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Advancing Environmental Rights in South Africa

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Your ref: Jongikhaya Witi
Our ref: CER/RH
7 July 2016

Dear Mr Witi

PRELIMINARY COMMENTS ON THE DRAFT NATIONAL GREENHOUSE GAS EMISSION REPORTING REGULATIONS

1. We refer to the Draft National Greenhouse Gas Emission Reporting Regulations ("the draft Regulations") published on 7 June 2016 in Government Notice 336 (Government Gazette 40054).

2. We address you on behalf of groundwork (gW), Earthlife Africa, Johannesburg (ELA), the Vaal Environmental Justice Alliance (VEJA), the Highveld Environmental Justice Network (HEJN), and the South Durban Community Environmental Alliance (SDCEA) ("our clients").[1]

[1] groundWork is a non-profit environmental justice service and developmental organisation aimed at improving the quality of Life of vulnerable people in South Africa (and increasingly in Southern Africa), through assisting civil society to have a greater impact on environmental governance. groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices. ELA is an environmental justice organisation which promotes sustainable solutions to South Africa's challenges, without exploiting people or degrading the environment. VEJA is a democratic alliance of empowered civil society organisations in the Vaal Triangle, who have the knowledge, expertise and mandate to represent the determination of the communities in the area to control and eliminate emissions to air and water that are harmful to these communities and to the environment. HEJN is an organisation comprising of 14 community-based organisations who share a common vision. Their objectives are: to be a platform of solidarity for local communities against environmental injustices relevant to the Highveld area and/or its people; to educate, organise and mobilise with organisations and the public on environmental justice issues relevant to the Highveld; and to respond to grassroots concerns on environmental injustices relevant to the Highveld. SDCEA is an environmental justice organisation based in south Durban. It is made up of 16 affiliate organisations, and it has been active since its formation in 1996. It is considered successful for many reasons, one of which is that it is a vocal

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Background

3. On 4 August 2015, we, on behalf of gW, ELA and SDCEA, submitted comments ('the 2015 comments") on a previous version of the draft Regulations, the Draft National Greenhouse Gas Reporting Regulations published on 5 June 2015 under Government Notice 541, Government Gazette 38857 ("the 2015 draft Regulations"). A copy of the 2015 comments is attached marked "**A**" for your ease of reference.

4. In the 2015 comments, we made reference to South Africa's National Climate Change Policy (NCCRP) embodied in the National Climate Change Response White Paper.

5. We point out that since the 2015 comments, South Africa submitted its Intended Nationally Determined Contribution (INDC)[2] and participated in the negotiations of the 21st annual Conference of the Parties (COP21) in Paris in December 2015, which culminated in the adoption of an international climate change agreement ("the Paris Agreement").

6. The INDC, now the Nationally Determined Contribution (NDC) outlines South Africa's international commitments in the context of the Paris Agreement and states, *inter alia*, that:
   6.1. the timeframes communicated are 2025 to 2030 … during this time South Africa's emissions will be in a range between 398 and 614 Mt CO2–eq, as defined in national policy. This is the benchmark against which the efficacy of mitigation actions will be measured;
   6.2. South Africa's greenhouse gas (GHG) emissions will peak between 2020 and 2025, plateau for approximately a decade, and decline in absolute terms thereafter;
   6.3. increased disaggregation over time will be enabled through the introduction of mandatory GHG reporting domestically, no later than 2016, with regular reporting to the United Nations Framework Convention on Climate Change (UNFCCC) as multi-laterally agreed; and
   6.4. the current GHG inventory, consistent with the 2006 Intergovernmental Panel on Climate Change (IPCC) guideline reporting requirements, used global warming potential (GWP) values from the Third Assessment Report (TAR) and indicated that future inventories will use GWP values from Assessment Report 4.[3]

7. We note that the NDC proposes to introduce mandatory GHG reporting by the end of this year, 2016.[4] In order to meet these goals, and the other goals in the NDC, it is necessary that mechanisms be put into place without delay to enable South Africa to effectively reduce, and regularly report on, its GHG emissions.

8. Furthermore, GWP values are changing with the evolution of scientific knowledge. This could have significant impacts for relative GWP GHGs. It is, therefore, important that South Africa's GHG emission index should use the most recent values in accordance with the most current international practice.

9. Notably, the Paris Agreement places obligations on parties to:
   9.1. every 5 years, [5] prepare, communicate and maintain successive NDCs that each party intends to achieve. Parties shall pursue domestic mitigation measures with the aim of achieving the objectives of such

and vigilant grouping in terms of lobbying, reporting and researching industrial incidents and accidents in this area. It contributes to the struggle against environmental racism for environmental justice and environmental health.

[2] Available at http://www4.unfccc.int/submissions/INDC/Published%20Documents/South%20Africa/1/South%20Africa.pdf.
[3] At p 7 of the INDC.
[4] See http://www4.unfccc.int/submissions/INDC/Published%20Documents/South%20Africa/1/South%20Africa.pdf at p 7
[5] Article 4(9).

contributions,[6] and each successive NDC will represent a progression beyond (own emphasis) the party's then current NDC and reflect its highest possible ambition;[7]

9.2. in communicating their NDCs, provide the information necessary for clarity, transparency and understanding;[8]

9.3. account for their NDCs. In accounting for anthropogenic emissions and removals corresponding to their NDCs, parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting;[9]

9.4. regularly provide information such as a national inventory report of anthropogenic emissions by sources and removals by sinks of GHGs, prepared using good practice methodologies accepted by the IPCC and agreed upon by the COP serving as the meeting of the Parties to the Paris Agreement, and information necessary to track progress made in implementing and achieving their NDCs under Article 4;[10] and

9.5. the COP serving as the meeting of the Parties to the Paris Agreement shall periodically take stock of the implementation of the Paris Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake"). It shall do so in a comprehensive and facilitative manner. The first global stocktake will be undertaken in 2023, with another every 5 years thereafter.[11]

10. It is clear that South Africa has now stepped into the realm of binding GHG emission monitoring and reporting obligations. Therefore, it is vital that the National Atmospheric Emissions Inventory System (NAEIS), in particular the GHG reporting system, is comprehensive, efficient and able to meet the requirements of the NDC and Paris Agreement.

11. We also refer to our comments on the draft Declaration of Greenhouse Gases as Priority Air Pollutants ("draft Declaration") and the draft National Pollution Prevention Plans Regulations ("draft PPP Regulations") of Government Gazette no 39578. Both were published on 8 January 2016 and our comments – attached hereto marked "**B**" – were submitted on 8 February 2016. In these comments, we made general recommendations for South Africa's GHG emissions regulatory regime, which currently includes the draft Regulations as well as the draft PPP Regulations and the draft Declaration.[12] We emphasised the need for: unification of the data submitted to the NAEIS; consistency of emission calculation and reporting methodologies; and the need for all information to be publicly available on NAEIS, in each of South Africa's draft GHG regulations.

12. We, on behalf of our clients, again emphasised the need for uniformity and for strict regulation of GHGs in South Africa in our letter to the Minister of 5 April 2016. A copy of this letter is attached marked "**C**". In this letter, we pointed out that South Africa, as a water-scarce country, will be particularly affected by the impacts of climate change – with the current ongoing drought being one example.

13. In the abovementioned letter, we pointed out that the necessity to take steps to mitigate against climate change and reduce GHG emissions is of particular relevance for South Africa. And although the NDC acknowledges that "*the adverse effects of climate change have been a stark reality for South Africa for many years*",[13] South Africa's INDC proposal was criticised as being inadequate to meet the overall objective of limiting global warming to 2°C.[14]

[6] Article 4(2).
[7] Article 4(3).
[8] Article 4(8).
[9] Article 4(13).
[10] Article 13(7).
[11] Article 14(1) and (2).
[12] See paragraphs 22 to 30 of the submissions of 8 February 2016.
[13] At page 3 of the INDC.
[14] See http://climateactiontracker.org/indcs.html.

14. Flowing from this, we point out that a significant portion of South Africa's population is vulnerable to the impacts of climate change, given the high levels of poverty and lack of adequate access to shelter, health services and drinking water, for example.

15. It is therefore necessary that South Africa set stricter GHG mitigation goals, through its NDCs to be submitted under the Paris Agreement, and that every necessary measure and precaution be taken to ensure that we meet the obligations of the Paris Agreement and take steps to mitigate the impacts of climate change in South Africa.

General Submissions on the Draft Regulations

16. In these comments, we make reference to the United States (US) Greenhouse Gas Reporting Program (GHGRP) pursuant to the Clean Air Act, section 114, promulgated by the Environmental Protection Agency (EPA) on 30 October 2009. The GHGRP aims to make facility-level GHG reporting data publicly available online.[15] In many respects, this serves as a good example of a national GHG reporting system. We also refer to an analysis on the draft Regulations prepared by Earthjustice, a nonprofit environmental law organisation in the US,[16] which provides a comparison of the draft Regulations with the GHGRP, and makes recommendations for amendments to the draft Regulations. The analysis is attached marked "**D**". We strongly recommend that consideration be given to the GHGRP, where referenced below, and to Annexure D in finalising the draft Regulations.

17. We and our clients welcome some of the changes to the draft Regulations as improvements from the 2015 draft Regulations, such as the more detailed registration provisions in draft regulation 5.

18. However, we and our clients have deep concerns over the draft Regulations as a whole and their practical implementation.

19. Our primary concern is that the **draft Regulations place the burden of determining the appropriate methodology, namely the relevant tier and emission factor to be applied, on the Category A data provider, when in fact this responsibility should rest with the competent authority**. The duty of the data provider should simply be to submit the relevant data to the competent authority – this would include operational and activity data – to enable the competent authority to ascertain which methodology to apply, and the competent authority must estimate the GHG emissions of a data provider. This would ensure a consistent and fair assessment of GHG emissions of all data providers.

20. The draft Regulations refer to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories ("the IPCC Guidelines") as guidance for data providers for the calculation of their GHG emissions. In fact these are guidelines intended to assist parties (member states) to the UNFCCC in fulfilling their commitments under the UNFCCC, for the purpose of estimating national inventories of GHGs.[17] The IPCC Guidelines are not appropriate for persons to estimate their own GHG emissions for purposes of reporting under the NAEIS.
    20.1. Firstly, expecting any Category A data provider to have the knowledge and/or necessary resources at their disposal to comprehend and apply the methodologies under the draft Regulations as they currently stand, would be unjust, and unreasonably burdensome.
    20.2. Secondly, this allows too much flexibility to the data provider to apply a methodology and/or an emission factor of their selection, which may not be appropriate or suitable, and which would leave too much room for inaccuracies and inconsistencies of methodologies applied.
    20.3. This also increases the administrative burden on the competent authority in that they are required to check and approve the appropriateness of particular methodologies to be applied by data providers and whether the methodologies are being applied properly. This would not be necessary if the competent

[15] See https://www.epa.gov/ghgreporting.
[16] See p 1 Annexure D.
[17] See http://www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/0_Overview/V0_1_Overview.pdf at p 4.

authority simply calculated the emissions itself, upon receipt of the necessary input data from the data providers.

21. We are also concerned that the Technical Guidelines for Monitoring, Reporting, Verification and Validation of Greenhouse Gas Emissions by Industry ("the Technical Guidelines") - defined in draft regulation 1 as "*the reporting methodology … on the National Department of Environmental Affairs website (www.environment.gov.za)"* - which are relied on and referenced in the draft Regulations, were not published with the draft Regulations. The 2015 draft Regulations were also published without the Technical Guidelines, which were referenced therein. In the 2015 comments we stated that we were unable to make any submissions on the appropriateness or adequacy of the calculation methods in the Technical Guidelines, as they were not available, and we reserved our clients' rights to submit comments on the Technical Guidelines once they were made available.

22. We submit that, given the volume of the Technical Guidelines, the technical nature of their content, and the importance of the Technical Guidelines in the implementation of the draft Regulations, the Technical Guidelines should have been published with the draft Regulations and more time should have been allocated to the public to comment on the draft Regulations as well as the Technical Guidelines. We regard this as an irregularity for administrative justice, contrary to the Promotion of Administrative Justice Act, 2000 (PAJA), and our clients' rights to make submissions on the Technical Guidelines at a later stage are reserved.

23. The Technical Guidelines are based on the IPCC Guidelines and are therefore, as submitted above, not appropriate guidelines for data providers, but rather for the competent authority, which should be responsible for calculating GHG emission estimates for purposes of compiling the National GHG Inventory.

24. Based on the above submission, **it is our recommendation that the draft Regulations be redrafted so as to do away with the data provider's obligation to determine their own tier method and to calculate their own GHG emissions. Instead, the draft Regulations should make very clear what activity data is required and should be provided by a data provider, including the level of detail at facility level, and within a facility**. In this instance tiers, and key categories (see below at paragraphs 42 and 43) can play a role, with identified key categories or tier 3 data providers being required to submit more detailed activity and process data than, for example, a tier 1 data provider.

25. The activity data to be provided by the data provider must include *inter alia*: operations information; fuel used in a reporting year; and details of facility layout and delineation of facility boundaries. More generally, the procedures for calculating GHG emissions, as detailed in the IPPC Guidelines, provide precise guidance on the activity data required as inputs to the accurate calculation of emissions for each category of activities. The draft Regulations should specifically require data providers to provide this data. As the data pertains to the operations of the relevant data providers, it should be possible for the data provider to submit such data to the competent authority with minimal effort or burden.

26. The draft Regulations must require that the actual estimate of GHG emissions should then be done by the competent authority using default emissions factors and other default data, or country-specific values if available.

27. Our clients would have no objection if, in terms of the draft Regulations, the data provider may conduct their own GHG emission calculations and estimate their GHG emissions, using the published methodology, but the only obligation of the data provider must be to report the required activity data to the competent authority, and the competent authority must bear the responsibility of:
    27.1. determining the appropriate methodology for calculation of the emissions of the data provider; and
    27.2. calculating the GHG emissions of each data provider.

28. We are also concerned that a third category of data providers – importers, wholesalers and distributors of fuels, substitutes for ozone depleting chemicals used in the air conditioning and other industries – has not been provided

for in the draft Regulations. We refer to our submission below where we recommend that a Category C data provider be added to the draft Regulations.

29. Given the above submissions and the fact that no opportunity has been afforded for commenting on the Technical Guidelines, we request an opportunity to submit further comment and recommendations for the reworking of the draft Regulations and Technical Guidelines at a later stage. Our clients' rights in this regard are fully reserved.

30. We further point out that certain provisions of the draft Regulations are worded ambiguously and unclearly - this will have problematic consequences for the interpretation and application of the draft Regulations if not amended.

31. In our 2015 comments, we stated that the 2015 draft Regulations, in order to establish a GHG reporting system which: effectively informs policy formulation; enables South Africa to meet its international obligations and conform with international best practice as described in the 2006 IPCC Guidelines;[18] enables the identification of mitigation opportunities and actions; enables the tracking of its emissions trajectory; and establishes and maintains a national GHG inventory,[19] must provide for, *inter alia*:
    31.1. clear and unambiguous identification of key categories which have a significant influence on South Africa's total GHG emissions inventory and therefore are prioritised within the inventory system;
    31.2. detailed and compulsory reporting of both relevant activity data and the GHG emissions of a data provider at facility level, including: information on the GHG emissions per facility, relevant facility layout and operations information, and monitoring and measuring methods;
    31.3. a reporting system that provides a pragmatic means of building an inventory that is consistent, comparable, complete, accurate and transparent – and that this is maintained in a manner that improves inventory quality over time; and
    31.4. public disclosure of the GHG data submitted in terms of the Draft Regulations.

32. Our 2015 comments then went on to address, in further detail, the importance for the 2015 draft Regulations to provide for:
    32.1. identification of key categories;
    32.2. detailed reporting; and
    32.3. public disclosure.

33. These, in our clients' view, remain fundamental requirements for South Africa's GHG reporting system, and we stand by the above submissions in the 2015 comments, insofar as they are still applicable to the draft Regulations.

34. In these comments we wish to emphasise the need for the draft Regulations to provide for:
    34.1. the calculation of GHG emissions to be the obligation of the competent authority;
    34.2. detailed reporting of activity data by a data provider in operational control; and
    34.3. public disclosure of data submitted by data providers under the draft Regulations

35. We also make further additional submissions and recommendations of amendments to the draft Regulations below.

Calculation of GHG Emissions by the Competent Authority

36. We refer to our detailed submissions above at paragraphs 19 to 27, which explain the need for simplification of the obligations of a Category A data provider under the draft Regulations. As submitted above, the data provider must simply be required to make the necessary data available to the competent authority. The competent authority must then, using the Technical Guidelines and the IPCC Guidelines - as intended for use by member states of the UNFCCC - determine which tier methodology to apply to a particular data provider and must calculate the GHG emissions of that data provider.

[18] 2006 IPCC Guidelines available at http://www.ipcc-nggip.iges.or.jp/public/2006gl.

[19] Referenced from draft Regulation 2, which sets out the purpose and objectives of the Regulations.

37. The current flexibility afforded to data providers to determine which methodology to apply, and the obligation on the Category A data providers to calculate their own GHG emissions estimates, are problematic and inappropriate. This will give rise to difficulties of implementation and enforcement of the Regulations.

Detailed Reporting by a Data Provider in Operational Control

38. We previously, in the 2015 comments, referred to the GHGRP, which also requires that each regulated facility provides its total GHG emissions as well as ancillary information that allow the United States EPA to quantify, characterise, and verify the emission reports.[20]

39. We see that the draft Regulations now make express provision for transparent reporting. Transparency, in terms of the draft Regulations means that *"the assumptions and methodologies used as a basis for reporting should be clearly explained*." While we do not necessarily agree with the proposed definition of "transparency", it speaks to the need for ancillary information to be provided to the competent authority. This requires more than just a detailed explanation, but rather actual supporting data to support verification of all submissions.

40. We stand by the submission in our 2015 comments that the keeping and maintaining of a credible GHG emission inventory is impossible without accurate, timeous and complete input data. Any GHG emission information that is not disclosed by industries will curtail proper decision-making and GHG emission calculations, irrespective of who makes the calculations.

41. It is therefore fundamental that the draft Regulations specifically provide for:
    41.1. more detailed reporting obligations for certain key categories of data providers;
    41.2. a non-exhaustive list of the activity data that must be reported;
    41.3. detailed reporting of activity data per individual facility; and
    41.4. the reporting obligations to be on the person in operational control of a particular facility.

Key Categories of Data Providers

42. We stand by our 2015 comments calling for the identification of key categories. The IPCC Guidelines define a key category as "*one that is prioritised within the national inventory system because its estimate has a significant influence on a country's total inventory of greenhouse gases*".[21] The identification of key categories in a national inventory system is important as it "*enables limited resources available for preparing inventories to be prioritised. It is good practice to focus the available resources for the improvement in data and methods onto categories identified as key*",[22] and, "*it is good practice to give additional attention to key categories with respect to quality assurance and quality control*".[23] The IPCC Guidelines suggest a methodology for selecting key categories of emission source sectors, for example, ranking each category by absolute emission levels and selecting the categories that cumulatively account for 95% of total emissions as key categories.

43. As the draft Regulations do not make provision for key categories of data providers, we repeat the recommendation for the draft Regulations to recognise key categories of Category A data providers, which will be required to undertake more detailed reporting and submit more comprehensive activity data to the competent authority. We point out that detailed reporting for large emitters is particularly fundamental for verification and validation purposes.

Activity Data to be Reported

44. We submit that in order for the draft Regulations to be clear and comprehensive, they should expressly list and clarify the details and data that must be reported, these will include:

[20] The general content of the required annual GHG report is outlined in 40 C.F.R. § 98.3(c).
[21] S4.1.1, Chapter 4, Volume 1 IPCC Guidelines.
[22] S4.1.2, Chapter 4, Volume 1 IPCC Guidelines.
[23] S4.1.2, Chapter 4, Volume 1 IPCC Guidelines.

44.1. relevant facility layout and delineation of facility boundaries;
44.2. a facility map;
44.3. operations information; and
44.4. activity data specific to the IPPC category and code in a reporting year.

45. Such a list should, however, not be exhaustive or exclusive, and should serve more as a means to provide certainty and clarification on the type of activity data that should be reported by a data provider.

Reporting per Individual Facility

46. The USA GHGRP requires facility-level reporting by direct-emitting facilities.[24]

47. In order for reporting under the draft Regulations to be sufficiently detailed, it is essential that reporting be for a specific individual facility. Emissions are easier to track over time if they are tied to physical sources, rather than corporate entities that can change over time. In addition, facility-level data would be necessary to implement other GHG regulatory initiatives, such as pollution prevention plans under the draft PPP Regulations.

48. We note that draft regulation 7 makes reference to facilities in the context of reporting; however, we point out that the wording of draft regulation 7 is disconcertingly ambiguous and unclear, in that it requires only Category A data providers applying a tier 1 or tier 2 method – no reference is made to tier 3 - to submit GHG emissions and activity data for all their facilities, and in accordance with the data and format requirements specified in Annexure 3. The problems with draft regulation 7 are twofold:
    48.1. it could be interpreted to allow simply for one total, aggregated report by a data provider for all facilities combined, as opposed to separate reports for each individual facility - which is what is required. In addition, Annexure 3, which should set out the format requirements for reporting under draft regulation 7, makes no provision for the individual facilities of a data provider; and
    48.2. without any reference to "tier 3" in draft regulation 7, the implication would be that reporting would not be required by data providers applying tier 3 methods. This is arbitrary and unjustifiable.

    Our concerns are set out in more detail below at paragraph 100.

Reporting by Person in Operational Control

49. Finally we submit that the reporting obligations under these Regulations must rest with the person in operational control of a facility. We make further submissions on this below at paragraph 89.

Public Disclosure

50. In the 2015 comments, we referred to the right of access to environmental information, which is guaranteed by section 32 of the Constitution and by the Promotion of Access to Information Act, 2000 (PAIA). We noted that this right will be severely limited if GHG data in the NAEIS are not publicly accessible. The importance of public participation in environmental decision-making, and particularly in air quality management matters, is recognised in both the National Environmental Management Act, 1998 (NEMA) and the National Environmental Management: Air Quality Act, 2004 (AQA) as well as in international law and principles and conventions.[25]

51. We note that the draft Regulations have as their stated purpose, the introduction of a single national reporting system for the transparent reporting of GHG emissions.[26] We were, however, disappointed to see that the draft Regulations' definition of "transparency" does not make any provision for access to information by the public, which is one of the most fundamental bases for transparent reporting.

52. Our clients also note, with concern, that draft regulations 12 (Confidentiality of Information) and 14 (Publishing Data and Information), which place undue restrictions on the publication of NAEIS data, remain in place.

[24] See https://www.epa.gov/sites/production/files/2015-07/documents/ghgrp_methodology_factsheet.pdf.
[25] See paragraphs 26 to 34 of the 2015 comments.
[26] Draft regulation 2.

53. Without adequate transparency of NAEIS data in the public domain, the rights of access to information and administrative justice[27] will not be adequately realised by the draft Regulations.

54. Furthermore, the administrative burden on the competent authority, in having to respond to requests for information in terms of PAIA, and also in having to adequately monitor compliance without the support of civil society, will be increased.

55. Most GHG emission data that are made available under the USA GHGRP are made publicly available. The GHGRP website has, *inter alia*: an interactive website with mapping features to identify GHGRP facilities by location, name, industry type, and other criteria; a GHGRP Multi-Year Data Summary Spreadsheet, as well as a more detailed spreadsheet including reported emissions by greenhouse gas and process; and an Envirofacts page, which shows all publicly available data collected by the GHGRP in a searchable, downloadable format for facilities. This includes GHG data and much of the underlying data facilities used to determine GHG values and other reported data elements in 32 industry types.[28]

56. We also refer below to other jurisdictions where the default position, in relation to GHG information, is public disclosure. If such information can be made available in other jurisdictions, there is no reason why it should be regarded as confidential and prohibited from public disclosure in South Africa, especially where our Constitution and other relevant laws support access to information.

57. We now address the specific provisions of the draft Regulations.

<u>Submissions on Specific Provisions of the Draft Regulations</u>

58. We do not make submissions on every provision of the draft Regulations; only those in respect of which we have specific recommendations.

59. We point out that our primary recommendation for the draft Regulations is that they be amended in line with the above recommendations in paragraphs 19 to 27 and 34 to 58. However, in the event that these amendments will not be made, we have also made submissions on the draft Regulations as they stand.

60. Please note that, where recommendations for amendments, insertions or deletions to the Draft Regulations are made, the recommended additions are <u>underlined</u> and the recommended deletions are shown in [**bold and in brackets**].

Draft Regulation 1 - Definitions

61. We note that numerous definitions have been added and some definitions from the 2015 draft Regulations have been deleted.

Definition of "GHGs"

62. The draft regulations do not specify within the text itself what constitutes a GHG. They reference AQA for the definition of GHG. This information is central to the GHG reporting system and to the draft Regulations, and should not require additional research to find. In addition, the language in draft regulation 7(1) (Reporting Requirements) implies that reporting is required for the GHGs specified in Annexure 1. However, Annexure 1 lists only the emission sources, whereas the GHGs included must be found in AQA.

63. The preamble of EPA's GHGRP final rule specifies that "*The rule requires reporting of annual emissions of carbon dioxide (Co2), methane (CH4), nitrous oxide (N2O), sulfur hexafluoride (SF6), Hydrofluorocarbons (HFCs),*

[27] S 33 of the Constitution.

[28] See https://www.epa.gov/ghgreporting/ghg-reporting-program-data-sets.

perfluorocarbons (PFCs) and other fluorinated gases."[29] As submitted above, the calculation of the GHGs emitted should be the responsibility of the competent authority and not the data provider.

64. We note that the Technical Guidelines indicate that the draft Regulations require reporting of carbon dioxide, methane, and nitrous oxide, as well as fluorinated gases.[30] The definition of GHGs, which the draft Regulations reference in AQA, however, includes only carbon dioxide, methane, and nitrous oxide.[31] The draft Declaration recognises a broader list of GHGs. However, this Declaration is still a draft and more pertinently, it is not clear to what extent the GHGs to be declared would have to be reported under these draft Regulations.

65. The provision for a broader range of GHGs in the draft Regulations would be useful to facilitate verification and to support future analyses of GHG emissions, particularly if fluorinated gases become increasingly widely used as substitutes for ozone-depleting substances.[32] If the Department of Environmental Affairs ("the Department") does intend to monitor and regulate these gases – which we and our clients believe should be regulated - they should provide for fluorinated gases in the Regulations. We refer to our submissions below at paragraph 141 in this regard.

66. We recommend that the definition of GHG be included in regulation 1 and that the list of GHGs legally recognised in South Africa be regularly revised to remain in line with international best practice.

Definition of "competent authority"

67. In the 2015 comments, we noted the role played by metropolitan and district municipalities in the atmospheric emission licensing system under AQA[33] and that, as AEL-holders (which would include Category A data providers under the draft Regulations) are required, under AQA, to include relevant GHG reporting requirements in their AELs, and these reports would presumably be submitted and administered by the relevant municipalities as the licensing authorities in respect of the AELs, the relevant municipalities would be well-placed to perform many of the functions which the National Inventory Unit is currently solely mandated to perform under the draft Regulations.

68. We stand by our 2015 comments in this regard and again recommend that the draft Regulations be amended to include municipalities and air quality officers as competent authorities to assist the National Inventory Unit in the monitoring and verification of activity data reporting by the data providers in terms of the draft Regulations. This would also assist in alleviating some of the capacity constraints on the Department in implementing and monitoring compliance with these draft Regulations.

Definition of "data provider"

69. We recommend that the definition of data provider, read with draft regulation 4, be amended to confirm that it is the person in <u>operational control</u> of a particular facility who will be classified as data provider and responsible for the reporting and general obligations under these draft Regulations.

70. Furthermore, we recommend that this provision be amended to include "and" after subcategory (b), to state, "any person as classified in regulation 4 and shall include …(a) …; (b)…; <u>and</u> (c) …"

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[29] *Id.* at 56264.

[30] Technical Guidelines for Monitoring, Reporting and Verification of Greenhouse Gas Emissions by Industry, *Department of Environmental Affairs* (2016), p. 7. "The greenhouse gases covered by these guidelines are defined in the Regulations

[31] National Environmental Management: Air Quality Act, 2004, No. 39, Vol. 476, Cape Town 24 (February 2005), Chapter 1. This chapter specifies that "greenhouse gas" means "gaseous constituents of the atmosphere, both natural and anthropogenic, that emit and re-emit infrared radiation, and includes carbon dioxide, methane, and nitrous oxide."

[32] *See* Greenhouse Gas Inventory for South Africa 2000-2010, *Department of Environmental Affairs*, Figure 2.6.

[33] Metropolitan and district municipalities are charged with implementing the atmospheric emission licensing system under AQA and, in terms of s 36(1) they must perform the function of licensing authority set out in Chapter 5 of AQA. Section 43(1) in Chapter 5 of AQA stipulates that "*A provisional atmospheric emission licence and an atmospheric emission licence must specify— … (l) greenhouse gas emission measurement and reporting requirements*"

Definition of "direct emission measurement"

71. We note that, even though "direct emission measurement" has been defined, it does not appear anywhere in the draft Regulations". As such, it should be deleted from draft regulation 1.

Definition of "facility"

72. We are of the view that the current definition of "facility", namely, "*premises where activities identified in Annexure 1 are being undertaken*" would allow for ambiguities and uncertainty.

73. In the USA regulations' sector-specific requirements, a facility is defined as "*any physical property, plant, building, structure, source, or stationary equipment, located on one or more contiguous or adjacent properties, in actual physical contact or separated solely by a public roadway or other public right-of-way, and under common ownership or common control, that emits or may emit any GHG*."[34] This definition is more detailed than the one proposed by the draft Regulations, and we recommend that it be considered to supplement the current definition of "facility".

Definition of "installation"

74. It is our view that the inclusion of the word "installation" in the draft Regulations is unnecessary, as it is synonymous with "facility".

75. For the sake of clarity and consistency, this definition should be deleted and any reference to "installation" in the draft Regulations, for example at draft regulation 11(5), should be replaced with "facility". If the Department disagrees with this, we ask that clarification be given as to why two separate terms, namely "facility" and "installation", are considered necessary and that we be afforded an opportunity to comment on this distinction

Definition of "tier"

76. We note that the definition of "tier" has been changed from the 2015 draft Regulations. In the 2015 comments, it was our recommendation that the definition be amended to provide for key categories as described and detailed above. Instead of providing for "key categories", express provision is made for a tier 3 method as the most stringent form of reporting under the regulations read with the Technical Guidelines.

77. We refer to our submissions above regarding the need for the draft Regulations to be reworked to provide for only activity data reporting obligations for data providers, and for the application of methodologies and calculation of GHG emissions to be the responsibility of the competent authority.

78. We submit that the definition of "tier" must be amended to provide for the tier methods to be applied by the competent authority and we suggest that a definition of "key categories" be included to provide for key categories of data providers which must submit more detailed activity data than other data providers.

Definition of "transparency"

79. Transparency under the draft Regulations means that "*the assumptions and methodologies used as a basis for reporting should be clearly explained*", as discussed above. We recommend that this definition include provision for access to information by relevant stakeholders and the public.

80. At the very least, this definition should be amended to state that "…<u>the source of data and</u> *methodologies used a basis for reporting should be clearly explained <u>and capable of verification by supporting documentation</u>*".

[34] 40 C.F.R. 98, Subpart W, available at http://www.envcap.org/energy/caa/40CFRPart98SubpartWNov10.cfm (accessed July 1, 2016).

Draft Regulation 2 – Purpose of the Regulations

81. We note that this provision of the draft Regulations has improved significantly in that it now makes provision for the transparent reporting of greenhouse gas emissions, which will be used *inter alia* - "*(a) to inform policy formulation, implementation and legislation*".

82. We recommend that this provision be amended to provide for the transparent reporting of activity data by data providers and for the reporting of GHG emissions by the competent authority.

83. It is not clear from the current wording and punctuation what the "implementation" refers to. We suggest that sub-regulation 2(a) be reworded to state: "*to inform the formulation and implementation of policy and legislation*."

84. We also recommend that sub-regulation 2(c) be amended to "to [**establish and**] maintain and inform the National Greenhouse Gas Inventory."

85. As previously submitted, and in light of the fact that South Africa is now a signatory to the Paris Agreement, it is now even more important that the content of the draft Regulations be amended to enable South Africa to meet its obligations under the Paris Agreement.

Draft Regulation 3 – Application of Regulations

86. We note that this draft regulation has been amended and simplified, which is an improvement from the 2015 draft Regulations.

87. This draft regulation refers to categories of emission sources listed in Annexure 1 and a corresponding data provider as classified in regulation 4 of these Regulations. We submit that Annexure 1 must either be amended to include Category B data providers in the table, or the word "corresponding" must be removed from draft regulation 3.

Draft Regulation 4 – Classification of Emission Sources

88. As specified above, in our submissions on the definition of "data provider" it is fundamental, for the effective operation of these regulations and for certainty as to the entity responsible for reporting in terms of the draft Regulations that a Category A data provider is the person in operational control of a particular facility – and that the person with operational control is the responsible and accountable person, bearing the obligations bestowed on a Category A data provider under these draft Regulations. The rationale for this is that the data provider with activity data related to the operation over which it has control, is best placed to assume reporting accountability.

89. We note that draft regulation 4(1)(b) has been amended to broaden and amend the scope of the Category B data provider; it now includes "any organ of state, research institution or academic institution, which holds GHG emission data relevant for calculating greenhouse gas emissions relating to a category identified in table Annexure 1 (Category B Column) to these Regulations" (own emphasis for new addition to the draft regulation).

90. We note that the table in Annexure 1 makes no reference to Category B data providers, despite the fact that draft regulation 4(1)(b) refers to Annexure 1. This should be corrected.

91. We also recommend that a third category of data provider, Category C, be provided for in the draft Regulations. Category C data providers will include importers, wholesalers and distributors of fuels and other substances (such as substitutes for ozone depleting substances) of relevance to the calculation of total GHG emissions. Such persons should be required to report activity data under the draft Regulations as their activities and data can make a significant contribution to South Africa's national GHG Inventory.

Draft Regulation 5 – Registration and Annexure 2 to the Draft Regulations

92. This draft regulation has improved in that it now more clearly addresses the registration process and the information to be provided as part of the registration, as listed in Annexure 2 to the draft Regulations. We note

that draft regulation 5 purports to now expressly require registration of all facilities, and our clients welcome this addition.

93. However, we point out that in accordance with our submissions above regarding the need for only comprehensive activity data to be provided by the data provider, that Annexure 2 will need to be significantly amended and further details, such as clear delineations of the facility boundaries and operational data per facility, including process flow diagrams, must be required for registration.

94. We further point out that the wording of draft regulation 5(1) is unclear and appears to be incomplete. We suggest that this be corrected. While it is not clear what the sentence was intended to say, we expect that it should have read "A person classified as a data provider in regulation 4(1) Category A of the Regulations must register all facilities where activities listed in Annexure 1 exceed the threshold specified in Annexure 1, on the National Atmospheric Inventory System …".

95. Our clients welcome the requirement that a data provider must ensure that the registration details in the NAEIS are complete and are an accurate reflection of the IPCC emission sources at each facility, in terms of draft regulation 5(2).

Draft Regulation 7 – Reporting Requirements and Annexure 3

96. We note that the reporting provision now states that "*a Category A data provider who is applying tier 1 or tier 2 specified in Annexure 1 to these Regulations for all its facilities and in accordance with the data and format requirements specified in Annexure 3 to these Regulations for the preceding calendar year to the NAEIS by 30 April each year*".

97. We refer to our submissions above regarding the importance of detailed and facility-level reporting and our reference to the USA GHGRP.

98. We recommend that draft regulation 7 be redrafted completely so as to meet our recommendations above, namely detailed reporting on activity data only, by a data provider at facility-level.

99. In the event that draft regulation 7 is to remain as is, we point out that our concerns with this provision are the following, and, at the very least, these issues should be amended:
    99.1. No reference is made in draft regulation 7 to data providers applying tier 3 methods. While tier 3 may require the submission of different kinds of data to tiers 1 and 2, the implication of the absence of any reference to tier 3 at all is that data providers applying tier 3 methodologies are not obliged to report in terms of draft regulation 7. It cannot be the intention that tier 3 data providers be exempt from reporting under the draft Regulations. We therefore strongly recommend that draft Regulation 7 be amended, either by inserting a reference to tier 3 in regulation 7(1) or by including a separate subsection in draft regulation 7, which deals specifically with reporting by data providers applying tier 3 methods.
    99.2. The reference to "all" facilities is misleading and ambiguous in that it could simply result in a total aggregated report on all facilities of a data provider. It is crucial that, in order to ensure facility-level reporting, that this sentence be amended to state: "… emission sources specified in Annexure 1 to these Regulations, separately for **[all]** each individual facility**[ies]** …"
    99.3. Annexure 3 does not make any reference to each facility of a data provider. We recommend that this be amended to include a column for facilities, alternatively that the first heading row state "Data Provider ID and Facility" so that a separate report table must be completed per facility.

100. We note that reporting under the draft Regulations to the NAEIS must take place by 30 April of each year. In our comments on the draft Declaration and the Draft PPP Regulations, we emphasised the need for a unification of the data submitted to the NAEIS in terms of these draft Regulations and the data required to be submitted under the draft PPP Regulations, as this will enhance transparency, consistency and enable verification of the data provided to both the NAEIS and the Minister under the Draft PPP Regulations. In the comments, our clients

submitted that "*the data submitted annually to the NAEIS in terms of regulation 7 of the Draft GHG Reporting Regulations should be submitted to the Minister with the pollution prevention plans, as well as annually with the annual progress reports in terms of regulation 6 of the Draft PPP Regulations*."[35] We stand by this recommendation and recommend that that the draft Regulations be amended accordingly to require that the report under draft regulation 7 be submitted to the Minister as and when it is submitted to the competent authority.

101. It is important for both the effective implementation of these draft Regulations and the draft PPP Regulations, when they come into force, that access to and sharing of GHG emission and activity data between the competent authority and other divisions in the Department be facilitated to avoid duplication of work and assist with verification and validation.

Draft Regulation 8 - Reporting Boundaries

102. We strongly recommend that draft regulation 8 be amended to clarify that reporting boundaries are to be delineated per facility and not per data provider. Little purpose would be served in requiring reporting per facility if the reporting boundaries are not linked to each individual facility.

Draft Regulation 10 – Methods

103. Draft regulation 10 envisages a procedure whereby the Category A data provider must make submissions as to the tier methodology to be applied. We refer to our submissions above and reiterate that the application of the calculation methods and the estimation of GHG emissions should not be left in the hands of the data provider. We therefore recommend that this provision be reworded completely to provide for the competent authority to determine which method to apply upon receipt of the necessary input and activity data from a data provider through registration and subsequent reporting under draft regulation 7.

104. As submitted above, a data provider may have the option to calculate its own GHG emissions, but the official GHG emission calculation responsibility must be in the hands of the competent authority.

105. In the event that this provision is to remain, and the data provider shall continue to be responsible for the methodology to be applied, our clients point out that they are concerned over the lack of detail in this draft regulation, and we strongly recommend that further provisions be included to regulate the process to be followed in the making of submissions on the applicable methodology. We recommend that:
    105.1. all data providers must make submissions as to the applicable methodology and such submissions should accompany the registration process;
    105.2. the submissions must include sufficient detail on the operations and emissions of the data provider to enable the competent authority to ascertain whether the methodology to be applied is appropriate; and
    105.3. the submissions must be available for public consideration and comment.

106. According to draft regulation 10(2), a data provider, if it reasonably believes that an emission factor is not appropriate, may make a submission to the competent authority and request a review of the applicable emission factor. We note that the draft regulation makes no provision for public participation in such a review process. It is vital, in recognising the right to just administrative action, that provision be made for public consultation and participation in respect of a data provider's submissions and before a decision is taken on the review. Failure to make provision for this would contravene the right to administrative justice and the provisions of PAJA.

107. We note, as submitted above, that the Technical Guidelines referred to in this draft regulation have not been formally published with the draft Regulations and therefore may not be accessible to all stakeholders. We submit that the failure to make these available simultaneously with the draft Regulations, is an irregularity which has prejudicial impacts on the public's rights to administrative justice and access to information.

[35] Paragraph 22 of the comments on the draft Declaration and draft PPP Regulations.

108. According to draft regulation 10(3), the competent authority must review any submission contemplated in sub-regulation (1) within 30 days after the submission date. If this submission is approved by the competent authority, the accepted method will be included in the Technical Guidelines. In terms of sub-regulation 10(4), the data provider's submission is deemed accepted if the competent authority does not respond to the data provider with questions for clarification or corrections within 30 days of the data provider's submission.

109. We do not believe that a time limit should be placed on the competent authority's review of the submissions. In any event, 30 days is far too short a period and, if such a time limit must remain, we submit that at least 90 days (3 months) should be allowed. We also submit that the deeming provision in draft regulation 10(4) is wholly unacceptable and without basis. Unless the submissions are expressly accepted, they cannot be deemed to be accepted. This would be placing an undue burden on the competent authority, and may result in data providers taking the law into their own hands, and effectively regulating themselves, to the exclusion of the competent authority. Draft regulation 10(4) must be deleted or replaced with a provision stating that "the competent authority must either accept or reject the submissions made in terms of draft regulation 10(1)".

Draft Regulation 11 – Verification and Validation

110. Draft regulation 11 places an obligation on the competent authority to assess, in accordance with the assessment procedures in the Technical Guidelines, the data submitted by a Category A data provider within 30 days after the submission date.

111. We refer again to our submissions above regarding the need for the estimation of GHG emissions to be conducted by the competent authority and not the data provider. In this case, the verification and validation to be undertaken by the competent authority must relate only to the verification and validation of input activity data submitted by the data provider to the competent authority.

112. We submit that, given that all data must be submitted on 30 April each year in terms of draft regulation 7(1), a mere 30 days for consideration of all data by all Category A data providers in South Africa, is too short a period of time for the competent authority. Such a time limit is without justifiable basis and would be unduly burdensome on the competent authority.

113. Our recommendation is that no time restriction be placed on the competent authority for the assessment of data submitted. If however, a time restriction is regarded as necessary, we submit that at least 6 months (180 days) be afforded to the competent authority to assess the data submitted.

114. The competent authority must be free to investigate, question, verify, validate and/or reject emission data submitted at any stage. It is for this reason that draft regulation 11(2) is wholly inappropriate and must be deleted.

115. Draft regulation 11(3) provides that if the competent authority reasonably believes that the information submitted to the NAEIS might not be transparent, complete, or correct, the competent authority must instruct the data provider to verify and validate the information. We refer to our submissions above regarding the word "transparent" and the need for it to be redefined in the draft Regulations.

116. We welcome the inclusion of draft regulation 11(5), which provides for a competent authority to conduct on-site or installation-specific verification and validation at its discretion. However, we recommend that "installation" be replaced with "facility" in accordance with our recommendation at paragraph 75 above, and that the verification and validation should pertain to the activity data provided, not the methodology applied, in accordance with our submission in paragraphs 19 to 27 above. In addition, it is not clear why this discretion is limited to data providers applying tier 2 or 3 methods only, and not those applying tier 1 methods. We submit that, in the event that this provision is to remain, this exclusion of tier 1 is arbitrary and that the competent authority's discretion to conduct on-site verification and validation must apply to all data providers.

117. We note that the draft Regulations do not include any specifications about accuracy calibration for mass or volume flow measuring instruments used as the basis of their emissions monitoring instruments. Neither do the Technical Guidelines. The USA GHGRP includes accuracy specifications for different kinds of monitoring tools. The default accuracy requirement is specified at +/-5% for flow meters.[36] We recommend that the draft Regulations include accuracy calibration requirements for monitoring mechanisms at applicable facilities. Having accurate emission measurements is clearly fundamental.

Draft Regulation 12 - Confidentiality of Information

118. We stand by our previous submissions on the confidentiality provision of the 2015 draft Regulations and refer to our submissions above at paragraphs 50 to 56 regarding the importance of public disclosure in relation to the draft Regulations.

119. We note that the confidentiality provisions have been amended from the 2015 draft Regulations and that they now place an obligation on the competent authority to ensure that no person discloses confidential information obtained in terms of the draft Regulations.

120. The draft Regulations now only allow confidential information to be disclosed if disclosed in compliance with the provisions of any law or if the person is ordered to disclose the information by a court of law. The draft Regulations no longer allow for confidential information to be disclosed to enable a person to fulfil a function under the draft Regulations.

121. Importantly, as previously submitted, "confidential information" has not been defined, so there is no clarity as to when information is in fact confidential or when it is not. In our experience, the claim of confidentiality is often improperly made. In addition, the ability of the authority to control disclosure by other parties is limited.

122. The effect of this provision will be that the competent authority will be reluctant to disclose <u>any</u> information under these Regulations, even though there is no reason why GHG emission data would be confidential. There is simply no logical basis for such data to be confidential. Furthermore, breaching this provision could render the competent authority criminally liable in terms of draft regulation 16(b). We and our clients submit that this is unacceptable and is likely to significantly curtail the public's rights of access to information, their environmental rights, and the draft Regulations' stated objective.

123. The information that would be sought under these Regulations relates to GHG emissions – a matter of fundamental environmental importance not only for South Africa, but internationally. There can be no reasonable or legal basis for withholding such information particularly if one considers the public interest override in PAIA, which prohibits information from being withheld if it would reveal "*a substantial contravention of, of failure to comply with, the law; or an imminent and serious public safety or environmental risk; and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question*."[37]

124. The provisions of PAIA in any event serve as protection for confidential information and would prohibit the disclosure of information properly covered by s 36 of PAIA, in terms of draft regulation 14, which prohibits the public disclosure of NAEIS data if it would contravene s 36 of PAIA. This provides sufficient protection for the commercial and confidential interests of data providers. In the circumstances, we regard s 12 as redundant and unnecessary. We therefore recommend that this provision be deleted entirely.

125. Furthermore, as submitted above and in the 2015 comments, jurisdictions such as the USA, the European Union and Australia provide for GHG emission data and a wide range of additional information to be publicly available. There is no reason why certain data should be regarded as confidential in South Africa when it is not regarded as

[36] Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56260, 56269 (October 30, 2009) (to be codified at 40 C.F.R. parts 86, 87, 89, 90, 94, 98, 1033, 1039, 1042, 1045, 1048, 1051, 1054, 1065).
[37] S 46 PAIA.

confidential in other jurisdictions. If this provision is to remain, clarity must be given as to what information is to be regarded as confidential, as well as the reasons for this.

Draft Regulation 13 – Record Keeping

126. We note that draft regulation 13 now purports to support verification and validation under the draft Regulations by requiring a data provider to ensure transparency of its submissions by archiving all data, measuring reports, algorithms, procedures, and technical references used to estimate GHG emissions. We submit, however, that in order for this to be effective as a means to verify, validate, and be informed on the emissions of data providers, the data provider should be required to submit this information when reporting in terms of draft regulation 7, or at the very least, such information must be readily available and easily accessible - in electronic format where possible - by the competent authority.

127. We also submit that the period of 5 years is far too short a period for the keeping of such data – given its significance on both a national and international level - and that the draft regulations should require the keeping of such records for at least 10 years.

128. In order for the objective of true transparency to be met, this information should be available to the public as well. This is addressed in draft regulation 14 below.

Draft Regulation 14 – Publishing Data and Information

129. We stand by our 2015 comments in respect of publishing data and information and, once again, emphasise the importance of public disclosure of data in order for these regulations to be effective and to meet the stated purpose of transparent reporting. We also refer you to the Supreme Court of Appeal's decision in *ArcelorMittal South Africa v Vaal Environmental Justice Alliance*,[38] and our reference to this decision in paragraph 33 of the 2015 comments.

130. We note that this provisions remains unchanged since the 2015 draft Regulations. As such we stand by and repeat our 2015 submissions, namely that:
    130.1. this section should be reworded, so that placing data and information in the public domain is the default position;
    130.2. draft Regulation 14 should be aligned with the position of default publication of GHG emission information;
    130.3. our clients have no interest in process or other technical information the confidentiality of which is already protected by law, such as trade secrets or other proprietary information. PAIA makes provision for genuinely confidential information to be severed from the record, as long as it would not detract from the public's ability to analyse and assess the GHG emissions of the data provider and its compliance with the law. As environmental justice and community organisations, our clients are interested in accessing the emission inventory information for purposes of pursuing their constitutional rights to an environment that is not harmful to health or wellbeing, to access information, and in the public interest. The same can be said for other members of the public who have a right to know what these atmospheric emissions are; and
    130.4. it is important for the Department to consider that not availing atmospheric emission data and information automatically will add significantly to the Department's administrative burden. In particular, this will increase the burden of trying to assess whether information is confidential. The Department will also increase its load of PAIA requests for information that would be in the public interest, as well as the number of internal appeals of decisions to refuse such requests and potential litigation in relation to refusals.

[38] *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* (69/2014) [2014] ZASCA 184; 2015 (1) SA 515 (SCA); [2015] 1 All SA 261 (SCA) (26 November 2014). See paragraph 33 of the 2015 comments.

131. We refer again to the comparative reference to jurisdictions such as Australia and the EU where public disclosure is the default position.[39]

132. We also submit that Category A data providers should be required to make their reports under draft regulation 7 and any other relevant activity data submitted, for example on registration in terms of draft regulation 5, available and easily accessible to public.

133. We recommend that this provision be amended to read, "14(1) The relevant authority and Category A data provider must [**may only**] place NAEIS data and information in the public domain unless [**if it does not**]-
[**(a) it does not promote unfair competition in terms of the Competition legislation**];
(a) it [**does not**] contravenes section 36 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); or [**and]**
(b) it [**does not**] contravenes section 17 of the Statistics Act, 1999 (Act No. 6 of 1999)."

Draft Regulation 15 - Transitional Provisions

134. This provision allows for any data provider to, for a period of 5 years, apply a tier 1 method. We refer once again to our recommendations above, that the data providers should not be responsible for the GHG emission calculations, in which case the provision for a lengthy transitional period for data providers will not be necessary.

135. In any event, we submit that there is no rational basis for allowing this lenience for a period as long as 5 years and for all data providers.

136. We point out that under the Paris Agreement and South Africa's NDC, we have made commitments, referred to above, and are bound to report our country's GHG emissions.

137. If data providers are to be required to estimate their own GHG emissions, we submit that:
    137.1. a data provider that wishes to apply lower tiers than those referred to must make submissions to the competent authority showing good cause why it would be unable to apply the appropriate tier and why it should be entitled to apply a lower tier. The submissions must also be published to all relevant stakeholders and made available for public submissions and consultation. As mentioned, 5 years is a significant period of time and a digression from the obligations under these Regulations for a period of 5 years will have significant impacts on South Africa's international reporting obligations and will be a setback for the effective functioning NAEIS; and
    137.2. it should be compulsory for Category A data providers to apply, at least, tier 2 methods within 1 year. This would not be too burdensome on data providers, particularly the large emitters, where the potential harm to South Africa nationally would outweigh any inconvenience and/or cost for the data provider.

138. Unlike the option for a multi-year transitional period in the draft Regulations, the USA GHGRP allows for a transition for regulated entities by permitting a more flexible monitoring approach just for the first quarter of the reporting period. Facilities that seek an extension will have to demonstrate that monitoring instrumentation "*could not be obtained within the timeframe despite good faith efforts by the facility*," and may be denied the more flexible approach if they fail to demonstrate legitimate need.[40]

Draft Regulation 16 - Offences

139. We submit that the failure to comply with regulation 12 should not be a criminal offence, for the reasons explained above.

[39] See paragraphs 85 to 98 of the 2015 comments.
[40] *See paragraph 5 of Annexure D.*

Annexure 1 – List of Activities for Which GHG Emissions Must be Reported to the Competent Authority

140. We note that paragraph 3 in Annexure 1 refers to Category A and Category B columns, however, the Category B column is missing from the table and this should be included. Alternatively, if there is no intention to include a Category B column, then reference to this must be removed from Annexure 1. If and when the Category B column is included, we point out that the public must have an opportunity to consider and comment on this column before the draft Regulations are finalised.

141. We note that no provision is made for reporting of GHG emissions from refrigeration and air conditioning, including refrigeration and stationary air conditioning and mobile air conditioning. Reporting of GHG emissions from refrigeration systems is a requirement for federal agencies in the USA.[41] Our clients submit that reducing emissions of hydrofluorocarbons (HFCs) and perfluorocarbons (PFCs) in refrigerant uses should be a top priority for averting catastrophic climate change because alternative refrigerants with much lower GWPs are available. These emissions should be monitored and reported on, at least, by importers, wholesalers and distributors of refrigerants that are GHGs.

Annexure 2 – Registration on the NAEIS

142. We refer to our submissions in paragraph 93 above and recommend that the table in Annexure 2 include provision for geographical delineation and mapping of each facility and clear indication and process flow diagrams for the processes at each facility.

Annexure 3 – Annual Reporting

143. We refer to our submissions above, and reiterate that, as draft regulation 7 requires - or should require - reporting per individual facility, we recommend that an additional column be added for facility. Alternatively that the top heading row state "Data Provider ID and Facility" so that a separate report table must be completed per facility.

General Recommendations

144. In light of the above submissions, it is our clients' recommendation that the draft Regulations be amended to provide for:
    144.1. calculation of the GHG emissions by the competent authority – not the data provider;
    144.2. more detailed reporting obligations for certain key categories of data providers;
    144.3. the specific activity data to be reported to be listed and set out clearly in the draft regulations;
    144.4. reporting of activity data per individual facility;
    144.5. the reporting obligations to reside with the person in operational control of a particular facility; and
    144.6. public disclosure of GHG emission data.

145. We strongly recommend that the deeming provisions in draft regulations 10(4) and 11(2) be deleted, as they are without justifiable basis and will only prejudice the public and hinder the duties of the competent authority.

146. We would appreciate the opportunity to meet with the Department to discuss these comments.

147. Kindly contact us should you have any questions. .

[41] See U.S. EPA (June 2012) "Federal Greenhouse Gas Accounting and Reporting Guidance at https://www.whitehouse.gov/sites/default/files/federal_greenhouse_gas_accounting_and_reporting_guidance_technical_support_document.pdf.

Yours sincerely
CENTRE FOR ENVIRONMENTAL RIGHTS

per:

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