

Ms T Madubela
Parliament of South Africa
021 403 3713
tmadubela@parliament.gov.za

**Head of Department:
Environment and Waste
Management**

Crn Van Riebeeck Avenue and
Hendrik Potgieter Street
Edenvale

PO Box 25
Edenvale
1610

Tel : (011) 999-3106
www.ekurhuleni.com

**SUBJECT: COMMENTS ON THE NATIONAL ENVIRONMENTAL MANAGEMENT LAWS
AMENDMENT BILL [B14 -2017]**

1. The City of Ekurhuleni hereby submits its comments to the Portfolio Committee on Environmental Affairs on the National Environmental Management Laws Amendment Bill [B14-2017].
2. Our comments relate specifically to the National Environmental Management: Air Quality Act (Act No. 39 of 2004) (NEMAQA).
3. As a licensing authority in terms of NEMAQA, the City of Ekurhuleni would like to propose an amendment to NEMAQA that would give the licensing authority the power to **revoke or suspend** an atmospheric emission license once issued. As the Act currently stands, the licensing authority is given the power to **review** and **vary** an atmospheric emission license (sections 45 and 46), but is not given the power to **revoke or suspend** an atmospheric emission license. This is in contrast to other specific environmental management Acts such as NEMA and NEM: Waste Act that do contain provisions that allow the licensing authority to withdraw or suspend a license or permit once issued.
4. For example, section 56 of the NEM: Waste Act states as follows:

(1) The licensing authority may, by written notice to the holder of a waste management licence, revoke or suspend that licence if the licensing authority is of the opinion that the licence holder has contravened a provision of this Act or a condition of the licence and such contravention may have, or is having, a significant effect on health or the environment.
5. Similarly, section 93B of the NEM: Biodiversity Act provides for an issuing authority to suspend a permit issued:

*93B. Suspension of permits.—(1) An issuing authority which issued a permit may suspend the permit if—
(a) the carrying out of the restricted activity is likely to have a negative impact on the survival of the listed threatened or protected species; or*

(b) the permit holder is under investigation for the contravention of or failure to comply with any provision of this Act or any condition of the permit.

(2) An issuing authority may recover any reasonable costs, incurred by that authority and necessitated by the suspension of the permit, from the permit holder.

6. The Environmental Impact Assessment Regulations, 2017 also contains a provision providing for the competent authority to suspend and withdraw an environmental authorisation (section 38).
7. It appears that NEMAQA is the only environmental Act that does not contain a provision allowing the licensing authority to revoke or suspend a license.
8. As a licensing authority, we believe that the power to revoke or suspend an atmospheric emission license is a fundamental enforcement tool that can be used to protect human health and the environment.
9. Local Authorities do not have adequate enforcement tools at their disposal to deal with atmospheric emission license-holders who are not complying with the conditions of their licenses. The City of Ekurhuleni, for instance, does not have a Grade 1 Environmental Management Inspector and, therefore, cannot make use of the section 31L Compliance Notice to compel a license-holder to comply with the conditions of their license. Indeed, the only tool available to us is the ECA section 31A directive, which is not necessarily the right tool to use against an atmospheric emission license-holder.
10. Atmospheric emission licenses are issued for a period of 5 years. What this means is that if a license-holder starts to contravene the conditions of their license and causes a serious threat to human health and the environment, the licensing authority is powerless to suspend or revoke the license for up to 5 years because it is *functus officio* and cannot change its own decision. The licensing authority would have to approach the courts to overturn its own decision which is a costly and time-consuming process. If, however, the empowering statute contained a provision allowing the issuing authority to revoke or suspend a license, the principle of *functus officio* would not apply.
11. This proposal for an amendment to NEMAQA arises from an actual case that the City of Ekurhuleni dealt with in 2016. The City had issued a provisional atmospheric emission license to a company permitting it to operate a tyre pyrolysis plant. Shortly after the license was issued the City started receiving complaints from the neighbouring companies complaining of noxious emissions. The emissions were so severe that some of the complainants had to book off work and seek medical attention. Lacking the power to issue a Compliance Notice in terms of section 31L of NEMA the City began corresponding with the license-holder in an attempt to get them to comply with the conditions of their license. This correspondence continued for several months during which time the license-holder made attempts to rectify their process to mitigate noxious emissions. Their attempts during this period were unsuccessful and the complaints continued to escalate with threats of litigation. The situation came to a point where the City concluded that it would be necessary to withdraw the atmospheric emission license that it had issued because it seemed that the license-holder was unable to comply with the conditions attached thereto and human health had to be protected. Pursuant to this conclusion the City then issued a Notice of Intent to withdraw the atmospheric emission license to the license-holder. It was subsequently brought to the City's attention that in fact it could not withdraw the license because the empowering statute does not make provision for this and that the principle of *functus officio* applies.
12. The City then lodged a query with the EMI Help Desk at the Department of Environmental Affairs on the principle of *functus officio* and how it relates to the withdrawal of an atmospheric emission license. The EMI Help Desk's response is attached hereto as **Annexure I**. The EMI Help Desk confirmed that, indeed, a licensing authority does not

have the power to suspend or revoke an atmospheric emission license once issued because of *functus officio* and because the empowering statute does not permit this. The only option available to withdraw the license would be to approach the High Court.

13. In light of this finding, the City of Ekurhuleni would like to propose that NEMAQA be amended to include a provision to suspend and revoke an atmospheric emission license to bring the Act in line with other Specific Environmental Management Acts that do have this provision. It is proposed that the following clause be inserted into NEMAQA:

46A Revocation and suspension of provisional atmospheric emission licenses and atmospheric emission licenses

(1) A licensing authority may, by written notice to the holder of a provisional atmospheric emission license or an atmospheric emission license, revoke or suspend that licence if the licensing authority is of the opinion that the licence holder has contravened a provision of this Act or a condition of the licence and such contravention may have, or is having, a significant effect on health or the environment.

14. The City has consulted widely about this proposed amendment including at Working Group 2 and Working Group 11.
15. A concern has been raised that such an amendment would give the licensing authority too much power to shut down industries. This concern holds no water because all power wielded by a government functionary is subject to the legal principles of legality and rationality. It goes without saying that the power to withdraw a license should only be done as a matter of last resort and can only be done rationally and legally. Furthermore, any decision to withdraw a license must be done in accordance with PAJA and the licenseholder must be afforded the opportunity to make representations before the action is taken. Any decision to withdraw or suspend a license would also be subject to appeal and can be taken on judicial review as is the case with any decision taken by a government functionary. Moreover, any concern raised about giving a licensing authority too much power can also be said of a waste management licensing authority or the authority issuing biodiversity permits who have already been given the power to revoke and suspend licenses. It is not clear what makes an air quality licensing authority any different to any other licensing authority in the environmental sector.
16. In conclusion, we believe that the proposed amendment will strengthen protection of human health and the environment and provide licensing authorities with an important enforcement tool. The Portfolio Committee's consideration of our comments is greatly appreciated.

Yours faithfully



MR STEWART C. GREEN
DIVISIONAL HEAD: LEGISLATIVE COMPLIANCE

DATE:

19/04/2018

ANNEXURE I



1. Question:

1.1 Background:

The Air Quality Officer of Ekurhuleni issued an atmospheric emission license to a company called Mandini Green Energy in Alberton. This company is causing an unacceptable health impact on neighbouring properties due to the nature of their operation. We have a substantial record of complaints from the neighbours and there is substantial correspondence between Ekurhuleni and the company concerned instructing them to sort out their operation. Despite the company's many representations to Ekurhuleni, the complaints continue. The complaints are not nuisance-related. The complainants are actually complaining of severe health impacts and are considered serious.

It has now come to the point where we believe that the AEL that was issued to the company should now be withdrawn and the company not be allowed to operate anymore.

Late last year we put the company on terms by issuing a Notice of Intent to Withdraw the Atmospheric Emission License wherein we stated our intent to withdraw the AEL and gave the company one last chance to make representations. The company duly made representations, however, we have, yesterday, received yet another complaint.

It has become clear to us that, whatever mitigation measures this company implements, it cannot control its emissions and should, therefore, not operate at all.

The administrative decision that we wish to invoke in this matter is to get the Air Quality Officer to revoke, withdraw or cancel the AEL that was issued to them. This will have the effect of closing them down immediately. The Air Quality Office has already given the company advance notice of this intent so PAJA



mjardine@environment.gov.za / mmasenya@environment.gov.za

Note that the views expressed in this advice are those of officials employed in the EMI Capacity Development and Support Directorate; and do not necessarily reflect the official view of the Department of Environmental Affairs. Nor is it intended to replace the legal services support offered within your own institution.



has been complied with. What we are not clear about is whether the Air Quality Officer is in fact prevented from taking this course of action by the principle of *functus officio*.

1.2 Question:

The question we need the helpdesk to answer is this:

Does the Air Quality Officer of a municipality have the authority to revoke, cancel or withdraw an atmospheric emission license that he or she has issued or is the Air Quality Officer, in fact, prevented from doing so by the principle of *functus officio*?

Bear in mind that the withdrawal of the license would not be arbitrary but would be based on genuine reasons and concerns.

2. Response:

2.1 The *functus officio* rule

The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.

The *functus officio* principle is also intended to foster certainty and fairness in the administrative process. It is not absolute in the sense that it does not apply to every type of administrative action.



mjardine@environment.gov.za / mmasenya@environment.gov.za

Note that the views expressed in this advice are those of officials employed in the EMI Capacity Development and Support Directorate; and do not necessarily reflect the official view of the Department of Environmental Affairs. Nor is it intended to replace the legal services support offered within your own institution.



Certainty and fairness have to be balanced against the equally important practical consideration that requires the re-assessment of decisions from time to time in order to achieve efficient and effective public administration in the public interest.

In this instance, it is assumed that the Municipal Council, who is deemed to be the licensing authority in terms of NEM:AQA, has delegated the issuing of the air emission licensing function to the Air Quality Officer of Ekurhuleni (AQO). It is assumed that this is the selfsame AQO that has issued the Notice of Intention to withdraw the AEL. It would appear, on the face of it, that this action falls within the ambit of the *functus officio* principle, unless certain exceptions to the principle find application.

2.2 Exceptions to the *functus officio* principle:

The general scope of the *functus officio* principle can be summarised as follows:

- The principle applies only to final decisions;
- It usually applies where rights or benefits have been granted – and thus when it would be unfair to deprive a person of an entitlement that has already vested;
- An administrative decision-maker may vary or revoke even such a decision if the empowering legislation authorises him or her to do so (although such a decision would be subject to procedural fairness having been observed and any other conditions); and
- The *functus officio* principle does not apply to the amendment or repeal of subordinate legislation.

In respect of the first two parameters of the *functus officio* principle, the issuing of an AEL can be regarded as a final decision that has granted the applicants certain rights and benefits subject to the conditions set out in the licence. The next consideration is whether the law, in this instance,



mjardine@environment.gov.za / mmasenya@environment.gov.za

Note that the views expressed in this advice are those of officials employed in the EMI Capacity Development and Support Directorate; and do not necessarily reflect the official view of the Department of Environmental Affairs. Nor is it intended to replace the legal services support offered within your own institution.



with NEMA or NEM:AQA, includes a specific empowering provision allowing the licensing authority to revoke the AEL?

2.3 Variation, Review and Revocation of an AEL

Chapter 5 of NEM:AQA deals with the licensing of listed activities and provides for the review and variation of AELs as follows:

“ 45. Review of provisional atmospheric emission licences and atmospheric emission licences

- (1) *A licensing authority must review a provisional atmospheric emission licence or an atmospheric emission licence at intervals specified in the licence, or when circumstances demand that a review is necessary, on payment of the prescribed processing fee ...”*

And

“46. Variation of provisional atmospheric emission licences and atmospheric emission licences

- (1) *A licensing authority may, by written notice to the holder of a provisional atmospheric emission licence or an atmospheric emission licence, vary the licence ...”*

It therefore appears that there is no specific provision in NEM:AQA empowering the licensing authority to revoke or withdraw the AEL. On the facts provided to us, we were informed that the AQO issued a Notice of Intent to Withdraw the Atmospheric Emission License; however, we are not informed which provisions of NEM:AQA empowered this action?

In contrast, section 56 of the National Environmental Management: Waste Act, states the following:



mjardine@environment.gov.za / mmasenya@environment.gov.za

Note that the views expressed in this advice are those of officials employed in the EMI Capacity Development and Support Directorate; and do not necessarily reflect the official view of the Department of Environmental Affairs. Nor is it intended to replace the legal services support offered within your own institution.



(1) *The licensing authority may, by written notice to the holder of a waste management licence, revoke or suspend that licence if the licensing authority is of the opinion that the licence holder has contravened a provision of this Act or a condition of the licence and such contravention may have, or is having, a significant effect on health or the environment.*

Finally, 34 C of NEMA provides for the withdrawal of any permit or authorisation issued in terms of NEMA or the SEMAs, if the rights conferred by the permit or authorisation were abused by that person. However, this withdrawal can only be ordered by a court of law upon conviction of the accused.

2.4 Enforcement Options:

The current approach of the AQO in revoking or withdrawing the AEL is potentially open to legal argument for two reasons: Firstly, there are no specific provisions in NEM:AQA empowering this type of action where existing rights are completely extinguished, on a temporary (suspension) or permanent (withdrawal/revocation) basis. The absence of these specific provisions opens the door for the facility to raise a further argument based on the *functus officio* principle.

Ekurhuleni has considered various types of enforcement options based on the risks attendant in following the current withdrawal/revocation route, and found these to be unsuitable for various reasons, including time, cost and lack of extension of certain powers to local authorities. It is suggested that Ekurhuleni also consider the use of section 31A of the Environment Conservation



mjardine@environment.gov.za / mmasenya@environment.gov.za

Note that the views expressed in this advice are those of officials employed in the EMI Capacity Development and Support Directorate; and do not necessarily reflect the official view of the Department of Environmental Affairs. Nor is it intended to replace the legal services support offered within your own institution.



Act, 31A that sets out the powers of Minister, competent authority, local authority or government institution where environment is damaged, endangered or detrimentally affected that provides

“(1) If, in the opinion of the Minister or the competent authority, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, competent authority, local authority or government institution, as the case may be, may in writing direct such person -

- (a) to cease such activity; or*
- (b) to take such steps as the Minister, competent authority, local authority or government institution, as the case may be, may deem fit,*

within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.” (emphasis added)

As a final point of interest, some of the downfalls related to your various enforcement options that Ekurhuleni has considered will be rectified once the National Environmental Law Amendment Bill is brought into effect, including the inclusion of the municipal mayor as an authority empowered to issue a section 28 directive; as well as providing for the section 31L compliance notice to remain in full force and effect pending the outcome of the appeal.



mjardine@environment.gov.za / mmasenya@environment.gov.za

Note that the views expressed in this advice are those of officials employed in the EMI Capacity Development and Support Directorate; and do not necessarily reflect the official view of the Department of Environmental Affairs. Nor is it intended to replace the legal services support offered within your own institution.
