



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

"Annexure 1"

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Our ref: CER51.1/RH

Date: 29 April 2015

Dear Sirs

RE: PRELIMINARY SUBMISSIONS ON THE DRAFT NKANGALA DISTRICT MUNICIPALITY AIR QUALITY MANAGEMENT PLAN AND DRAFT AIR QUALITY MANAGEMENT BY-LAWS

1. We address you on behalf of the Highveld Environmental Justice Network (HEJN),¹ groundWork (gW)² and Earthlife Africa (ELA)³ ("our clients").

¹ HEJN is a community organisation aimed at raising awareness on key health and environmental issues within the Highveld region and improving the quality of life of vulnerable people living in the Highveld. HEJN is founded by and represents the following organisations: Ekurhuleni Environmental Organisation; Greater Middelburg Residents Association; Movement for Environmental Defence; EarthNoGenesis; Mpumalanga Youth Against Climate Change; Schoongezicht Residents Committee; Wonderfontein Resettlement Forum; Guide the People; Khuthala Environmental Care; SANCO Tokologo; SANCO Emalahleni; Outrageous Courageous Youth; Carolina Environmental Crisis Association; and Iguqa Environmental Community Service.

² gW is a non-profit environmental justice service and developmental organisation aimed at improving the quality of life of vulnerable people in South Africa, through assisting civil society to have a greater impact on environmental governance.

³ ELA is an environmental justice organisation which promotes sustainable solutions to South Africa's challenges, without exploiting people or degrading the environment.

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2. Our clients represent various community members and organisations interested in and concerned with the management and implementation of the three priority areas declared in terms of section 18 of the National Environmental Management: Air Quality Act, 2004 (AQA), including the Highveld Priority Area (HPA), in which the Nkangala District Municipality (NDM) falls.
3. We refer to the notification from the Municipal Manager (MM Skosana) of NDM ("the notification") received on 16 March 2015 advising of a meeting with stakeholders ("the meeting") to discuss a draft Air Quality Management Plan ("the draft AQMP") and draft Air Quality Management By-laws ("the draft by-laws") for the NDM, *"to provide a broad management approach towards improving air quality in the area"*.
4. We confirm that the meeting took place on Thursday 26 March 2015 at the offices of NDM, and that Sylvia Kamanja and Nicole Löser of the Centre for Environmental Rights (CER) were present, as were various representative members of HEJN and other organisations and stakeholders with an interest in improving air quality within the Nkangala district.
5. We note that, in terms of section 15(2) of AQA, NDM is obliged to have an AQMP. Such AQMP must, in terms of section 16(1)(b), describe how NDM will give effect to it. Section 16(1)(a) provides that AQMPs must seek, amongst other things:
 - 5.1. to give effect, in respect of air quality, to Chapter 3 of the National Environmental Management Act (which deals with co-operative governance) to the extent that that Chapter is applicable to it;
 - 5.2. to improve air quality;
 - 5.3. to identify and reduce the negative impact on human health and the environment of poor air quality;
 - 5.4. to address the effects of emissions from the use of fossil fuels in residential applications;
 - 5.5. to address the effects of emissions from industrial sources;
 - 5.6. to address the effects of emissions from any point or non-point source of air pollution other than those contemplated above;
 - 5.7. to implement the Republic's obligations in respect of international agreements; and
 - 5.8. to give effect to best practice in air quality management.
6. While the NDM has evidently delayed in the fulfilment of its legal obligations, it is essential that the process of drafting the AQMP and by-laws be given proper attention for the reasons set out below.
7. The NDM falls within the HPA and it is common knowledge that the air quality within the NDM is a cause for concern. We therefore regard this process and the draft AQMP and by-laws as essential means for addressing the air quality concerns within the area, and a fundamental stepping-stone towards addressing, *inter alia*, the following urgent needs:
 - 7.1. for better regulation of industrial emissions such as particulate matter (including dust), sulphur dioxide, nitrogen oxides, hydrogen sulphide and other harmful pollutants in the NDM;
 - 7.2. for regulation and reduction of poor air quality within dense low-income settlements; and
 - 7.3. to improve the health of members of communities within the municipality's jurisdiction and in the HPA.
8. In light of the above, it is essential that due consideration and attention be given to the process of drafting the AQMP and by-laws and that stakeholders be given an adequate, reasonable opportunity to participate in the process. This is required by the Promotion of Administrative Justice Act, 2000, which recognises the right to administrative action that is lawful, reasonable and procedurally fair and requires that our clients be given adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations. Furthermore, the 2012 National Framework for Air Quality Management ("the National Framework") notes that vulnerable groups and communities have capacity constraints - such as the lack

of technical and human resources and other specific needs - that impact on their ability to participate effectively in air quality decisions, and these must be taken into consideration when setting time lines for public comment.⁴

9. While we do not herein intend to make extensive comments on the processes followed thus far by NDM in relation to the drafting and stakeholder engagement in respect of the draft AQMP and draft by-laws, we wish to place on record the following:
 - 9.1. We received the notification on 16 March 2015, a mere 10 days prior to the meeting;
 - 9.2. We received copies of the draft AQMP and the draft by-laws on Friday 20 March 2015, less than 4 working days prior to the meeting. Both documents are fairly voluminous and contain extensive technical detail along with various questions and points for consideration – in other words, both documents are very much still in draft form, and the period afforded for consideration of the documents was insufficient to allow for proper preparation prior to the meeting. Some stakeholders only received the draft AQMP and draft by-laws 1 day prior to the meeting, while others did not receive them at all;
 - 9.3. No meeting agenda was circulated prior to the meeting;
 - 9.4. The meeting commenced at 10h00 and was scheduled to end at 12h55. The agenda presented at the meeting proposed to deal with a baseline assessment conducted by EScience, the draft AQMP and the draft by-laws. We note that less than 3 hours were allocated in the meeting to cover a baseline assessment and 2 extensive important draft documents;
 - 9.5. Hard copies of the draft AQMP and draft by-laws to be considered were not provided at the meeting;
 - 9.6. The consultants presenting on the draft AQMP and draft by-laws did not have sufficient time to finish their presentations, and stakeholders were not given an adequate opportunity to raise all their questions. Many of the questions which were asked were not answered;
 - 9.7. At the end of the stakeholder engagement meeting, stakeholders were told that they had 14 days to comment on the draft AQMP and draft by-laws. Stakeholders protested about the short comment periods, given the importance of these documents, and were then given 30 days from the date of the meeting to submit comments on the draft AQMP and draft by-laws. We reiterate that our clients regard this as an insufficient and unreasonable period of time, given factors which include: the several public holidays during this period; the technical nature of the documents – which requires that experts be consulted; that fact that we and our clients have limited access to technical expertise; the fact that the documents are, in several respects, incomplete; that fact that the AQMP, in particular, is voluminous; the importance of these documents for meeting the requirements of the HPA; the time required not only for the drafts to be considered, but also for consultation with our clients and affected community members to explain the contents of the drafts and to allow time for them to consider the contents of the drafts;
 - 9.8. On 31 March 2015, we addressed correspondence to NDM in which we referred to the 30 day commenting period afforded to stakeholders and requested that NDM send out a notification to stakeholders confirming the date by which submissions on the drafts should be submitted.
 - 9.9. On 7 April 2015, a list of questions on the draft AQMP and the draft by-laws was sent by email to Abdul Ebrahim of EScience and Jenny Hall of Environmental Counsel CC. Mpho Nembiliwi and Vusi Mahlangu of NDM were copied in the email, attached hereto as annexure A. To date we have not received any responses to the questions listed in and attached to this email.
 - 9.10. Further emails were sent to Mpho Nembiliwi and Vusi Mahlangu of NDM on 7 April 2015, 10 April 2015 and 21 April 2015, all requesting confirmation of the deadline for the submission of comments and/or requesting an extension of time within which to submit such comments.
 - 9.11. There were also numerous attempts, during this period, by the CER to contact NDM telephonically to obtain confirmation of the date for the submission of comments. No such formal confirmation was received. Owing to factors that include those set out above, it has proved impossible to obtain comprehensive instructions from clients or technical expert input for purposes of commenting on two

⁴ Page 87 National Framework.

extensive documents by 28 April 2015 (30 days calculated from 26 March 2015). In the aforementioned email of 21 April 2015, CER requested that its clients be afforded until 11 May 2015 to submit comments on the draft AQMP and draft by-laws;

9.12. During telephone discussions between Vusi Mahlangu and Nicole Löser of the CER and Robyn Hugo of the CER on 22 and 23 April 2015 respectively, Mr Mahlangu was unable to confirm the date for the submission of comments, but undertook to revert.

9.13. On 28 April 2015 (the deadline for the submission of comments), in a telephone discussion between Robyn Hugo and Vusi Mahlangu, Mr Mahlangu advised that:

9.13.1. NDM was willing to accept our submissions on the draft documents on 29 April 2015 (one day after the deadline);

9.13.2. NDM intends to publish further drafts of the AQMP and by-laws for comment, on 30 April 2015 – these drafts will apparently address the submissions made herein, in annexures B and C referred to below;

9.13.3. Stakeholders will have 21 days from 30 April 2015 to submit comments on the new draft AQMP and by-laws;

9.13.4. There will be a public meeting on 12 May 2015 to discuss the draft AQM and by-laws; and

9.13.5. They intend to publish the final drafts of the AQMP and by-laws by end of May 2015.

9.14. We reiterate that the process of developing an AQMP and by-laws are fundamental to improving air quality in the area. As such, we anticipate that there will be fair and reasonable opportunities to comment on additional drafts of these documents. Our clients and other stakeholders have been waiting, in particular, for the AQMP – which is required by legislation - and is important for meeting the HPA objectives and constitutional rights.

10. It is submitted that, since we were only advised on 28 April 2015 that the deadline for comment would be extended and only by one day; and given: that the draft AQMP and draft by-laws are currently still very much in a draft format; that various issues are left open for consideration in the drafts; the limited period of time afforded for the making of submissions; and our inability to consult meaningfully with our clients and technical experts on the drafts during this short period of time allocated, our comments and submissions hereunder are preliminary and should not be construed as a complete record of our clients' views on the draft AQMP and draft by-laws. Our clients' rights in this regard remain fully reserved.

11. We hereby make submissions on the draft AQMP and the draft by-laws for your consideration. Our submissions on the draft AQMP are attached hereto as annexure B, while our submissions on the draft by-laws are attached as annexure C, for your ease of reference. The relevant background information concerning the draft AQMP and draft by-laws is contained in this letter, and will not be repeated in the relevant annexures, which contain solely our clients' preliminary submissions on the draft AQMP and draft by-laws respectively.

12. Please be advised that any failure by us to make submissions on certain aspects of the draft AQMP and draft by-laws should not be construed as an acceptance of those provisions and we reserve our clients' rights to make further submissions and/or to amend any submissions made hereunder at a later stage; including once the drafts are published for comment.

13. Our clients value their entitlement to be involved in this process of developing a meaningful, useful and binding AQMP and by-laws to contribute to achieving improved air quality within the NDM and consequently the HPA.

14. We trust that you will give due consideration to the above submissions and we look forward to making further submissions on the draft AQMP and draft by-laws further on in the process.

15. Should you require more information regarding any aspect of the submissions made in the annexures, please let us know.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS

per:

Robyn Hugo

Attorney & Programme Head: Pollution and Climate Change

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Nicole Loser

From: Nicole Loser
Sent: 07 April 2015 01:53 PM
To: 'abdul@escience.co.za'; 'jhall@envirocounsel.co.za'
Cc: 'nembilwim@nkangaladm.gov.za'; 'mahlangumv@nkangaladm.gov.za'; Sylvia Kamanja; Robyn Hugo; Melissa Fourie
Subject: Nkangala Draft AQMP and Bylaws - Questions
Attachments: CER Questions - NDM Draft AQMP and Bylaws.docx

Dear Abdul and Jenny

I refer to the meeting at the offices of Nkangala District Municipality on 26 March 2015 - at which myself and Sylvia, from the CER, were present - and to the draft air quality management plan (AQMP) and air quality by-laws which were discussed during the meeting.

We have a few questions on both draft documents. While some of them were raised during the meeting, you'll recall that the process was quite rushed, and so many of our questions were not responded to adequately, or addressed at all in some instances.

Below, and attached in Word format, is a table of our questions for your record and consideration. These may perhaps be of some assistance as you continue to work on the draft AQMP and by-laws, as they highlight some of the main areas of concern that have, thus far, come to our attention.

REFERENCE IN DRAFT AQMP	QUESTION
1.	We have been waiting for the draft air quality management plan (AQMP) and bylaws for a while – it is important for meeting the objectives of the Highveld Priority Area air quality management plan (HPA AQMP) and constitutional rights. We trust that there will be fair and reasonable opportunities for full comment on both documents. What is the process that will be followed in finalising and adopting the AQMP and what are the timelines? How many commenting opportunities will there be and when will the AQMP be published for comment?
2.	Is Nkangala District Municipality (NDM) able to comment on whether any steps have been/are being/will be taken to have regulations passed for the implementation of the HPA AQMP and/or the NDM AQMP?
3.	How does NDM plan to enforce the AQMP? How will noncompliance be addressed? Will provision be made for environmental management inspectors (EMIs) in the AQMP, is there a plan to train or designate EMIs to assist with air quality compliance and enforcement?
4.	It appears that the AQMP implementation plan is taken almost directly from the HPA AQMP and that the activities and indicators for the AQMP objectives are vague – will the implementation plan be amended to include a more tangible enforcement and monitoring strategy, specific to the NDM and specifying, for example, enforcement targets; how regularly monitoring will be done and by whom; where monitoring results will be made available; and what will be done in events of noncompliance?
5.	What is the integrity of data being relied upon? How do NDM propose to deal with gaps in information, for instance, in circumstances where no data is available or the data is unreliable? Have any health impact studies been conducted?

6.		Does NDM plan on giving public access to AELs, compliance/emission reports, external audits, minutes of meetings, presentations and any other records relevant to assessing air quality in the NDM and if so, how will these be made available?
7.	S7, page 79	The objectives in the AQMP Overall Objectives and Goals differ from those of the HPA AQMP – mainly in that goals set for 2017 in the NDM AQMP are in fact goals for 2015 in terms of the HPA AQMP – the goals of the NDM AQMP therefore contradict the goals of the HPA AQMP. How does NDM plan to address this inconsistency?
8.	S3.6, page 28	The AQMP states that " <i>Baseline output to be used to update section on Air pollution and health in the NDM</i> " at what stage is the baseline assessment at and when will the AQMP be updated to reflect the findings?
9.	S3.3, page 20	It is noted that no ambient monitoring is undertaken in the Dr JS Moroka, Thembisile, eMakhazeni and Victor Khanye Local Municipalities – why is this? Are any steps being taken to address this and by when? How will/does this affect the baseline assessment and the update thereof?
10.	S3.7, page 33	It is not clear from the AQMP whether the appointment of an air quality officer (AQO) has already been done for NDM. Is Vusi Mahlangu the AQO? Are there AQOs already appointed in the other local municipalities within NDM? If not, what is the strategy and envisaged timeframe for the appointment of APOs in these local municipalities?
11.	S3.8, page 35	How does NDM propose to deal with the extensive vacancies at office? Is it able to adequately fulfil its functions and will it be able to fulfil the functions of the AQMP with this limited capacity?
12.	Page 37	Does the NDM plan to incorporate the recommendations and interventions proposed by the 'Status Quo Report for Assessment of the Requirements for Municipalities and Provinces to Fully Undertake Air Quality Functions in 2014' which is referred to on page 37 of the AQMP, namely to make air quality part of the municipal manager or mayor's scorecard; to make air quality an auditable function; to recruit experienced scientists and engineers for AEL processing? We have not had sight of this report and also ask that a copy be made available.
13.	Table 4-1, S4.1, Page 38	With regard to the reference to " <i>Industrial</i> " under the 'Source Category' heading, why are the industries grouped in this way and not named individually? Surely NDM is aware of all the industries within its jurisdiction and their emission contributions? Why are the individual industry percentage contributions not reflected in the AQMP? This would give a better sense of which are the worst emitters in NDM and is important for the objectives of the AQMP, rather than simply grouping all industrial emission sources into one broad category.
14.	Table 4-1, S4.1, Page 38	Why is there no data for mine haul roads, open cast mining, agricultural dust, windblown dust and traffic? Dust is a big problem (all dust mine haul roads and dust from moving vehicles unrelated to mining – around power stations for instance). The dust regulations don't seem to deal appropriately with the dust issues. How does the AQMP plan to address the problem of dust in NDM?
15.	S8.2, point 12, page 99	Reference is made to " <i>Quarterly meetings with communities</i> " - who will run and oversee this process? Provision should be made in the AQMP for sufficient advance notice to be given to stakeholders of these meetings, to allow for adequate preparation. The notice should include an agenda for comment; and copies of all documents to be discussed/presented at the meeting. The AQMP should also provide for draft minutes to be timeously circulated for comment after the meeting.
16.	S8.2, point 5, page 86	Reference is made to a " <i>training guideline document</i> " to identify skills training needs for the AQMP, which apparently has been developed and a skills gap analysis has been conducted – please provide more details on this document

		and analysis and kindly make a copy available.
17.	S8.2, point 6, page 87	With regard to the plans to develop an AQM implementation plan and budget to give effect to the adopted NDM AQMP and include in IDP/ EIP – this is referenced as a short term goal. Is a date envisaged by when this will be done? What is the expected budget?
18.	S8.2, point 9, page 90	With regard to the goal to <i>"Develop monitoring station purchase and operation guideline, including capacity development activities"</i> – have any steps been taken yet to achieve this? More details would be appreciated.
19.	S8.2, point 10, page 91	Reference is made to plans to establish a Standing Committee with governance stakeholders to assess and report on progress with the NDM AQMP implementation. According to the AQMP 'Indicator' column, this committee has already been established. Please provide more details on how it is constituted, the work done by it and the meetings held; who is on the committee; and is there a community/civil society representative or is it only government officials? Is this effectively an implementation task team? How is this aligned to the broader HPA AQMP implementation plan?
20.	S8.2, point 1, page 100	The implementation of the strategy for dense low income settlements is set as an objective and <i>"requires that planning of dense low income settlements considers the objectives of the strategy"</i> – note that this is still a draft strategy and has not yet been published. Have any steps been taken by NDM to push for adoption of the strategy?
21.	S8.2, point 2, page 104	With regard to the goal to communicate air quality information with all stakeholders, a quoted activity is <i>"establishing a community forum/fora (NGOs, CBOs and FBOs) to address stakeholder education, awareness and capacity building"</i> – the AQMP states that these stakeholder forums have been established. Please furnish more details on this – how will this process be conducted; are there any quorum requirements; how many NGO/CBO representatives will be required to be present at the forum; will provision be made for the calling of meetings, notification of participants?
22.	S9.1, page 112	The AQMP states that monitoring will be done by NDM and working groups within a timeframe of 6 months. Will this be every 6 months? Who will make up the working groups?
23.	S9.2 pg 112	Evaluation is divided into two sections, which comprise an internal evaluation of the final AQMP, and an on-going evaluation, which addresses implementation outcomes. Who will be responsible for the internal evaluation and the ongoing evaluation? How regularly will this be done? Against what standards? Is there a review and how will this be done? Please provide more details.

REFERENCE IN DRAFT BYLAWS	QUESTION
1.	Provision must be made for an adequate opportunity for public comment. Will there be another draft of these Bylaws published? When is it envisaged that these will be published?
2.	Why has no provision been made for public participation in respect of authorisations applied for and granted, or standards published, in terms of these bylaws in accordance with chapter 4 of the Municipal Systems Act?
3. S23 – Authorisation Procedures	Can we assume that all references to <i>"authorisations required by the Municipality"</i> are authorisations in addition to AELs which municipalities are responsible to administer? There needs to be more clarity on this. We suggest amending section 23 to clarify the position with regard to AELs and the responsibility of NDM as the licensing authority.
4. S19 - Noise	Why has noise pollution management been omitted?
5. S9 – Small	Why do the bylaws only deal with small boilers and not fuel burning

	Boilers	equipment in general? Is it not possible that the scope could be narrowed down too far by only dealing with boilers?
6.	S9 and s11	Why has no provision been made for monitoring and sampling by owners of property and/or persons in control of premises in respect of controlled emitters such as small boilers and/or dust emitting activities?
7.	S5 – Emission Standards	With regard to the standards to be set in schedule 1, is it envisaged that these will be based on national standards? Is it likely that stricter standards will be set given that NDM falls within HPA? What standards are envisaged?
8.	S11 – Dust Control	We submit that the measures imposed by the dust control regulations are inadequate for the effective regulation of dust particularly within the NDM. We suggest that the bylaws include more strict and detailed regulation or at least a requirement that control measures must seek to bring dust in line with ambient air quality standards.
9.	S24 - Appeals	What is the effect of a decision pending appeal? NEMA suspends the decision – is it the same in this instance? Does this apply to decisions on AELs? It should be made clear that AEL decisions are excluded from this appeal process if this is the case.
10.		Could provision be made for administrative fines?

In the meantime, we are working on our comments on both draft documents and will be sure to send these to you when we submit them to the Nkangala District Municipality.

Feel free to contact me if you have any queries.

Thanks and kind regards.

Nicole Löser
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SUBMISSIONS ON THE DRAFT NKANGALA AIR QUALITY MANAGEMENT PLAN, APRIL 2015

Introduction

1. Section 15 of the National Environmental Management: Air Quality Act¹ (AQA) and paragraph 5.4.6.7 of the National Framework for Air Quality Management² require each municipality to include an air quality management plan (AQMP) in its integrated development plan (IDP) as contemplated in Chapter 5 of the Municipal Systems Act.³
2. Nkangala District Municipality (NDM), which is in the Highveld Priority Area (HPA), is in the process of developing this AQMP and invited comments from stakeholders on the first draft of the NDM AQMP.

Overview

3. Given that this is a first draft of the AQMP, our submissions focus on highlighting gaps in the document as it currently stands and propose some amendments/changes. We reiterate that these submissions are only made on a preliminary basis and may be supplemented and/or amended once we have had an opportunity to receive feedback from technical experts and instructions from our clients.
4. As pointed out above, the AQA requires each municipality to integrate its AQMP into the IDP. It is crucial to ensure that the AQMP is effectively funded. Our clients would like clarification on where the NDM is in their IDP cycle; when the draft AQMP will be available for comment; when the NDM AQMP will be included in the IDP; and when it will be reviewed.

Air Pollution and Health in the NDM

5. One of the objectives of the AQA is to give effect to section 24(b) of the Constitution in order to enhance the quality of ambient air for the sake of ensuring an environment that is not harmful to health or well-being of the people. The Framework therefore recognises that air quality management and planning should take into account the impacts of air quality on human health and the interventions developed should be aimed primarily at minimising the effects of air pollution on the health of the people.⁴
6. Paragraph 3.6⁵ in the draft AQMP highlights broadly the health risk estimates that are directly relevant to the HPA, and we note that there has been no discussion on the effects of outdoor combustion and indoor pollution

¹ Act 39 of 2004

² GG 37078 of 29 November 2013

³ Act 32 of 2000

⁴ The 2012 National Framework for Air Quality Management of 29 November 2013 at paragraph 5.4.6.10

⁵ DraftV1 NDM AQMP of 20 March 2015 p29

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on population morbidity - the health impacts on those who remain alive and are affected by air pollution.⁶ Our clients are of the opinion that this should be included in this paragraph and in the estimates of the overall burden of disease.

Air Quality Management Capacity in the NDM

7. This section of the report is very important as it highlights the critical shortage of technical and financial resources allocated to AQM functions in NDM.⁷ It is clear from Table 3-11⁸ that there is a significant shortage of skilled personnel to effectively undertake air quality functions in the municipality. Therefore, the first objective of the AQMP should be to fully populate the AQM structure within NDM. Without the requisite technical and financial resources, it will be almost impossible to implement this AQMP and to achieve the overall goals of improving air quality in the NDM and broader HPA.

General Comments

8. In identifying emission sources, the Draft AQMP delves into emission reduction areas - like mining,⁹ transport¹⁰ and agriculture¹¹ - which require collaboration with departments such as Mineral Resources, Transport, and Agriculture Forestry and Fisheries, in order to ensure that the correct processes are followed and properly implemented. This collaboration should be addressed.
9. The proper alignment of the draft AQMP with HPA AQMP goals should be another priority, particularly because the outlined goals and objectives¹² in the NDM draft AQMP are inconsistent and unaligned with the goals of the HPA AQMP. For instance, goal 1 of the HPA AQMP - to be achieved by 2015 - requires that organisational capacity in government is optimised to efficiently maintain, monitor and enforce compliance with ambient air quality standards. Goal 1 of the draft NDM AQMP is exactly the same, only that the date set for the realisation of this goal is 2018. This is counter-intuitive and potentially results in confusion regarding mandates and even a duplication of work already set out by the HPA AQMP. This further compounds the existing financial and technical capacity constraints. Therefore, our clients are of the opinion that the HPA AQMP should be properly and strategically aligned to avoid duplication and a waste of already scarce resources. It is essential that organisational government capacity be urgently optimised. This cannot be delayed until 2018.
10. Our clients point out that Chapter 6 on technology review appears not to add value to the process insofar as it is a textbook application for which there is no application to the AQMP. Hence, an assessment should be conducted on an industry-by-industry basis aimed at assessing the actual versus the desired outcomes and consequently using this information to get the industries to commit to a refurbishment/retrofit schedule to ensure that atmospheric emissions from their facilities are as limited as possible.
11. One of the goals identified in the draft AQMP is the implementation of clean technologies and processes.¹³ An indicator is that the AEL should include clean technology recommendations. In our clients' opinion, clean technologies should be a requirement and not a recommendation.

⁶ A 2014 study by groundWork highlights the disease burden that communities in the HPA are carrying due to pollution from Eskom's electricity generation. The study showed Eskom to be the primary driver of outdoor pollution health risk in the area. There is no doubt that these Eskom emissions combined with emissions from other industries in the HPA, and in NDM in particular, would have dire consequences on the health of those living in the affected area. This study is available here: <http://www.groundwork.org.za/specialreports/groundWork%20The%20Health%20Impact%20of%20Coal%20final%2020%20May%202014.pdf>

⁷ DraftV1 NDM AQMP of 20 March 2015 paragraph 3.8 p36

⁸ DraftV1 NDM AQMP, of 20 March 2015 p36

⁹ Mining emissions reduction goals as stipulated in draftV1 NDM AQMP paragraph 7.1.3 p83

¹⁰ Transport emission reduction goals as stipulated in draftV1 NDM AQMP paragraph 7.1.4 p83

¹¹ Veld burning emission reduction goals in paragraphs at 7.15 p83 and paragraph 7.1.7 in draftV1 NDM AQMP at p84

¹² DraftV1 NDM AQMP at pages 84 - 105

¹³ DraftV1 NDM AQMP 2020, goal 2, objective 9, p99

12. One of the other identified objectives for increasing awareness and knowledge on air quality awareness, is to communicate air quality information with all stakeholders, which will involve, amongst others, that air quality information is easily accessible to all stakeholders.¹⁴ Our client's request that the draft AQMP specifically provides for access to all air quality information including access to: atmospheric emission licences (AELs), compliance/emission reports, external audits, minutes of meetings; and all documents pertaining to the HPA process i.e terms of reference, minutes, presentations, agendas etc. It is important for this information to be made easily accessible to all stakeholders and interested and affected parties as it assists in the monitoring of industries in the municipality. Timous access to documents relating to the HPA is essential to facilitate the smooth running of this process and the eventual realisation of the aim to improve ambient air quality so that it no longer exceeds the ambient air quality standards.

13. Various gaps have been identified in the draft AQMP and these are highlighted below.

Information gaps identified in the draft AQMP

14. Our clients noted that there was no enforcement strategy outlined for the enforcement of the identified goals and emission reduction plans, and nor was there any mention of how monitoring will be done or whether there was a plan to train and designate environmental management inspectors (EMIs) on the NDM AQMP.

15. We noted that there was no ambient monitoring being undertaken in Dr JS Moroka, Thembisile, eMakhzeni and Victor Kanye local municipalities; it is not explained why this was not taking place nor what steps are being taken to address this and how this will affect the baseline assessment.¹⁵

16. Our clients are particularly concerned about the regulation of industrial dust emissions, particularly because the existing National Dust Control Regulations¹⁶ are not effective in ensuring that dust levels are regulated to a level that is not harmful to human health. In terms of the 2020 goal,¹⁷ we note that the draft AQMP states that it aims to equitably reduce industrial emissions to achieve compliance with ambient air quality standards and dust fallout limit values. It is not clear what the term 'equitably' is intended to mean in this context, and this should be clarified. The draft AQMP goes on to identify various objectives to achieve this, including ensuring that fugitive emissions are minimised and emissions from dust generating activities are reduced. We propose that the draft AQMP (this should also be reflected in the by-law¹⁸) implements a much stricter regimen of regulating dust control, which is more aligned with the ambient air quality standards, and aimed at minimising air pollution and the health effects on people.

17. The draft AQMP states that quarterly consultative meetings will be conducted with communities, in order to ensure that a line of communication exists between industry and communities.¹⁹ It is not clear how this process will be run and by whom, and how this is aligned to the HPA implementation processes meetings. It is important that this be clarified to avoid duplication and stakeholder fatigue.

18. It is unclear how NDM plans to incorporate the recommendations and interventions proposed by the status quo report for assessment of the requirements for municipalities and provinces to fully undertake air quality functions conducted in 2014, which is referred to in the draft AQMP.²⁰ Our clients would like to reiterate that capacity

¹⁴ DraftV1 NDM AQMP, 2020 goal 5, objective 1, p106

¹⁵ DraftV1 NDM AQMP, paragraph 3.3 p21

¹⁶ GG36974 of 1 November 2013

¹⁷ DraftV1 NDM AQMP, p93

¹⁸ s11 of the AQA states that: If national or provincial standards have been established in terms of section 9 or 10 (AQA) for any particular substance or mixture of substances, a municipality may not alter any such national or provincial standards except by establishing stricter standards for the municipality or any part of the municipality

¹⁹ DraftV1 NDM AQMP, paragraph 12 p101

²⁰ DraftV1 NDM AQMP, paragraph 3.8 p37

development should be the first priority for the NDM, if the objectives of this draft AQMP are to be achieved. They also propose that: air quality be made a part of the municipal manager or mayor's scorecard; that air quality be made an auditable function; that a budget be set aside to recruit experienced scientists and engineers for AEL processing and air quality management; and for the provision of air quality monitoring and enforcement.

19. The draft AQMP states that, by 2020, air quality in all low income settlements is in full compliance with ambient air quality standards²¹ and talks about promoting the objectives of the strategy in dense low income settlements in the NDM.²² It is not clear whether this strategy has been finalised and whether this will be finalised by the time that the AQMP is finalised. Further, the AQMP talks about coordinating Basa njengo Magogo (BnM) rollout in NDM PM10 "hot spot" settlements. It should be clarified whether BnM has been accepted and adopted as the strategic tool for the reduction of domestic coal burning in dense low income settlements. In this regard, our instructions are that our clients have consistently argued that BnM does not have the desired impact and there is an urgent need for improved housing and clean energy provision.
20. NDM plans to establish a Standing Committee with governance stakeholders to assess and report on progress with the NDM AQMP implementation.²³ This committee has apparently been established and is operational. However, it is not clear whether this is related to the HPA AQMP Implementation Task Team or how it is aligned with the HPA processes. Once again, our clients reiterate that duplication should be avoided as much as possible and resources expended to ensure the proper implementation and enforcement of the emission reduction plans.
21. Paragraph 9.2 of the draft AQMP divides evaluation into two sections, which comprise an internal evaluation of the final AQMP, and on ongoing evaluation, which addresses implementation outcomes.²⁴ It is not clear who will be responsible for the internal and the ongoing evaluations, nor how regularly these will be done. This should be clarified in the next draft of the NDM AQMP.

Conclusion

22. As stated above, the Draft AQMP is still in draft form and various gaps have been identified and highlighted above. Our clients reiterate that this is an important document and it should be accorded the attention and time that it deserves.
23. As stated above, NDM should prioritise getting the necessary technical and financial capacity for the effective implementation of the AQMP. Additionally, the draft AQMP should be aligned to the HPA AQMP to the extent possible and should also be integrated into the IDP as soon as is possible (following a reasonable public participation process) so as to ensure that there is a budget for the implementation of the NDM AQMP.
24. Our clients are of the view that, to the extent possible, the NDM should be using the time and resources invested on this AQMP to implement existing goals and emission reduction plans, as required by the HPA AQMP.
25. In the circumstances, it is submitted that the gaps and concerns identified above be addressed before the next draft of the document is made available to stakeholders.

²¹ DraftV1 NDM AQMP 2020 goal 3, p102

²² DraftV1 NDM AQMP 2020 goal 3, objective 1 p102

²³ DraftV1 NDM AQMP 2018 goal, objective 10 p93

²⁴ DraftV1 NDM AQMP, paragraph 9 p114



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

"ANNEXURE C"

SUBMISSIONS ON THE DRAFT AIR QUALITY MANAGEMENT BY-LAW

Introduction

1. We note that, during the meeting, we were advised that Jenny Hall of Environmental Counsel CC had been instructed by NDM to draft the by-laws. In this regard, Jenny Hall advised that:
 - 1.1. The draft by-laws are still very much in the draft stages;
 - 1.2. The draft by-laws are based largely upon the Model Air Quality Management By-Law for the Easy Adoption and Adaptation by Municipalities GN 579 of 2 July 2010 ("the model by-laws");
 - 1.3. The intention is for the by-laws only to cover issues not already regulated by provincial or national legislation, in order to avoid duplication of provisions of national or provincial legislation in the by-laws; and
 - 1.4. The main justification for seeking to avoid duplication of existing legislation was in order to avoid any necessary amendments of the by-laws in the event that the national or provincial legislation cited or referred to in the by-laws is amended.
2. Our general remarks and recommendations, followed by our submissions and comments on each of the sections of the draft by-laws appear below.
3. Where additions or inclusions to certain existing provisions are suggested, these are underlined. We again reiterate that we reserve the right to make additional or other submissions, once the by-laws are more complete and we have consulted with our clients and received input from technical experts.

General Comments

4. There are numerous issues which are unclear from the draft by-laws and which require clarification and confirmation before meaningful submissions can be made on these.
5. It is recommended that the draft by-laws draw a clear distinction between authorisations referred to in the various provisions of the draft by-laws and other authorisations such as atmospheric emission licences (AELs) in respect of which municipalities, in terms of AQA, are, in general, the licensing authorities. It is important that there be clarity as far as NDM's powers and duties in respect of AELs on one hand, and authorisations in terms of the draft by-laws on the other, are concerned.
6. Similarly, it is recommended that the draft by-laws make clear the powers and duties of NDM in respect of compliance notices (such as removal or abatement notices) in terms of the draft by-laws, and the powers and duties of environmental management inspectors who operate at a local level in terms of section 31C(1)(a)(iii) NEMA, to issue directives and compliance notices in terms of sections 31G to 31L of NEMA.

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Submissions on Specific Provisions of the Draft By-laws

7. Definitions (Chapter 1, section 1)

7.1. It is recommended that all definitions contained in the draft by-laws, including the definition of 'environment', align with the definitions of any of the same terms that appear in AQA and that all definitions reiterate AQA's aim to enhance the quality of ambient air to secure an environmental not harmful to health or wellbeing.

7.2. It appears that the following definitions remain "to be checked":

7.2.1. 'control measure'; and

7.2.2. 'dark smoke'

7.3. It is submitted that we are not in a position to provide meaningful comment on the above definitions. Given the short period of time afforded to us to make submissions hereon, we have not had an opportunity to obtain the necessary expert scientific input on this. We reserve the right to comment on the above definitions at a later stage.

7.4. We note that the definition of 'dust' has been taken from and aligned with the National Dust Control Regulations, 2013 ("Dust Control Regulations"). Our clients have numerous objections to the Dust Control Regulations, which we don't intend to address herein. Nevertheless, we submit that the definition of 'dust' in this section and in the Dust Control Regulations is too narrow and would result in the exclusion of particulate matter in ambient air that is most likely to cause public health effects. It is generally accepted that the smaller the aerodynamic diameter of a solid particle, the more potently it will impact human health by penetrating deeper into the lung than larger particles. Exposure to particles with an aerodynamic diameter of less than 10 microns, called PM10, is known to give rise to serious human health effects, including premature mortality. Very fine particulate matter (PM2.5), which makes up dust and which is regulated in the National Ambient Air Quality Standards for Particulate Matter with Aerodynamic Diameter less than 2.5 Micron metres, as well as ultrafine particulate matter (PM1.0) cause disproportionately high rates of human health effects. It is therefore recommended that 'dust' be defined as, "solid particulate matter released into or carried in the air by natural forces, by any fuel-burning, combustion, process equipment or device, construction work, mechanical or industrial processes".

7.5. We submit that the draft by-laws should include definitions for the following terms which appear in the draft by-laws, and which, for purposes of certainty, require further clarification:

7.5.1. 'landscaping activities' as referred to in section 11(3)(a), should be defined to specify the nature and scope of the activities envisaged, bearing in mind that the relevant provision deals with the control of dust emissions; and

7.5.2. 'recreational outdoor activities' as referred to in section 12(3), should be defined to specify the nature and scope of the activities envisaged, for example, "camp fires and fires used solely for outdoor cooking and other recreational purposes, or for ceremonial occasions, or for human warmth and comfort, and which do not create a nuisance and do not use synthetic materials or refuse for fuel".

7.6. We recommend that the paragraphs, following the definition of 'vehicle', be numbered to avoid confusion and that the penultimate paragraph of section 1 be restructured to read as follows:

"Neither-

(a) *a reference to a duty to consult specific persons or authorities;*

(b) *nor the absence of any reference in these by-laws to a duty to consult or give a hearing*

exempts the official or authority exercising a power or performing a function from the duty to act fairly”

8. Objectives (Chapter 1, section 2)

8.1. It is recommended that the reference to “public health” in section 2(1)(b) be replaced with reference to “human health”.

9. Application (Chapter 1, section 3)

9.1. It is recommended that section 3 be amended to provide the following:

“These By-laws apply within the jurisdiction of the Municipality and must be read with any applicable provisions of the –

- (a) National Environmental Management Act, 1998 and relevant regulations and notices published thereunder;
- (b) National Environmental Management: Air Quality Act, 2004 and relevant regulations and notices published thereunder;
- (c) National Environmental Management: Waste Act, 2008 and relevant regulations and notices published thereunder;
- (d) National Environmental Management: Biodiversity Act, 2004 and relevant regulations and notices published thereunder;
- (e) National Environmental Management: Protected Areas Act, 2003 and relevant regulations and notices published thereunder;
- (f) National Water Act, 1998 and relevant regulations and notices published thereunder;
- (g) Mineral and Petroleum Resources Development Act, 2002 and relevant regulations and notices published thereunder;
- (h) National Veld and Forest Fire Act, 1998 and relevant regulations and notices published thereunder;
- (i) The National Forests Act, 1998 and relevant regulations and notices published thereunder;
- (j) Local Government Municipal Systems Act, 2000 and relevant regulations and notices published thereunder;
- (k) The Environment Conservation Act, 1989;
- (l) the National Framework; and
- (m) any other applicable provisions of relevant national, provincial or local legislation.”

9.2. It is noted in a ‘Discussion Point’ in this section that “*the rules of interpretation regarding conflicts between local, provincial and national legislation are contained in the Constitution. However, if the Municipality wants to draw the reader’s attention to that fact, an additional clause can be inserted in the section above.*” We recommend that the additional Constitutional clause referred to be inserted for purposes of certainty.

9.3. We recommend further that this section be aligned with and confirm sections 6 and 11(2) of AQA. Section 6 addresses any conflicts between AQA and subordinate legislation issued in terms of AQA and other Acts of Parliament, provincial legislation and municipal by-laws. Section 11(2) regulates conflicts between emission standards set by national, provincial and local authorities. See paragraph 11 below.

10. Duty of Care (Chapter 1)

10.1. We note that this provision has been taken from NEMA section 28, but that it confers powers on the municipality, as opposed to the Director General and provincial head of department as provided for in NEMA.

10.2. We have no objections to the inclusion of this provision, but note that there are various grammatical errors in the wording and inconsistencies with the paragraph numbering and number references, which need to be addressed.

11. Local Emission Standards (Chapter 2, Part 1)

11.1. We refer to section 11(2) AQA which provides that: "*If national or provincial standards have been established in terms of section 9 or 10 for any particular substance or mixture of substances, a municipality may not alter any such national or provincial standards except by establishing stricter standards for the municipality or any part of the municipality.*" In terms of this provision, it is necessary that any local standards to be set by NDM be stricter than the national minimum emission standards (GN 893 of 2013) and any other emission standards promulgated nationally or provincially.

11.2. It is suggested that the following subsection be included in section 6: "*If national or provincial standards have been established in terms of AQA for any particular substance or mixture of substances, such national or provincial standards will enjoy preference, unless the Council established stricter standards for the municipality or any part of the municipality.*"

11.3. In light of the fact that NDM falls within the HPA and due to the prevailing health and environmental concerns resulting from the air pollution in the area, it is important that the NDM take steps to set local standards without delay.

11.4. It is recommended that section 5 include lists of criteria and factors to be considered by NDM in the setting of local emission standards. The following serves as an example:

"The Council must apply the following criteria when identifying and prioritising the substances in ambient air that presents threat to public health to the environment:

(a) the possibility, severity and frequency of effects, with regard to human health and the environment as a whole, with irreversible effects being of special concern;

(b) widespread and high concentration of the substance in the atmosphere;

(c) potential environmental transformation and metabolic alterations of the substance, as these changes may lead to the production of chemicals with greater toxicity or introduce other uncertainties;

(d) persistence in the environment, particularly if the substance is not biodegradable and able to accumulate in humans, the environment or food chain;

(e) the impact of the substance taking the following factors into consideration: (i) size of the exposed population, living resources or ecosystems; (ii) the existence of particularly sensitive receptors in the zone concerned; and

(f) substances that are regulated by international convention.

The Council may, when developing the local emissions standards:

(a) identify the critical factors for public health impacts;

(b) identify sensitive sub- populations;

(c) review available databases for public health status

(d) review available databases for ambient air quality information; and

(e) review and assess international guidelines and standards.

The Council may take the following factors into consideration in setting local emission standards:

(a) Health, safety and environmental protection objectives;

(b) Analytical methodology;

(c) Technical feasibility;

(d) Monitoring capacity; and

(e) Socio-economic consequences."

11.5. We recommend that section 5(2) be amended to read as follows: "*Any emission standards that are adopted must be published in the Provincial Gazette, and the relevant community/interested parties must*

be given an opportunity to comment thereon in terms of the processes envisaged by Chapter 4 of the Local Government: Municipal Systems Act, 2000."

11.6. Our clients reserve their rights to comment on the draft list of substances contained in schedule 1.

12. Air Pollution Control Zones (Chapter 2, Part 2)

12.1. Insofar as NDM is empowered to declare 'air pollution control zone' as suggested in the draft by-laws, the by-laws should make clear what the status is of such zones and the obligations therein – as compared to declaration of the HPA. It is recommended that the draft by-laws provide for NDM to, from time to time and by notice in the provincial gazette, take certain steps, such as:

- 12.1.1. prohibiting or restricting the emission of one or more air pollutants from all premises or certain premises;
- 12.1.2. prohibiting or restricting the combustion of certain types of fuel;
- 12.1.3. declaring smokeless zones, in which smoke with an obscuration of more than 10% may not be emitted;
- 12.1.4. prescribing different requirements in an air pollution control zone relating to air quality in respect of:
 - 12.3.4.1. different geographical portions;
 - 12.3.4.2. specified premises;
 - 12.3.4.3. classes of premises; or
 - 12.3.4.4. premises used for specified purposes.

13. Specific Regulatory Measures (Chapter 2, part 3)

13.1. It is recommended that the provisions falling in part 3 make additional provision for monitoring and sampling steps to be taken by owners as conditions of any authorisations granted under these draft by-laws, as and where appropriate.

13.2. Small boilers (section 9)

13.2.1. Please be advised that neither AQA nor the Declaration of a Small Boiler as a Controlled Emitter and Establishment of Minimum Emission Standards (GN 831 of 2013) ("the declaration") make provision for authorisations, as envisaged in this section, to be required. The declaration simply requires that emissions from small boilers comply with the standards set out in the declaration and that the reporting requirements to the air quality officer in terms of the declaration be complied with.

13.2.2. To the extent that NDM is empowered to require authorisations for small boilers, it is recommended that the following sub section (unnumbered) in section 9 be amended as indicated:

An authorisation issued in terms of this section (1) above must specify—

- (a) *the product name and model of the small boiler;*
- (b) *the premises in respect of which it is issued;*
- (c) *the person to whom it is issued;*
- (d) *the period for which the authorisation is issued;*
- (e) *the periods at which the authorisation may be reviewed;*
- (f) *the maximum allowed amount, volume, emission rate or concentration of pollutants that may be discharged in the atmosphere , which amount must coincide with or be stricter than national standards imposed in GN 831 of 2013;*
- (g) *point source emission measurement and reporting requirements;*

- (h) any other operating requirements relating to atmospheric discharges, including non-point source or fugitive emissions;
- (i) penalties for non-compliance;
- (j) greenhouse gas emission measurement and reporting requirements, where relevant;
- (k) any decommissioning requirements and the date by which the small boiler must cease to operate; and
- (l) any other matters which in the discretion of the air quality officer, are necessary for the protection or enforcement of air quality.

13.2.3. It is recommended that the following subsection be included in section 9: "The Municipality must review the authorisation issued in terms of this section at intervals specified in the authorisation, or when circumstances demand that a review is necessary."

13.2.4. It is further recommended that section 10 'Transitional arrangements in respect of existing boilers' be incorporated as a subsection of section 9.

13.2.5. We refer to the drafting note with question, "*Do municipalities require authorisations for existing small boilers? If it is required an additional provision regarding the process will be inserted*".

- 13.3.5.1. We assume that the question is whether NDM would be required to require authorisation from owners/occupiers of premises where a boiler already exists, although it is not entirely clear.
- 13.3.5.2. In terms of the declaration, existing small boilers are required to comply with existing small boiler emission standards within 5 years from the date of publication (s6). In order for air quality officers to exercise their compliance-monitoring and enforcement duties in terms of the declaration in respect of existing boilers, we propose that authorisation for existing boilers should be required.
- 13.3.5.3. It is therefore recommended that a provision requiring authorisation for existing small boilers be included.

13.3. Dust emissions (section 11)

13.3.1. We submit that the National Dust Control Regulations, 2013 ("the dust control regulations") are flawed and fail to effectively address dust emissions on a national level, in that, *inter alia*, the dustfall standard with a maximum dustfall rate averaged only over 30 days, as provided for in the dust control regulations, is an inadequate measure for controlling dust emissions. The regulation of dust emissions should be based on ambient air quality monitoring for PM10 and PM 2.5 rather than dustfall rates, as it is the concentration of dust in air that people breathe, not how much dust falls to the ground that constitutes a public health risk. This is simply one example of why our clients regard the dust control regulations as inadequate. We are instructed also to address the national government in relation to the flaws in the dust control regulations.

13.3.2. It is therefore recommended that the draft by-laws incorporate stricter measures, distinct from the dust control regulations, for the regulation and management of dust emissions within the NDM.

13.3.3. It is recommended that section 11 be amended as follows:

- 13.4.3.1. subsection 3(a) be amended to read "*landscaping activities by or on behalf of a person at their place of residence*";
- 13.4.3.2. in relation to subsection 3(c), it is submitted that the allotted vehicle limit of 500 vehicles per day is excessive. We recommend that this number be reduced substantially,

and recommend further that reference to 'vehicles' in this provision exclude trucks or any heavy duty vehicles in order for this section to be of any effect in regulating dust emission;

- 13.4.3.3. Note that it has been recommended above that "*landscaping activities*" be defined so as to provide further clarity on the scope and application of the exemption in subsection 11(3)(a).

13.4. Emissions caused by open burning (section 12)

13.4.1. It is recommended that sections 13 and 14, referred to below, be incorporated in this provision. Namely that this section should confirm the prohibition on the burning of industrial waste, garden waste or domestic waste without the requisite licence or permit in terms of the National Environmental Management: Waste Act, 2008 or the Environment Conservation Act, 1989 and the absolute prohibition on the burning of any toxic waste or industrial by-product, tyres, rubber products, cables and other non-vegetative material in open spaces. It should be confirmed that no authorisation can be granted in such instances.

13.4.2. Note that it has been recommended above that "*recreational outdoor activities*" be defined so as to provide further clarity on the scope and application of the exemption in subsection 12(3). See paragraph 7.5.2 above.

13.4.3. It is recommended further that open burning of vegetative material as authorised in terms of these by-laws only be permitted to take place after 8h00, and no additional material can be added to the existing burning material after 18h00.

13.4.4. It is recommended that provision be made in this section for instances where NDM intends to conduct open burning activities and the steps that will be taken by it to notify stakeholders prior to any proposed burning.

13.5. Emissions caused by the burning of industrial waste, domestic waste and garden waste (section 13)

13.5.1. It is recommended that this provision be retained, despite the fact that it merely confirms the already existing legal position, as it is, nevertheless, important for the sake of clarity. We recommend that this provision be incorporated into section 12.

13.6. Emissions caused by tyre burning and burning of rubber products and cables in open spaces (section 14)

13.6.1. The drafting note "*Discussion point: should this section not be combined with the open burning section above as one of the instances in which no permission may be given?*" refers. We agree and recommend that section 14 be included as a subsection in section 12.

13.7. Sugar cane burning emissions (section 15)

13.7.1. It is recommended that the title of this section be changed to "*Agricultural and plantation burning emissions*" which would read as follows:

13.7.2. It is further recommended that the following subsections, or something similar, be inserted:

"(1) Any person who burns agricultural land or plantations must, in addition to the requirements of the National Veld and Forest Fire Act, 1998 (Act 101 of 1998), comply with the following control measures:

(a) obtain the prior written authorisation of the Council, which authorisation may be granted by the Council with conditions; and
(b) notify in writing the owners and occupiers of all adjacent properties, including communities within 150 metres of where the burning will take place, providing: (i) the details of the proposed area to be burned; (ii) the reason for the agricultural or plantation burning; (iii) the date and approximate time of the agricultural or plantation burning; (iv) in the event of inclement weather conditions, an alternative date or dates on which the agricultural or plantation burning may occur; (v) the right of owners, occupiers of adjacent properties and communities within 150 metres to lodge written objections to the proposed agricultural or plantation burning with the municipality within 7 days of being notified; and
(c) pay an administrative fee that may be levied by the municipality.

(2) The Council may not authorise agricultural or plantation burning:

(a) unless it is satisfied that the requirements set out in subsection (1) have been complied with; and
(b) where a warning notice in terms of section 10(1) of the National Veld and Forest Act, 1998 (Act No. 101 of 1998) has been published for the region."

13.8. Sandblasting emissions (section 16)

- 13.8.1. The 'discussion point' "Would the provisions of this section not be covered by the section on dust? If so, can it be omitted?" refers. It is recommended that this provision be included as a subsection in the 'dust emissions' section.
- 13.8.2. If this section is to remain in its current location, we suggest that it be numbered correctly, namely section 18 and not section 16, and that the numbering of the following sections be adjusted accordingly.

13.9. Emissions that cause a nuisance (section 18)

- 13.9.1. It is recommended that this section be amended to read, "*Notwithstanding any other provisions of these By-laws, no occupier, or owner, or person in control of premises may allow emissions from those premises to cause an offence.*"
- 13.9.2. It is recommended that the above provision be amended further to give clarity on whether the 'offence' referred to implies a criminal offence or simply an offensive disturbance.

13.10. Noise pollution management (section 19)

- 13.10.1. "It is noted that the provisions regarding noise pollution management contained in the model by-laws have been omitted." Please provide clarity as to why this has been done. We recommend that these provisions be included.

14. Compliance and Enforcement (Chapter 3)

14.1. Administrative enforcement

- 14.1.1. The following drafting note refers, "*The model by-laws contain different administrative enforcement mechanisms. The provisions are copied below for ease of reference. It is suggested that these mechanisms be contained in the compliance and enforcement chapter and that consideration be given to the feasibility of devising one 'compliance notice' that can be used for all situations.*" It is recommended that the 'repair notice', 'removal notice' and 'abatement notice' be replaced with one general compliance notice to fulfil the intended function of all three notices.

14.1.2. It is recommended that the provisions for the compliance notice state something along the lines of the following:

"An authorised person must issue a notice compelling compliance with a provision of these by-laws if there are reasonable grounds for believing that a person has failed/is failing to comply with a provision of these by-laws. Such notice may direct a person to take certain steps within a specified period of time, including but not limited to the following:

- (a) to abate any nuisance within a period specified in the notice;*
- (b) to take all necessary steps to prevent a recurrence of a nuisance;*
- (c) to remove an item from premises;*
- (d) to repair a vehicle and take it to a place identified in the notice for re-testing;*
- (e) to pay an administrative fine of a specified amount to the Municipality; and*
- (f) to comply with any other conditions contained in the notice."*

14.1.3. It is recommended further that this suggested provision set out clearly what information the compliance notice should contain, namely the full name, identity number and address of the person to whom it is addressed, the date by which the directed steps must be taken, and the consequences of non-compliance.

14.1.4. In the interests of aligning such a compliance notice with the compliance notice provided for in section 31L NEMA, a provision should be included stating that the notice must set out:

- 14.1.4.1. The details of the conduct constituting non-compliance with the by-laws;
- 14.1.4.2. any steps the person must take and the period within which those steps must be taken;
- 14.1.4.3. anything which the person may not do, and the period during which the person may not do it; and
- 14.1.4.4. the procedure to be followed in lodging an objection to the compliance notice.

14.1.5. As mentioned above, it is important that the by-laws clearly set out the distinction between compliance notices issued under section 31L NEMA and the compliance notice issued in terms of the draft by-laws and the roles of EMIs and other municipal officials in this regard.

14.2. Offences (section 20)

14.2.1. It is recommended that the 'Offences' section be amended to read as follows:

"A person is guilty of an offence if that person –

(a) contravenes any section contained in Part 3 of these By-laws;

(b) refuses or fails to comply with a directive or compliance notice issued in terms of these By-laws;
..."

14.3. Penalties (section 21)

14.3.1. Please be advised that the Adjustment of Fines Act, 1991 applies when no fine is prescribed.

14.3.2. It is recommended further that the following subsection be included in the 'penalties' provision, in keeping with section 34 of NEMA, alternatively that this provision at least make mention of section 34 NEMA:

"In addition to imposing a fine or imprisonment, a court may order any person convicted of an offence under these by-laws: (a) to remedy the harm caused; (b) to pay damages for harm caused to

another person or to property, which order shall have the force and effect of a civil judgment; and (c) to install and operate at the person's own expense air pollution measuring equipment."

14.3.3. The 'Discussion point' "*what fines should be imposed and should there be different fines for different offences? Reference can be had to the provisions of the MSA and PFMA*" refers. It is recommended that provision be made in these by-laws for the issuing of administrative fines by NDM in addition to the criminal fines provided for in section 21.

14.4. Compliance Monitoring and Enforcement (section 22)

14.4.1. It is recommended that section 22(1) be amended to read, "*the Municipality must appoint as many authorised persons as it considers necessary for compliance monitoring and enforcement with this By-law.*"

14.4.2. It is noted that EMIs and air quality officers (AQOs) are recognised as 'authorised persons' for purposes of compliance monitoring and enforcement of the draft by-laws in terms of section 22(2) and that the definition of 'authorised person' in section 1 of the by-laws includes any member of the municipal police service and any peace officer. Please advise who else might act as an 'authorised person' in terms of these by-laws and what the appointment requirements and processes are.

15. General Matters (Chapter 4)

15.1. Appeals (section 24)

15.1.1. It is recommended that the 'Appeals' section (section 24) provide further clarity on the steps to be taken in the appeal procedure and the relevant appeal authorities, bearing in mind that, in terms of section 62 of the Local Government Municipal Systems Act, 2000, the appeal authority differs depending on the decision-maker.

15.1.2. It is recommended further that clarity be given on the status on a decision pending an appeal and on the position where the appellant is a third party (a stakeholder for instance) and not the applicant, as this provision appears to envisage only instances where the applicant would be the appellant. It seems from this provision that a decision would remain in force pending appeal. We request clarity and recommend that this section provide for the suspension of a decision pending appeal, as does section 43 of NEMA.

15.2. Exemptions (section 25)

15.2.1. It is recommended that provision be made for instances in which exemptions cannot apply, for example, in cases of severe harm or risk of irreparable harm or detriment to human health and/or the environment. In addition, no exemptions should be provided from the requirement to obtain authorisations in terms of the by-laws.

15.2.2. It is further recommended that subsection 25(4) be amended to read as follows:

"The Municipality may not grant an exemption under subsection (1) until the Municipality has - taken measures to ensure that all persons whose rights may be significantly detrimentally affected by the granting of the exemption, including but not limited to all interested and affected parties, including adjacent land owners or occupiers, are aware of the application for exemption and how to obtain a copy of it..."

Conclusion

16. As indicated above and in the cover letter, the draft by-laws are still very much in draft form. The gaps and concerns highlighted above should be addressed before the next draft of the document is made available to stakeholders.