



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

The Honourable Johnny de Lange MP
The Chairperson: Portfolio Committee on Water & Environmental Affairs
Committee Section
Parliament of RSA
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Attention: Ms Tyhileka Madubela
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Dear Advocate de Lange

Strengthening institutional arrangements and planning matters for the management of air quality between the three spheres of government: submissions on the National Environmental Management: Air Quality Amendment Bill, 2013

1. We make these submissions in our own name, and also on behalf of our clients, groundWork,¹ the South Durban Community Environmental Alliance² (SDCEA), the Vaal Environmental Justice Alliance³ (VEJA), Earthlife Africa Johannesburg (ELA),⁴ and the following community groups: Middelburg Environmental Justice Network; Greater Middelburg Residents' Association; Guqa Community Service Centre; Southern Africa Green Revolutionary

¹ groundWork is a non-profit environmental justice service and developmental organisation aimed at improving the quality of life of vulnerable people in South Africa (and increasingly in Southern Africa), through assisting civil society to have a greater impact on environmental governance. groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices.

² SDCEA is an environmental justice organisation based in south Durban. It is made up of 16 affiliate organisations, and it has been active since its formation in 1996. It is considered successful for many reasons, one of which is that it is a vocal and vigilant grouping in terms of lobbying, reporting and researching industrial incidents and accidents in this area. It contributes to the struggle against environmental racism for environmental justice and environmental health.

³ VEJA is a democratic alliance of empowered civil society organisations in the Vaal Triangle, who have the knowledge, expertise and mandate to represent the determination of the communities in the area to control and eliminate emissions to air and water that are harmful to these communities and to the environment. Among other things, it aims to promote a culture of environmental awareness and sustainable development.

⁴ ELA is a non-profit organisation, founded in Johannesburg, South Africa which seeks a better life for all people without exploiting other people or degrading the environment. ELA seeks to encourage and support individuals, businesses and industries to reduce pollution, minimise waste and protect South Africa's natural resources.

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Council; Greater Delmas Civic Movement; Schoongesicht Community Movement; Highveld Environmental Justice Network; Wonderfontein Resettlement Forum; and Mpumalanga Youth Against Climate Change.

2. Below, we make submissions regarding the National Environmental Management: Air Quality Amendment Bill, 2013 (the Bill). We only address those aspects of the Bill on which we have comments.
3. **Clause 4: insertion of section 22A (providing for the consequences of unlawful conducting of listed activities)**
Clause 13: amendment of section 53 (providing for regulations on the procedure and criteria in the determination of an administrative fine in terms of section 22A)

3.1. We note that the proposed section 22A is similar to the revised section 24G contained in the National Environmental Management Laws Second Amendment Bill [B13-2012] (NEMLAB 2). However, as is addressed below, certain portions of section 24G have not been included in section 22A. No explanation has been provided for this and it is submitted that the sections should be equivalent (if section 22A is not deleted for the reasons set out below).

3.2. There appears to be a fundamental problem with the introduction of section 22A. This is that, in circumstances where a violator has commenced an activity without an atmospheric emission licence (AEL) in terms of the National Environmental Management: Air Quality Act, 2004 (AQA), she has also commenced an activity without an environmental authorisation in terms of the National Environmental Management Act, 1998 (NEMA). As a result, two *ex post facto* authorisation applications would need to be made – one in terms of section 24G of NEMA, and another in terms of section 22A of the Bill. This is because the Listing Notices in terms of the Environmental Impact Assessment (EIA) Regulations require that applicants for AELs would also require NEMA environmental authorisations. For instance:

3.2.1. a basic assessment is required for:

3.2.1.1. the construction of facilities or infrastructure for the storage of ore or coal that requires an AEL in terms of AQA (Listing Notice 1, activity 2); and

3.2.1.2. the expansion of or changes to existing facilities for any process or activity where such expansion or changes to will result in the need for a permit or licence in terms of national or provincial legislation governing the release of emissions or pollution (Listing Notice 1, activity 28); and

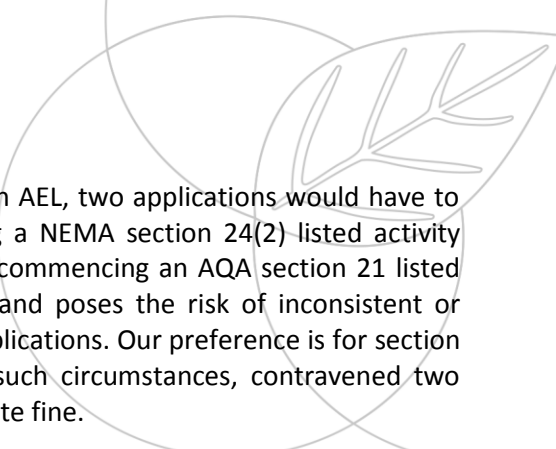
3.2.2. a full EIA is required for:

3.2.2.1. the construction of facilities or infrastructure for any process or activity which requires a permit or licence in terms of national or provincial legislation governing the generation or release of emissions, pollution or effluent and which is not identified in Listing Notice 1 or included in the list of waste management activities published in terms of the National Environmental Management: Waste Act (Listing Notice 2, activity 5); and

3.2.2.2. commencing of an activity which requires an AEL in terms of AQA in terms of section 21 of AQA, except where such commencement requires basic assessment in terms of Listing Notice 1 (Listing Notice 2, activity 26).

3.3. The effect of this is that, whenever one of these activities is triggered, an applicant will require environmental authorisation in terms of NEMA, as well as an AEL in terms of AQA.

3.4. Section 24G is already applicable to a person who has commenced with a listed (in terms of NEMA) activity without authorisation. As set out above, the effect of section 22A of the Bill is that, where an applicant



commences a NEMA listed activity that requires an AEL without such AEL, two applications would have to be made – one in terms of section 24G of NEMA for commencing a NEMA section 24(2) listed activity without authorisation, and one in terms of section 22A of AQA for commencing an AQA section 21 listed activity without authorisation. This is an unnecessary duplication, and poses the risk of inconsistent or contrary decisions by different authorities on related rectification applications. Our preference is for section 22A to be deleted. However, the fact that an applicant has, in such circumstances, contravened two statutes must be taken into account in the calculation of an appropriate fine.

- 3.5. The capacity constraints of local government are well known. The deletion of section 22A will also allay concerns about the capacity of municipalities (where they are the relevant licensing authority) to consider such technical applications, as well as concerns regarding the use of funds from section 22A fines that would presumably be paid to municipalities in these circumstances.
- 3.6. Below, we make some general comments on section 24G of NEMA and section 22A of the Bill. Thereafter, we propose certain amendments to section 22A, if it is not deleted.

General comments on section 24G of NEMA and proposed amendments to section 22A of the Bill

- 3.7. Over the years, the Centre has made numerous submissions regarding section 24G of NEMA. In this regard, we refer you to our 18 July 2012 joint NEMLAB 2 submissions with the Legal Resources Centre and the annexures thereto. We also attach hereto, marked “**Annexure 1**”, submissions we made in August 2013 on the current draft section 24G – together with the Centre for Applied Legal Studies – to the Western Cape and Gauteng Standing Committees on Agriculture and Environmental Planning.
- 3.8. Following submissions to the PCWEA, several changes were made to improve section 24G. However, a number of concerns with the proposed draft remain (as contained in “**Annexure 1**”) – and these concerns also apply in relation to section 22A of the Bill. Our main concerns with the proposal in the Bill are:
 - 3.8.1. although “may” is used, it is still not made clear that acceptance of the application is discretionary, i.e. that there are some offences so egregious that they cannot be rectified and should never be considered for rectification;
 - 3.8.2. the maximum administrative fine is still too low, and should ideally be imposed by an independent tribunal (though in several other jurisdictions, including the United Kingdom and the Netherlands, the fine is imposed by the relevant authority and not a tribunal). Moreover, the section should, as in other jurisdictions, prescribe factors to be considered when determining the appropriate fine, such as:
 - 3.8.2.1. the extent of the intention or negligence of the person who committed the offence;
 - 3.8.2.2. the behaviour of the person who committed the offence;
 - 3.8.2.3. the offender’s ability to pay the fine;
 - 3.8.2.4. the severity of the offence in terms of its impact, or potential impact on health, wellbeing and the environment;
 - 3.8.2.5. and the monetary and/or other benefits which accrued to the person as a result of the commission of the offence;
 - 3.8.3. insufficient clarity regarding criminal liability. It is important that “the payment of a fine in terms of subsection (4)” also be included as one of the section 22A(6) instances which will not derogate from the authority to investigate transgressions or criminal prosecution. We have taken advice from senior counsel on this aspect, who recommends the following preferred wording in relation to section 22A(6)(b): “shall not indemnify the applicant from liability in terms of section 51(1)(a) for

having contravened section 22". In the circumstances, it is submitted that the subsection be amended as follows:

"(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) or the payment of a fine in terms of subsection (4):

- (a) shall in no way derogate from the environmental management inspector's or the South African Police Services' authority to investigate any transgression **[from]** in terms of this Act; and*
- (b) shall not indemnify the applicant from liability in terms of section 51(1)(a) for having contravened section 22;"*

3.8.4. in relation to section 22A(7), in order for the proposed discretion for the licensing authority to "defer" the decision to issue an environmental authorisation while a criminal investigation is underway to be a proper disincentive for illegal commencement, this needs to be an automatic, non-discretionary suspension of the section 22A process. Since the decisions made in the criminal prosecution and those made in the section 22A application affect each other, they cannot run concurrently; if the offence justifies criminal prosecution, then this more serious enforcement process must take precedence. This will encourage speedy prosecution by authorities, and plea and settlement agreements with offenders who would like access to rectification. In the circumstances, we propose that "may" in section 22A(7) read "must":

*"(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]** must defer a decision to issue an atmospheric emission licence until such time that the investigation is concluded and—
....".*

3.8.5. It is pointed out that section 21 of the AQA makes provision for a list of activities to be published that "have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage". However, section 22A(1)(b) only deals with impacts on the "ambient air". It is submitted that this subsection should read:

"(b) investigate, evaluate and assess the impact of the activity on the environment, including the ambient air, and human health;"

3.8.6. As indicated above, various phrases contained in section 24G of NEMLAB 2 are not contained in section 22A of the Bill. There is no reason why these sections should not mirror one another. As a result, a new subsection 22A(1)(c) should be included, along the lines of section 24G(1)(b)(iii) of NEMLAB 2:

"(c) remedy any adverse effect of the activity on the environment, including the ambient air, and human health;"

3.8.7. "Modify" should be included in section 22A(1)(c), as per section 24G(1)(b)(iv) of NEMLAB 2:

*"**[(c)]**(d) cease, modify or control...."*

3.8.8. A new subsection 22A(1)(f) should be inserted before the current subsection 22A(1)(e) (which should now become section 22A(1)(g)), along the lines of section 24G(1)(b)(vi):

"(f) eliminate any source of atmospheric emission;"

3.8.9. For the reasons set out above, “the environment” and “human health” should be included in the current section 22A(1)(e)(ii) and (iii):

“(ii) an assessment of the nature... or impacts on the environment, including the ambient air, and human health of the activity.....”

“(iii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment, including the ambient air, and human health of the activity;”.

3.8.10. “An environmental management programme” should be added to the current section 22A(1)(e) as per section 24G(1)(b)(vii)(ee):

“(v) an environmental management programme”.

3.8.11. As per section 24G(2)(b) of NEMLAB 2, it must be made clear in section 22A(2)(b) that the AEL granted following a section 22A application does not apply retrospectively:

“(b) issue an atmospheric emission licence to such person to conduct the activity subject to such conditions as the licensing authority may deem necessary, which atmospheric emission licence shall only take effect from the date on which it has been issued;”

3.8.12. As per section 24G(3)(a) of NEMLAB 2, section 22A should make provision for the decision-maker to direct an applicant to rehabilitate the environment. In this regard, a new section 22A(3)(a) should be inserted before the current section 22A(3)(a):

“(a) rehabilitate the environment within such time and subject to such conditions as the licensing authority may deem necessary;”

3.8.13. We note that the Bill makes provision for regulations to be drafted on the procedure and criteria to be followed in the determination of an administrative fine in terms of section 22A. These regulations should be made available for comment as soon as possible.

4. Clause 7: amendment to section 38(3)(a) (providing for the AEL application to be brought to the attention of relevant organs of state, interested persons and the public immediately after its submission to the licensing authority)

4.1. We support this amendment, but request that that it be amended to make clear that a copy of the application itself should also be made available. In our experience, AEL (and numerous other) applications are not made available to interested and affected parties. This impacts on the ability of such persons to participate meaningfully in the public participation process for an AEL. It is submitted that that a new subsection (3)(b)(iii) should be inserted between the current (3)(b)(ii) and the current (3)(b)(iii):

“(iii) indicating where a copy of the application can be obtained;”

5. Clauses 8 and 9: amendments of section 39(d) and section 40(2)(c) (deleting reference to Environment Conservation Act and including references to environmental impact assessment and decision taken on an application for environmental authorisation)

5.1. In both section 39(d) and section 40(2)(c), “and” must be inserted before “any applicable notice”.

5.2. In section 40(3), “authorisation” should be spelled with an “s” and not a “z”.

6. **Clause 10: insertion of section 41(3) (providing for the provisional AEL to be valid for 1 year from the date of commissioning)**

- 6.1. It is not clear how it is envisaged that the new section 41(3) will interact with section 42(1), which provides that “the holder of a provisional atmospheric emission licence is entitled to an atmospheric emission licence when the commissioned facility has been in full compliance with the conditions and requirements of the provisional atmospheric emission licence for a period of at least six months.”
- 6.2. A consequence of this would seem to be that, if the commissioned activity is still not in full compliance with the provisional AEL a year after commissioning, the provisional AEL falls away and the activity is unlicensed and cannot continue.
- 6.3. The implications and practical implementation of this new subsection must be clarified.

7. **Clause 11: amendment of section 49(c) (clarifying the intention of section 49)**

- 7.1. The proposed section 49(c) is still not clear. We propose the following wording:

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

8. **Clause 12: amendment of section 51(1)(a) (including non-compliance with section 28 as an offence)**

- 8.1. We support this amendment. It is submitted that non-compliance with section 9-10 (ambient air quality and emission standards) should also be an offence. There is currently widespread non-compliance with ambient air quality standards and limited mechanisms available to enforce these standards. Making contravention of these standards an offence would improve this situation.
9. We appreciate the opportunity to make submissions on the Bill. Please let us know should you require more information in relation to any of the submissions.
10. We also request an opportunity to make oral submissions when this legislation is discussed in the Portfolio Committee. In this regard, we understand that these hearings will be held on 17 and 18 September 2013 and request that we be given a slot on Wednesday, 18 September 2013.
11. Please do not hesitate to contact us, should you have any queries.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per:



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