Western Cape Government

MINISTRY OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND
DEVELOPMENT PLANNING

Reference: 3/5/10 (2013/438)

Department of Environmental Affairs

Private Bag x447

PRETORIA

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Per e-mail: sshabalala@environment.gov.za

Attention: Mr Sibusiso Shabalala

Dear Sir

NATIONAL ENVIRONMENTAL MANAGEMENT AIR QUALITY AMENDMENT BILL, 2013

1. The call for comments on the above draft Bill published in Government Gazette No. 36765 of 16 August 2013 refers. Kindly find herewith the comments of the Western Cape Government on the draft Bill.

General comments

2. Kindly note that the National Environmental Management: Air Quality Act, 2004, is hereinafter referred to as the "principal Act" and the National Environmental Management Act, 1998, is hereinafter referred to as "NEMA".

3. Ad clause 2 of the Bill:

3.1 This clause establishes the National Air Quality Advisory Committee in accordance with section 3A of NEMA. Section 3A states that the Minister may by notice in the Gazette establish any forum or advisory committee, determine its composition and functions, and determine, in consultation with the Minister of Finance, the basis and extent of the remuneration and payment of expenses of any member of such forum or committee.

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3.2 Clause 2 with its incorporation of section 3A of NEMA effectively provides for a statutory body which will operate nationally to be established by subordinate legislation.

3.3 Despite section 6(3) of the principal Act, the notice (subordinate legislation) referred to in section 3A does not have to be included in a public participation process. The National Air Quality Advisory Committee is an important entity as it is empowered to advise the Minister on the implementation of the Bill and the principal Act. Its establishment should therefore also be subjected to public scrutiny.

3.4 The principal Act contains various notices which the Minister may issue for e.g. the listing by notice of controlled emitters in terms of section 2, the declaration of priority areas by notice in terms of section 58 and the listing of activities by notice which will result in atmospheric emissions. All these notices are obliged to follow the public participation process set out in section 56 and 57 of the principal Act. It is proposed that clause 2 is likewise subjected section 56 and 57 of the principal Act.

4. Ad clause 3 of the Bill:

4.1 Section 19 of the Principal Act provides that when the Minister has declared an area as a priority area, the national air quality officer must within 6 months of the declaration of the area, or such longer period as specified by the Minister, submit an air quality management plan to the Minister for approval. The amendment contained in clause 3 changes the time period from 6 months to 24 months (or longer as approved by the Minister) for a plan to be submitted in national priority areas.

4.2 The rationale for the amendment as per paragraph 3.3 of the explanatory memorandum is that it is not practical to complete and consult on the plan within 6 months. The subject of the plan is a national priority area. In terms of section 18(5) of the principal Act, if the national priority area is rehabilitated for at least two years, the priority status may be withdrawn. With the amendment, an air quality officer is given up to 2 years to submit a plan. If 2 years is a yardstick for the priority area to rehabilitate, the potential degradation of the priority area within a two year period, or longer, could render the priority area debilitated.

4.3 It is proposed that the amendment makes provision for interim air quality management measures to be taken purely to mitigate actual or potential further degradation of the declared priority area pending the submission of the management plan.

5. Ad clause 4 of the Bill:

5.1 The rationale for the insertion of section 22A into the principal Act, as per paragraph 3.4 of the explanatory memorandum, is to provide for the consequences of unlawfully conducting any of the listed activities in section 22 of the principal Act.

5.2 This clause does not align with the stated rationale. What the provision does make provision for is when an entity conducts a listed activity and then applies for an atmospheric emissions licence.

5.3 It is not at once clear what the mischief is that needs to be regulated by this provision. If the mischief to be regulated by this provision is to get all unlicensed undertakings to apply for a licence and deter undertakings from conducting listed activities without a licence, then the clause offers no incentive for undertakings to become licenced.

5.4 Before the licensing authority acts in terms of this provision, a fine of no more than 5 million rand is payable by the undertaking conducting the activity. The provision is silent on how the licensing authority actually determines the amount payable. This clause provides further that if there are criminal investigations pending against the undertaking, the undertaking's application for an emissions licence does not place the criminal proceedings in abeyance.

5.5 It is doubtful that an undertaking would after or while conducting a listed activity apply for a licence if the act of application does not stay the investigation of the licensing authority in terms of subsection (1)(b) or the criminal proceedings against the undertaking. An undertaking that has been conducting the listed activity may opt to defend criminal proceedings and run the gauntlet of paying a criminal fine which in terms of section 51, for a first offender, is the equivalent of the administrative fine of 5 million rand as provided for in this clause. The mischief would be regulated more efficiently if there was an incentive to apply for the licence.

6. Ad clause 6 of the Bill:

6.1 The Western Cape Government does not support the insertion of sub-clause (6) and (7).

6.2 The insertion of sub-clause (6) raises concern on how state-owned entities and major hazardous installations will be regulated in terms of future compliance monitoring. These facilities are regarded as significant point source contributors of

pollution. It is therefore proposed that that the current licensing authorities continue to process such applications, as these authorities handle complaints and monitor compliance and enforcement associated with any Air Emission Licences issued. It is further recommended that the national Department of Environmental Affairs provide inputs during the Environmental Impact Assessment process, and that the Minister is not identified as the licensing authority for declared national priorities. Provision should be made for an agreement to be reached between the licencing authority and the Minister to allow the Minister to become the licencing authority for declared national priorities.

6.3 Licensing authorities are often accused of pursuing, strategic or social goals by issuing licences in contravention of the human right to clean air. Ideally therefore, licensing authorities should be unbiased and should not have any direct access to business undertakings owned by the state. It is proposed that where the undertaking is state-owned, a licensing authority other than the Minister should be the licensing authority, despite sub-clause (6).

6.4 The legal provision contained in sub-clause (6) is contained in section 24L of NEMA. The legal provision contained in sub-clause (7) is contained in section 24L(2) of NEMA. Its inclusion in the principal Act by way of this clause is superfluous as it is already law and does not need to be repeated.

6.5 Currently, section 36 on the principal Act provides that district and metropolitan municipalities are the primary licensing or competent authorities except in three instances where a provincial organ of state is the licensing authority, i.e. where the municipality delegates its licensing function to a province (in terms of section 238 of the Constitution, 1996), where a municipality applies for an atmospheric emissions licence and where an MEC has intervened because a municipality cannot perform its functions as a licensing authority (in terms of s139 of the Constitution, 1996).

6.6 The proposed insertion of Section 36(5)(c) by this clause identifies the Minister as the licensing authority if "the activity forms part of a matter declared as a national priority in terms of a Cabinet decision..." .

6.7 The concept of national priority is vague despite section 18(2) of the principal Act. The potential for the centralised decision-making that may follow as a result of this amendment to section 36 is of concern.

6.8 There is a concern that centralisation of decision-making, as proposed by the amendment to section 36, will focus on a national agenda whilst overlooking regional and local considerations. In this regard it is important to consider the proposed Infrastructure Development Bill, 2013 which makes provision for the establishment of a Commission to "ensure that any strategic integrated project is given priority in planning, approval and implementation". Considering that

"industrial facilities" is one of the strategic infrastructure projects (SIPs) included in the proposed Infrastructure Development Bill, 2013 and therefore a national priority, it potentially means that decision-making related to many industrial facilities (which require atmospheric emission licences) could be centralised.

6.9 The Western Cape Government is concerned with the shift away from the dispensation to devolve power to the lowest levels (provincial and municipal) by moving decision-making to the national sphere of government. The focus should therefore not be on centralisation of decision-making and capacity-building at national level, but rather building the capacity of provincial and local authorities. In addition, the focus should be on improved coordination and integration between spheres of government, not on centralisation of decision-making.

6.10 This will ultimately result in the relegation of municipalities and provinces to commenting authorities and dilute the concurrent powers envisaged in the Constitution, 1996. Ultimately, provinces will be significantly limited in the exercise of granting/authorising environmental applications with the concomitant consequence, of, for example, reduced ability to influence the outcome of decision-making towards achieving provincial goals or a moratorium on the appointment of staff to execute the remaining functions of the province.

6.11 In addition, the proposed amendment to section 36 will mean that additional capacity will have to be created at national level which will duplicate, not replace, the existing capacity at provincial and municipal level.

7. Ad clause 7 of the Bill:

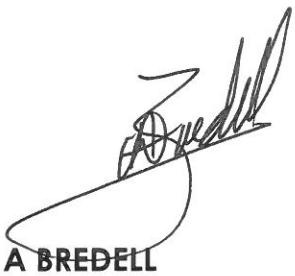
7.1 This clause amends section 38 of the principal Act which deals with the licensing process.

7.2 The principal Act fails to provide for the circumstance where a current licence holder needs to apply for the renewal of its current licence and a new licence for a different range of activities regarding a different part of its business,

7.3 It is recommended that this draft Bill makes provision for when more than one licence per undertaking is sought.

7.4 Clarity is also sought on whether the same premises may have a provisional licence for one activity as well as a final licence, for another. The licensing procedure in the principal Act is silent on this. The amendment of section 38 would have been an apt opportunity to address these issues.

We trust that these comments will receive your favourable consideration.



A BREDELL

MINISTER

DATE: 16/9/2013.