulated in the LGMSA. The IWMP, although forming an integral part of the IDP, must however be submitted to GDACE as a stand-alone document. The IWMP should be reviewed, updated and expanded on a regular basis. During the development phase, consultation with authorities at national, provincial and local level must take place, as well as with the public and other Interested and Affected Parties. Public consultation may share the processes and platforms used for the development of IDP's. It is further suggested that a Waste Management Planning Forum be established for consultation with businesses, industry, NGO's and organised labour, and that a public consultation strategy and process be developed as part of the planning phase for the development of the IWMP.

The guidelines accept that “[L]egislation is a key tool for the effective implementation of a comprehensive waste management system. It should at least embody the basic requirements of the waste management system and establish a framework that is “clear, accessible, applied consistently and (are) legally enforceable”66. Implications of national legislation and guidelines include the following aspects:

- The allocation of powers in terms of the Constitution, as was set out above.
- Giving effect to the rights entrenched in the Constitution which includes not only the environmental right, but also rights effecting just administrative action and access to information.
- The principles of NEMA, as was set out above.
- The shift from reactive impact management to waste prevention, minimisation, impact management and remediation.
- The requirements of the LGMSA, as was set out above.

66 Guidelines:11
Legislation will assist to determine the scope and content of the IWMP, the approach to gathering of information, planning, institutional arrangements and public participation. The implementation and enforcement of the legislative prescriptions must receive adequate attention - without such implementation and enforcement, legislative measures have little value.

Local authorities should of course take note of all existing legislation, as well as the impact of imminent legislation such as the Waste Bill. The guidelines also appreciate that some municipalities might need to update and review current by-laws as well as to develop new by-laws for the enforcement and implementation of IWMP initiatives.

2.8.3 Gauteng Provincial Integrated Waste Management Policy

Gauteng Provincial Integrated Waste Management Policy (September 2006) builds on the approach of the 1999 National Waste Management Strategy (“MWMS”) and the 2000 White Paper on Integrated Pollution and Waste Management for South Africa to move away from fragmented and uncoordinated waste management to integrated waste management. It also acknowledges the fact that NEMA is steadily replacing the ECA, and that the forthcoming Waste Bill “will provide an overarching framework for the management of both general and hazardous waste....”

The following aspects of the policy document are particularly relevant in this context:

- The functional responsibilities of GDACE include a range of responsibilities that are concurrent with national and local government. This aspect, in so far as both legislative as well as executive powers are concerned, was discussed above. Note is taken of the importance of the harmonisation of the relationship, and the management of potentially conflicting mandates, between the different spheres of government.

- “Local government is already obliged.....to develop IWM Plans for consideration by Provincial Government....This is to ensure the effective integration and optimisation across Provinces of appropriate waste management services to address needs and problems holistically”68. Integrated Waste Management Planning need to include the generation, avoidance, reduction, collection, transport, recovery, recycling, reuse, treatment and final disposal of waste. The collection, collation and interpretation of detailed data on waste (amounts, types, services etc) and waste management practices is however crucial to achieve this.

67 Guidelines: 82
68 See p.4 of the policy document.
9 CONCLUSION

Following the detailed review of existing legislation & policies pertaining to integrated waste management in Gauteng the following pertinent aspects is highlighted:

- The right to have the environment protected (inter alia through measures that “prevent pollution and ecological degradation” in terms of section 24 of the Constitution), as well as the principle of co-operative governance, serves as broad background to the proposed regulations.

- Considering that the Waste Bill (as referred to below) specifies that an IWMP must be included in the IDP planning of municipalities, the LGMSA should guide the process in so far as it sets out the rights and duties of municipalities. This Act also makes provision for regulations on certain waste matters, but its provisions are too limited to be of any assistance in this context.

- There are two possible tools for the publication of the proposed regulations, being the ECA and the proposed Waste Act, currently in the format of a National Environmental Management: Waste Bill.

- Although ECA makes provision for regulations on waste matters, large parts of ECA have already been repealed as it is steadily being replaced by NEMA and the SEMA’s. The Waste Bill repeals all the existing provisions on waste matters contained in ECA. ECA is therefore not an appropriate tool for the publishing of the proposed regulations, especially as it is foreseen that at the time these regulations will be ready for publishing, the Waste Bill will already be in place.

- The Waste Bill is intended to be a SEMA under NEMA, and therefore not only incorporates the principles and mechanisms in NEMA, but brings waste management under the broad umbrella of integrated environmental management. It contains detailed and modern provisions on integrated waste management, including a provision that municipalities are obliged to submit IWMP’s to the provincial authorities. It sets out certain requirements as to the content of such IWMP’s, as well as prescribes annual performance reports by municipalities on the implementation of IWMP’s. Most importantly, it provides for regulations to be published by the MEC on a variety of matters. This clearly gives a MEC the authority to regulate the matters envisaged to be included in the proposed regulations.

- It is therefore submitted that the Waste Bill is the only appropriate tool for the publication of the regulations. The regulations will however, only be published once the Waste Act comes into operation. Whilst no major changes from the current version contained in the Bill are expected, the draft version of the regulations will need to be re-examined to determine that they are still in line with the provisions of the Waste Act as soon as that Act comes into operation.
APPENDIX 2: SUGGESTED FRAMEWORK FOR THE GAUTENG INTEGRATED WASTE REGULATIONS

It is proposed that the waste regulations will include, but not be limited to, the following sections:

1) Applicability / Scope of the regulations
2) Roles and Responsibilities of Provinces
3) Roles and Responsibilities of Local and District Municipalities
4) Integration into the IDP process
5) Cooperative governance
6) Preparation of IWMPs
7) Format of IWMP required at different levels of government
8) Contents of IWMPs,
   i. Action plans
   ii. Waste avoidance
   iii. Waste Reduction
   iv. Waste Disposal
   v. Cleansing
   vi. Education
   vii. Resources
   viii. Capacity development
9) (Period and triggers for) Internal and External review and updating
10) Submission of IWMPs
11) Approval of IWMPs
12) Principles of IWM to be applied in these regulations or alternatively minimum standards against which the contents of IWMP’s are adjudicated
13) Implementation of IWMPs
   m. Monitoring of implementation and compliance
   n. Auditing and reporting of implementation - scorecard
   o. Compliance
   p. Offences
   q. Penalties
   r. Action plans
   s. Internal auditing
   t. Integration into IDP
   u. Incentives
      i. cleanest city competition,
      ii. participation in inter authority waste disposal site audits
      iii. Job creation potential
      iv. sustainability of waste recovery market
         1. internalising externalities - (incentives for landfill space saved)
         2. Municipal Infrastructure Grant funds for recovery facilities
   v. Annexure 1 – Matrix of contents of IWMPs Province, Metropolitan, District and Local Authorities
   w. Annexure 2 – Contents of IWMPs
   x. Annexure 3 – Format
1 APPLICABILITY / SCOPE OF THE REGULATIONS

The three Metropolitan Municipalities and the three District Municipalities (with their constituent Local Municipalities) of the Gauteng Province are as follows:

Ekurhuleni Metropolitan Municipality  
City of Johannesburg Metropolitan Municipality  
City of Tshwane Metropolitan Municipality

Metsweding District Municipality  
Kungwini Local Municipality  
Nokeng Tsa Taemane Local Municipality

Sedibeng District Municipality  
Emfuleni Local Municipality  
Lesedi Local Municipality  
Midvaal Local Municipality

West Rand District Municipality  
Merafon City Local Municipality  
Mogale City Local Municipality  
Randfontein Local Municipality  
Westonaria Local Municipality

2 GENERAL DUTY OF STATE

In fulfilling the rights contained in section 24 of the Constitution, the State, through the organs of state responsible for implementing this Act, must put in place measures that seek to reduce the amount of waste that is generated and, where waste is generated, to ensure that waste is reduced, reused, recycled and recovered in an environmentally sound manner before being safely treated and disposed of (Waste Bill).

3 ROLES AND RESPONSIBILITIES

The three Metropolitan Municipalities (A municipalities) and three District Municipalities (C municipalities) of the Gauteng Province have the responsibility of planning, coordinating, developing, compiling and eventually submitting the IWMPs to DACEL (7). Input and co-planning will, however, be required from Local Municipalities (B municipalities) located within the area of jurisdiction of District Municipalities with respect to the waste management services rendered by them.

The IWMPs of Local Municipalities will therefore be integrated into that of the District Municipality, which will in turn eventually be integrated with that of the other Metropolitan and District Municipalities into the Integrated Provincial Waste Management Plan.

In the case of B and C municipalities, structures must be put into place to ensure that all B municipal strategies and plans are integrated with those of other B Municipalities into the required district (C municipality) plan. Close co-operation will therefore be required between B and C municipalities.
The sharing of waste disposal services and infrastructure, specifically of waste disposal facilities, and these will have to be considered and reflected in the planning processes of the various municipalities and hence in their IWMPs.

4 INTEGRATION INTO THE IDP

The IWMP should be seen as an integral part of the Integrated Development Plan (IDP) that needs to be developed by municipalities (8). The requirements with regard to integrated development planning, as stipulated in the Municipal Systems Act, Act 32 of 2000, and recently published regulations, must therefore be considered and complied with (9). The IWMP, although forming an integral part of the IDP, must, however, be submitted to DACEL as a stand-alone document.

5 COOPERATIVE GOVERNANCE

Due to the Constitutional aspects pertaining to cooperative governance requirements the offences pertaining to non-compliance and associated penalties will be carefully considered.

6 PREPARATION OF IWMPs

In the development of the IWMPs cognisance must be taken of:

- The Basic Waste Management Systems
- The Waste Management Hierarchy, which is the internationally accepted approach to integrated waste management planning
- Appropriate priorities and sustainability of the service rendered.
- The Principles of “Proximity” and “Regional Self Sufficiency.”
- The “Best Practicable Environmental Option” (BPEO).
- Participation principles

7 CONTENTS OF IWMPs

When developing an IWMP, the project can be broken down into a number of logical elements (or phases). The elements each have their own objectives, scope and hence outputs or deliverables. The output of the preceding element will, however, determine the objectives, scope of work and hence output or deliverables of subsequent elements. The development of an IWMP can be broken down into the following major elements:

- Status Quo or Situation Analysis
- Gap Analysis / Needs Assessment
- Setting of Goals, Objectives, and Targets (well defined and measurable)
- Development and Evaluation of Alternatives (solutions) and Scenarios
- Implementation Strategy
- Action Plans (step wise achievable with well defined milestones)
- Monitoring and Review

8 FORMAT OF IWMP REQUIRED AT DIFFERENT LEVELS OF GOVERNMENT

It is anticipated that the proposed regulations will set formats for IWMPs at different levels of government as follows:

- Metro Municipalities
- District Municipalities
A format will be suggested for supply / communication of IWMP related information to be supplied by Local Municipality to District Municipalities

9 SUBMISSION DATES FOR IWMPS

The formal process of IWMP compilation is anticipated to commence with the promulgation of Regulations with IWMPS to be submitted 12 months thereafter or as determined by the MEC.

10 REVIEW OF IWMPS

IWMPS should be reviewed, updated and expanded on a regular basis; otherwise an IWMP will become irrelevant and lose its planning value. The regular review and amendment of IWMPS is required as Gauteng is experiencing rapid economic growth, demographic changes, including the influx of people, growth in disposable income, etc.

In this context the review period for IWMPS may be set at a minimum 3 yearly but in areas with high rates of urbanisation, low levels of service delivery and or poor was management this may be need to shortened to 2 yearly.

11 APPROVAL OF IWMPS

Approval of IWMPS will be undertaken by GDACE at the hand of IWMP Guidelines and IWMP Regulations.

12 IMPLEMENTATION

Implementation of IWMPS pertaining to the following key aspects
i. Waste avoidance
ii. Waste Reduction
iii. Waste Disposal
iv. Cleansing
v. Education
vi. Resources
vii. Capacity development
viii. Action plans

13 ACTION PLANS

Format of action plans (step wise achievable with well defined milestones)

14 WASTE MINIMISATION PLANS AND INCENTIVES

Gauteng is currently developing a Waste Minimisation Plan; aspects of this plan may be included in the proposed Regulations. Various incentives toward IWMP and Integrated Waste Management is being considered as follows:

i. cleanest city competition,
ii. local authority participation in inter authority waste disposal site audits
iii. waste management and minimisation job creation potential
iv. sustainability of waste recovery market
   a. internalising externalities - (payment for landfill space saved)
   b. MIG funds for recovery facilities
15 MONITORING OF IMPLEMENTATION AND COMPLIANCE
Monitoring of implementation of IWMPs should be conducted on a regular basis; otherwise an IWMP will become irrelevant and lose its planning value. The regular monitoring of the implementation of IWMPs is required to ensure that integrated waste management is being practised as planned.

16 AUDITING AND REPORTING OF IMPLEMENTATION - SCORECARD
Auditing and reporting on the implementation of the IWMPs should be done annually by an external auditor and scored on a standard provincial scorecard. This will ensure that the auditing and other methods used to evaluate IWMPs and assess of the implementation of IWMPs is done on an equal basis within all the municipalities of Gauteng

17 COMPLIANCE

18 OFFENCES

19 PENALTIES