

REPUBLIC OF SOUTH AFRICA

NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary of
Bill published in Government Gazette No. 36673 of 18 July 2013)
(The English text is the official text of the Bill)*

(MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS)

[B 27—2013]

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[] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

To amend the National Environmental Management: Air Quality Act, 2004, so as to substitute certain sections; to align the establishment of the National Air Quality Advisory Committee with the requirements of the National Environmental Management Act, 1998; to change the timeframes on the submission of the priority area air quality management plan to the Minister for approval; to provide for the consequences of unlawful commencement of the listed activity; to provide for monitoring and evaluation of and reporting on the implementation of the pollution prevention plan; to provide for the Minister as licensing authorities in situations where the province, as a delegated licensing authority by the municipality, is the applicant for an atmospheric emission licence, where the applications are trans-boundary, where the air activity forms part of national priority project, where the activity is also related to the environmental impact and waste management activities authorised by the Minister; to delete cross-references to the Environmental Conservation Act, 1989; to clarify that applications must be brought to the attention of interested and affected parties soon after the submission to the licensing authority; to provide for a validity period of provisional atmospheric emission licence; to clarify a criteria on fit and proper person for the purposes of applications for atmospheric emission licences; to create an offence for non-compliance with controlled fuels standards; to provide for the development of regulations on the procedure and criteria for administrative fines; to delete certain obsolete provisions; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

1. Section 1 of the National Environmental Management: Air Quality Act, 2004 (hereinafter referred to as the principal Act), is hereby amended—

- (a) by the substitution for the definition of “Department” of the following definition:
- “**‘Department’** means the Department **[of Environmental Affairs and Tourism]** responsible for environmental affairs.”;
- (b) by the deletion of the definition of “Environment Conservation Act”; and
- (c) by the substitution for the definition of “Minister” of the following definition:
- “**‘Minister’** means the Minister **[of Environmental Affairs and Tourism]** responsible for environmental affairs.”.

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Amendment of section 13 of Act 39 of 2004**2. Section 13 of the principal Act is hereby amended—**

(a) by the substitution for subsection (1) of the following subsection:

“(1) The Minister may establish a National Air Quality Advisory Committee **[as a subcommittee of the National Environmental Advisory Forum, established in terms of]** in accordance with section 3A of the National Environmental Management Act, to advise the Minister on the implementation of this Act.”; and

(b) by the deletion of subsection 2.

Amendment of section 19 of Act 39 of 2004**3. Section 19 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:**

“(b) within **[six] 24** months of the declaration of the area, or such longer period as the Minister may specify, submit the plan to the Minister for approval.”.

Insertion of section 22A in Act 39 of 2004**4. The following section is hereby inserted in the principal Act, after section 22:****“Consequences of unlawful conduct of listed activity resulting in atmospheric emission**

22A. (1) On application by a person who conducted an activity in contravention of section 22, the licensing authority may direct the applicant to—

(a) immediately cease the activity pending a decision on the application submitted in terms of this section;

(b) investigate, evaluate and assess the impact of the activity on the ambient air;

(c) cease or control any act, activity, process or omission causing atmospheric emission;

(d) prevent atmospheric emission from the activity;

(e) compile a report containing—

(i) a description of the need and desirability of the activity;

(ii) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the ambient air of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity;

(iii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the ambient air of the activity;

(iv) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed; or

(f) provide such other information or undertake such further studies as the licensing authority may deem necessary.

(2) The licensing authority must consider any reports or information submitted in terms of subsection (1) and thereafter may—

(a) refuse to issue an atmospheric emission licence;

(b) issue an atmospheric emission licence to conduct the activity, subject to such conditions as the licensing authority may deem necessary; or

(c) direct the applicant to provide further information or take further steps prior to making a decision in terms of paragraphs (a) and (b).

- (3) The licensing authority may as part of the decision contemplated in subsection (2), direct a person to—
- (a) prevent or eliminate any source of atmospheric emission from the activity within such time and subject to such conditions as the licensing authority may deem necessary; or
 - (b) take any other steps necessary under the circumstances.
- (4) A person contemplated in subsection (1) must pay an administrative fine, which may not exceed R5 million and which must be determined by the licensing authority, before the licensing authority may act in terms of subsection (2)(a) or (b).
- (5) In considering a decision contemplated in subsection (2), the licensing authority may take into account whether or not the applicant complied with any directive issued in terms of subsection (1) or (2).
- (6) The submission of an application in terms of subsection (1) or the issuing of an atmospheric emission licence in terms of subsection 2(b) shall in no way derogate from—
- (a) the environmental management inspector's or the South African Police Service's authority to investigate any transgression from this Act; or
 - (b) the National Prosecuting Authority's legal authority to institute any criminal prosecution.
- (7) If, at any stage after the submission of an application in terms of subsection (1), it comes to the attention of the licensing authority that the applicant is under criminal investigation for the contravention of or failure to comply with section 22, the licensing authority may defer a decision to issue an atmospheric emission licence until such time that the investigation is concluded and—
- (a) the National Prosecuting Authority has decided not to institute prosecution in respect of such contravention or failure;
 - (b) the applicant concerned is acquitted or found not guilty after prosecution in respect of such contravention or failure has been instituted; or
 - (c) the applicant concerned has been convicted by a court of law of an offence in respect of such contravention or failure and the applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review.”.

Amendment of section 29 of Act 39 of 2004

5. Section 29 of the principal Act is hereby amended by the addition of the following subsection:

- “(4) A notice contemplated in subsection (1)(b) or (2) may contain a requirement that the person indicated in the notice monitors, evaluates and reports on the implementation of the pollution prevention plan approved in terms of subsection (1) or (2).”.

Amendment of section 36 of Act 39 of 2004

6. Section 36 of the principal Act is hereby amended by the addition of the following subsections:

- “(5) Notwithstanding subsections (1) to (4), the Minister is the licensing authority and must perform the functions of the licensing authority if—
- (a) a provincial organ of state, which has been delegated the power to perform the licensing authority function in terms of subsection (2) by the metropolitan or district municipality, applies for an atmospheric emission licence;
 - (b) the activity falls within the boundaries of more than one province;
 - (c) the activity forms part of a matter declared as a national priority in terms of a Cabinet decision and notice referred to in section 24C(2B) of the National Environmental Management Act, 1998, as amended by the National Environmental Management Laws Second Amendment Act, 2013; or
 - (d) the activity relates to the activities listed in terms of section 24(2) of the National Environmental Management Act, 1998, and in terms of section 19(1)

of the National Environmental Management: Waste Act, 2008, and the Minister has been identified as the competent authority.

(6) For the purposes of subsection (5)(d), the Minister, as the competent authority empowered under section 24C(2) of the National Environmental Management Act, 1998, and as the licensing authority empowered under section 43(1) of the National Environmental Management: Waste Act, 2008, may issue an integrated environmental authorisation for the activities listed under section 24(2) of the National Environmental Management Act, 1998, and section 19(1) of the National Environmental Management: Waste Act, 2008, and the activities contemplated in subsection (5)(d).

(7) An integrated environmental authorisation contemplated in subsection (6) may be issued only if—

- (a) the relevant provisions of this Act, the National Environmental Management Act, 1998, and the National Environmental Management: Waste Act, 2008, have been complied with; and
- (b) the integrated environmental authorisation specifies the provisions in terms of which it has been issued.

(8) The Minister and the licensing authority contemplated in subsections (1) to (4) may agree that an application for an atmospheric emission licence with regard to any activity contemplated in section 22 may be dealt with by the Minister or the relevant licensing authority contemplated in subsections (1) to (4).”.
relevant licensing authority contemplated in subsections (1) to (4).”.

Amendment of section 38 of Act 39 of 2004

7. Section 38 of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection:

“(2) Section 24 of the National Environmental Management Act **[and section 22 of the Environment Conservation Act apply]** applies to all applications for atmospheric emission licences, and both an applicant and the licensing authority must comply with **[those sections]** that section and any applicable notice issued or regulation made in relation to **[those sections]** that section.”; and

- (b) by the substitution in subsection (3) for paragraph (a) of the following paragraph:

“(a) An applicant must, immediately after the submission of the application to the licensing authority, take appropriate steps to bring the application to the attention of relevant organs of state, interested persons and the public.”.

Amendment of section 39 of Act 39 of 2004

8. Section 39 of the principal Act is hereby amended by the substitution for paragraph (d) of the following paragraph:

“(d) section 24 of the National Environmental Management Act **[and section 22 of the Environment Conservation Act]** and any applicable **[notice issued]** environmental impact assessment done, the decision taken on the application of the environmental authorisation, any applicable notice issued or regulation made pursuant to [those sections] that section;”.

Amendment of section 40 of Act 39 of 2004

9. Section 40 of the principal Act is hereby amended—

- (a) by the substitution in subsection (2) for paragraph (c) of the following paragraph:

“(c) section 24 of the National Environmental Management Act **[and section 22 of the Environment Conservation Act]** and any applicable environmental impact assessment done, the decision taken on the application for the environmental authorisation, any applicable notice issued or regulation made pursuant to [those sections] that section;”;

- (b) by the substitution for subsection (3) of the following subsection:

“(3) If **[an authorisation notice is issued]** the decision on the relevant application for an environmental authorisation has been made in terms of

section 24 of the National Environmental Management Act [or **section 22 of the Environment Conservation Act in respect of an application**], the licensing authority must decide the application within 60 days of the date on which the [notice] decision on the application for the environmental authorisation has been [issued] made.”.

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Amendment of section 41 of Act 39 of 2004

10. Section 41 of the principal Act is hereby amended by the addition of the following subsection:

“(3) A provisional atmospheric emission licence is valid for a period of one year from the date of the commissioning of the listed activity.”.

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Amendment of section 49 of Act 39 of 2004

11. Section 49 of the principal Act is hereby amended by the substitution for paragraph (c) of the following paragraph:

“(c) that person has [been] a director or senior manager who is or was a director or manager of a company, a juristic person or firm to whom paragraph (a) or (b) applies; [and] or”.

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Amendment of section 51 of Act 39 of 2004

12. Section 51 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) contravenes a provision of section 22, 25, 28 or 35(2);”.

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Amendment of section 53 of Act 39 of 2004

13. Section 53 of the principal Act is hereby amended by the insertion of the following paragraph after paragraph (l):

“(lA) the procedure and criteria to be followed in the determination of an administrative fine in terms of section 22A.”.

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Repeal of section 62 of Act 39 of 2004

14. Section 62 of the principal Act is hereby repealed.

Repeal of section 63 of Act 39 of 2004

15. Section 63 of the principal Act is hereby repealed.

Repeal of Schedule 2 to Act 39 of 2004

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16. Schedule 2 to the principal Act is hereby repealed.

Amendment of Table of Contents of Act 39 of 2004

17. The Table of Contents of the principal Act is hereby amended by the insertion after item 22 of the following item:

“**22A.** Consequences of unlawful conduct of listed activity resulting in atmospheric emission.”.

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Short title and commencement

18. This Act is called the National Environmental Management: Air Quality Amendment Act, 2013, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

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MEMORANDUM ON THE OBJECTS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY AMENDMENT BILL, 2013

1. OBJECTS OF BILL

- 1.1 The objects of the Bill is to amend the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (the Act), so as to substitute certain sections; to align the establishment of the National Air Quality Advisory Committee with the requirements of the National Environmental Management Act, 1998; to change the timeframes on the submission of the priority area air quality management plan to the Minister for approval; to provide for the consequences of unlawful commencement of listed activity; to provide for monitoring, evaluation and reporting on the implementation of the pollution prevention plan; to provide for the Minister as licensing authorities in situations where the province, as a delegated licensing authority by the municipality, is the applicant for an atmospheric emission licence, where the applications are trans-boundary, where the air activity forms part of national priority project, where the activity is also related to the environmental impact and waste management activities authorised by the Minister; to delete cross references to the Environmental Conservation Act, 1989; to clarify that applications must be brought to the attention of interested and affected parties soon after the submission to the licensing authority; to provide for a validity period of provisional atmospheric emission licence; to clarify a criteria on fit and proper person for the purposes of applications for atmospheric emission licences; to create an offence for non-compliance with controlled fuels standards; to provide for the development of regulations on the procedure and criteria for administrative fines; and to delete certain obsolete provisions.

2. BACKGROUND

- 2.1 The purpose of the Act was to replace the outdated Atmospheric Pollution Prevention Act, 1965 (Act No. 45 of 1965). The Act brings air quality management in line with the Constitution allocation of functions between the three spheres of government. In the main, the Act provides for a more effective regulatory regime, including the establishment of national norms and standards, a framework for air quality management planning and reporting regime and numerous regulatory instruments for the control of air pollution and compliance and enforcement.
- 2.2 The Act has been in operation since 2005. The National Department of Environmental Affairs and the provincial departments responsible for environmental affairs have identified certain provisions of the Act that have become obsolete.

3. CLAUSE BY CLAUSE ANALYSIS

3.1 Clause 1: Amendment of section 1

Clause 1 seeks to correct the definitions for “Department” and “Minister”. The definition for “Environment Conservation Act” is deleted as due to the amendments, it will no longer be used in the Act.

3.2 Clause 2: Amendment of section 13

Clause 2 seeks to amend section 13 of the Act to align the establishment of the National Air Quality Advisory Committee with the requirements of section 3A of NEMA.

3.3 Clause 3: Amendment of section 19

Clause 3 amends section 19(1)(b) to change the period for submitting a priority area air quality management plan to the Minister for approval from six months to 24 months, as it is not possible in practice to complete and consult on the plan within six months.

3.4 Clause 4: Insertion of section 22A

Clause 4 inserts section 22A to provide for the consequences of unlawful conducting of listed activities.

3.5 Clause 5: Amendment of section 29

Clause 5 seeks to provide for monitoring, evaluation and reporting requirements on the implementation of the approved pollution prevention plan.

3.6 Clause 6: Amendment of section 36

Clause 6 seeks to extend the powers of the National Minister responsible for environmental affairs to provide for situations where the applicant for atmospheric emission licence is the provincial organ of state who has been delegated the power by the municipality to issue Atmospheric Emission Licences, where the listed activity falls under two provinces, whenever the air quality activity forms part of any strategic infrastructure project approved by Cabinet, or where the activity is also related to the activities listed under the National Environmental Management Act, 1998, and National Environmental Management: Waste Act, 2008, authorised by the Minister.

The amendment provides for the issuing of an integrated environmental authorisation for activities listed under the National Environmental Management Act, 1998, National Environmental Management: Waste Act, 2008, and the Act.

This amendment further provides for the Minister and the relevant licensing authorities to enter into an agreement regarding certain activities that may be authorised either by the Minister or the relevant licensing authority.

3.7 Clause 7: Amendment of section 38

Clause 7 seeks to delete reference to section 22 of the Environment Conservation Act, 1989, as the EIA regulations and notices in terms of this section have been repealed.

3.8 Clause 8: Amendment of section 39

Clause 8 seeks to delete reference to section 22 of the Environment Conservation Act, 1989, as the EIA Regulations and notices in terms of this section have been repealed.

3.9 Clause 9: Amendment of section 40

Clause 9 seeks to delete reference to section 22 of the Environment Conservation Act, 1989, as the EIA Regulations and notices in terms of this section have been repealed. Section 40 of the Act has further been amended to clarify the intention of this section.

3.10 Clause 10: Amendment of section 41

Clause 10 seeks to provide for a period of validity of 1 year for provisional atmospheric emission licence from the date of commissioning.

3.11 Clause 11: Amendment of section 49

Clause 11 seeks to clarify the intention of section 49 to mean that where a juristic person employs a director or manager that was previously employed by another juristic person and which juristic person contravened air quality legislation or its licence was suspended, the current juristic person could be found to be a not fit and proper person.

3.12 Clause 12: Amendment of section 51

In order to ensure compliance with the provisions of the Act, clause 12 inserts that not complying with section 28 of the Act is an offence.

3.13 Clause 13: Amendment of section 53

This is a consequential amendment necessitated by the insertion of section 22A. Clause 13 therefore seeks to provide the Minister with a legal mandate to develop regulations on the procedure and criteria to be followed in the determination of an administrative fine.

3.14 Clause 14: Repeal of section 62

Section 62 deals with transitional provisions regarding listed activities. The national list of emission standards has been published. Clause 14 seeks to repeal section 62 of the Act as it is no longer relevant.

3.15 Clause 15: Repeal of section 63

Section 63 deals with the transitional provisions regarding ambient air quality standards. These air quality standards have finally been published. Clause 15 seeks to repeal section 63 of the Act as it became obsolete.

3.16 Clause 16: Repeal of schedule 2

Schedule 2 sets out the transitional ambient air quality standards. In light of the fact that the Department seeks to repeal section 63 of the Act, schedule 2 thus became obsolete.

4. FINANCIAL IMPLICATIONS FOR THE STATE

There would be no financial implications for the Department.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The amendments do not require new structures or capacity within the Department.

6. COMMUNICATION IMPLICATIONS

Appropriate communication measures will be implemented by the Government Communication and Information System.

7. PROVINCIAL IMPLICATIONS

Where the applicant for atmospheric emission licence is the provincial organ of state or where the listed activity falls under two provinces, the licensing authority will be the National Department of Environmental Affairs.

8. CONSTITUTIONAL IMPLICATIONS

None

9. PARLIAMENTARY PROCEDURE

- 9.1 The State Law Advisers and the Department of Environmental Affairs are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by section 76(1) or (2) of the Constitution since it falls within functional areas listed in Part A or B of schedule 4 of the Constitution, namely “environment” and “air pollution”, respectively.
- 9.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or custom of traditional communities.

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