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Advancing Environmental Rights in South Africa

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Our ref: NL/RH
19 January 2018

Dear Minister

CONCERNS REGARDING THE INTERPRETATION AND IMPLEMENTATION OF THE NATIONAL GREENHOUSE GAS REPORTING REGULATIONS AND THE NATIONAL POLLUTION PREVENTION PLAN REGULATIONS

1. We address you as the Life After Coal/Impilo Ngaphandle Kwamalahle campaign, a joint campaign made up of the Centre for Environmental Rights, groundWork and Earthlife Africa Johannesburg, with the objectives of:

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discouraging investment in new coal-fired power stations and mines; accelerating the retirement of South Africa's existing coal infrastructure; and enabling a just transition to renewable energy systems for the people.

2. We refer to the National Greenhouse Gas Emissions Reporting Regulations, published on 3 April 2017 in Government Notice 275[1] ("the GHG Reporting Regulations") and to the National Pollution Prevention Plan Regulations, published on 21 July 2017 in Government Notice 712[2] ("the Pollution Prevention Plan Regulations").

3. We wish to seek clarification on certain provisions of these regulations.

4. Additional and more extensive submissions on the draft GHG Reporting Regulations, on behalf of a number of our clients, were made on 7 July 2016, and prior to that (on the initial draft GHG Reporting Regulations) on 4 August 2015.[3] The 7 July 2016 submissions are available here and can also be made available by email, if so required. Previous submissions, made on behalf of our clients in respect of the draft Pollution Prevention Plan Regulations – prior to their promulgation – can be accessed here and can also be made available by email. For purposes of this correspondence and our concerns at present, we address each set of regulations in turn, below.

GHG Reporting Regulations

5. In our comments of 7 July 2016 we emphasised that:

   5.1. certain provisions of the draft GHG Reporting Regulations are worded ambiguously and unclearly - this will have problematic consequences for the interpretation and application of the Regulations if not amended;

   5.2. 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 (then draft) Pollution Prevention Plan Regulations;[4] and

   5.3. the wording of the draft regulations – by simply requiring reporting for "all facilities" - 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 should be required.[5]

6. We note that the promulgated GHG Reporting Regulations still state, as the draft GHG Reporting Regulations did, that "*[a]Category A data provider must submit the greenhouse gas emissions and activity data as set out in the Technical Guidelines for Monitoring, Reporting and Verification of Greenhouse Gas Emissions by Industry for each of the relevant greenhouse gases and IPCC emission sources specified in Annexure 1 to these Regulations for all of its facilities*" (emphasis added).[6]

7. Therefore, despite some of the commendable changes made to the promulgated GHG Reporting Regulations, the ambiguity highlighted in our comments of July 2016 relating to the potential for **one** aggregated report to be submitted by a data provider **for all of its facilities**, remains. Yet, based on certain provisions of the Regulations, it would appear that there is an intention, on the part of the legislature – at least from a practical perspective - for reporting to be conducted at facility level. This could be inferred from the following:

[1] Government Gazette 40762.
[2] Government Gazette 40996.
[3] Available at https://cer.org.za/wp-content/uploads/2016/08/CER-Comments-on-Draft-GHG-Reporting-Regs-4-8-15.pdf.
[4] Para 47.
[5] Para 48.
[6] Regulation 7(1).

7.1. the fact that registration, in terms of regulation 5, read with the Annexure 2 registration form and the Technical Guidelines Technical Guidelines for Monitoring, Reporting and Verification of Greenhouse Gas Emissions by Industry ("the Technical Guidelines"), must be done per facility;[7] and

7.2. in terms of regulation 7(4), registration and reporting must be processed through the National Atmospheric Emission Inventory System (NAEIS) - implicitly via the South African Atmospheric Emission Licensing & Inventory Portal (SAAELIP).[8] It is our understanding that data can only be entered in the NAEIS **at the facility/emission unit/stack level on the system**, not per company activity. The NAEIS Industry User's Guide[9] clearly requires emissions data to be reported at the facility, emissions unit (process unit), and stack level.

8. However, despite the facility-level registration and NAEIS reporting requirements as specified above, in terms of regulation 7(4), in cases where the NAEIS is unable to meet the reporting requirements, the reporting must be done by submitting the information specified in Annexure 3 in an electronic format to the competent authority. Annexure 3 simply requires reporting per activity – not per facility.

9. Regulation 7(4)(b) is vague as it is not clear as to what is meant by "*cases where the NAEIS is unable to meet the reporting requirements*", nor who is to decide that "*the NAEIS is unable to meet the reporting requirements*". This will result in inconsistent reporting and data being gathered, as a data provider electing to report in terms of 7(4)(b) in accordance with Annexure 3, would be able to bypass the NAEIS online reporting system and requirements, thereby undermining the integrity of the entire reporting system.

10. Regulation 7(1) requires a Category A data provider to submit greenhouse gas (GHG) emissions and activity data "*as set out in the Technical Guidelines for Monitoring, Reporting and Verification of Greenhouse Gas Emissions by Industry for each of the relevant greenhouse gases and IPCC emission sources specified in Annexure 1 to these Regulations for all of 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 competent authority by 31 March of each year*" (emphasis added).

11. It is highly problematic that Annexure 3 requires reporting with far less detail compared with reporting via the NAEIS (SAAELIP) portal.

12. We submit that data reported in terms of Annexure 3 would essentially be un-auditable and would lack transparency as they would not include details as to the source(s) of emissions. This means it would not be clear which facilities and emission units are included in "activity data".

13. We have reason to believe that many industrial data providers, as listed in Category A,[10] Annexure 1 to the GHG Reporting Regulations, interpret the relevant provisions to require reporting of the total quantity of emissions **per company activity**, as opposed to 'facility-level' reporting. We submit that this interpretative approach is inappropriate, and is contrary to the intentions of the legislature and the purpose of the GHG Reporting Regulations.

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[7] Regulation 5(1) requires that "A person classified as a Category A data provider in terms of regulation 4(1)(a) of these Regulations must register all facilities where activities exceed the thresholds listed in Annexure 1".

[8] https://saaelip.environment.gov.za/.

[9] NAEIS User's Guide, http://www.saaqis.org.za/documents/NAEIS%20User's%20Guide_(Facility)_v2.0.pdf see section 6 pages 16 – 48.

[10] 4. (1) For purposes of these Regulations, a data provider is classified as follows:
(a) Category A: any person in control of or conducting an activity marked in the Category A column above the capacity given in the threshold column of the table in Annexure 1 to these Regulations; and
(b) Category B: any organ of state, research institution or academic institution, which holds greenhouse gas emission data or activity data relevant for calculating greenhouse gas emissions relating to a category identified in table in Annexure 1 to these Regulations.

14. Any ambiguity on the question of the level and manner in which reporting must take place under the GHG Reporting Regulations is extremely detrimental to the effective implementation of these Regulations. This will completely undermine the objectives of the GHG Reporting Regulations; namely: to update and maintain a National Greenhouse Gas Inventory; for the Republic of South Africa to meet its reporting obligations under the United Framework Convention on Climate Change (UNFCCC) and instrument treaties to which it is bound; and to inform the formulation and implementation of legislation and policy.[11]

15. A further problem is that data which are simply aggregated and not reported at facility-level will severely hinder local authorities in developing their own GHG emission inventories and this will be detrimental to any GHG emission monitoring and/or reduction plans of local authorities.[12]

16. We submit that the information which will flow from a system based on company-level (as opposed to facility-level) reporting will not provide a sufficient basis for either the development of national and local climate policy and subsequent climate law, nor for meeting South Africa's reporting obligations under the UNFCCC, and especially for the reporting regime which is being developed as part of the enhanced transparency framework under the Paris Agreement. Nor will such a system support the effective implementation of a carbon tax, or the effective regulation of emissions by large emitters.

17. Considering the above submissions, we request that the Department of Environmental Affairs (DEA), as the Competent Authority tasked with the implementation and enforcement of these Regulations, provide clarity on this issue. **Kindly advise whether facility-level reporting is, in fact, required by DEA under the GHG Reporting Regulations. If yes, kindly advise what steps will be taken, if any, against those data providers who do not report per facility. If it is not, kindly advise why DEA does not regard facility-level reporting as necessary for a properly-functioning GHG emission reporting system and inventory.**

18. In any event, we urge the DEA to **amend the Regulations to make clear that reporting must be done per facility**. In this regard we strongly recommend that Annexure 3, and all references to it, be deleted so that the only permissible reporting route is via the NAEIS (SAAELIP) internet portal. Alternatively, we recommend that Annexure 3 be amended so as to be aligned with the reporting standards of the NAEIS and SAAELIP.[13]

19. Furthermore, as the SAAELIP/NAEIS portal is designed for both NAEIS (including GHG emissions) reporting and the management of the atmospheric emission licensing (AEL) system, including reporting under the minimum emission standards (MES), we suggest that a table be developed and published that maps MES categories and subcategories, as far as possible, on to IPCC codes, to facilitate harmonisation of reporting under the two systems.

20. We are also very concerned with the limitations on public access to and disclosure of the data that will be posed by sections 12 (Confidentiality of Information) and 14 (Publishing Data and Information). While the wording of these provisions has improved from the draft, they still have the effect of placing undue restrictions on the publication of vital NAEIS data. A competent authority will be reluctant to disclose any information under these Regulations, even though there is no reason or logical basis why GHG emission data should be confidential. Other jurisdictions[14] 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 they are not regarded as confidential in other jurisdictions. **The default position must be public disclosure, given the fundamental public importance of emission data**.

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[11] Regulation 2.

[12] At present s43(1)(l) of the National Environmental Management: Air Quality Act, 2004 (AQA), states that an atmospheric emission licence (AEL) must specify GHG emission measurement and reporting requirements. The AELs of numerous Eskom and Sasol facilities, for example, do require annual reporting of GHG emissions. We do note, with great concern, however, that the "proposed content for a climate change response legal framework" of May 2017 proposes deleting s43(1)(l) of AQA.

[13] See the NAEI Industry User's Guide http://www.saaqis.org.za/documents/NAEIS%20User's%20Guide_(Facility)_v2.0.pdf.

[14] Australia and the European Union for example.

21. Finally, we refer to the **registration deadline of 3 May 2017**, 30-days post-promulgation of the GHG Reporting Regulations.

    21.1. We request that you provide us with confirmation of the number of Category A facilities that have duly registered in accordance with the requirements of regulation 5(1), as well as a list of all the facilities registered to date.

    21.2. What are the envisaged steps that DEA intends to take in respect of those Category A facilities that did not register within the stipulated 30-day timeframe?

    21.3. Does the DEA intend to proceed with enforcement action, given that failure to comply with regulation 5 is an offence in terms of regulation 16 of the GHG Reporting Regulations?

    21.4. What steps does DEA intend to take against those facilities that have not yet registered as required?

Pollution Prevention Plan Regulations

22. With regard to the Pollution Prevention Plan Regulations, our concern relates to the obligations in relation to the submission of the plans and the validity and review periods of the plans.

23. Regulation 4(1) requires the submission of the first pollution prevention plans to the Minister within five (5) months from the date of promulgation of the Regulations. The promulgation date of these Regulations was 21 July 2017.

24. Regulation 3(2) further provides that the first pollution prevention plan must cover a period from the date of promulgation of the Regulations up to 31 December 2020, and the subsequent pollution prevention plans must cover periods of five (5) calendar years each.

25. Regulation 4(6) specifies that a pollution prevention plan is valid for a period of five (5) years after the date of approval by the Minister, and must be reviewed every five (5) years thereafter. During this period, for the purposes of monitoring and evaluation of the approved plan, regulation 5(1) requires the submission of a progress report to the Minister by 31 March each year for the preceding calendar year.

26. Based on these provisions, it is our understanding that the first round of pollution prevention plans will cover the period of 21 July 2017 – 31 December 2020. **The submission deadline for these plans was 21 December 2017**.

27. Our uncertainty, however, arises from the second part of regulation 4(1), which reads ". . . . *and the subsequent pollution prevention plans must be submitted* ***within five months of existing plans being reconciled****"* (emphasis added). We do not understand how this accords with the provisions and timeframes set out above, specifically the review period of five (5) years and annual reporting period. **Is the intention that new pollution prevention plans be submitted every 5 months, despite the 5 year period for the validity of a plan and the annual reporting requirement? We are also uncertain as to the meaning of "reconciled" – is this upon the Minister's approval after the 30-day consideration period provided for in regulation 4(3)-(5)?**

28. **We request that the DEA provide clarity on the implementation of regulation 4(1), and whether subsequent pollution prevention plans are required to be submitted every five (5) months. If this is not the case, what is the DEA's position on the interpretation and application of regulation 4(1) with regard to "subsequent pollution prevention plans"?** We recommend that the Pollution Prevention Plan Regulations be amended to include a definition of "reconciled", so as to provide the necessary clarity on the interpretation and implementation of regulation 4(1).

29. **Kindly also advise which persons have submitted pollution prevention plans – given that the 21 December 2017 deadline has now passed - and please provide us with copies of these plans. In this regard, we are particularly interested in the plans of Eskom, Sasol and ArcelorMittal SA.**

Conclusion

30. We would like to take this opportunity to emphasise the critical importance of both the GHG Reporting Regulations and Pollution Prevention Plan Regulations, in complying with South Africa's domestic and international legal obligations. This includes the protection of the right to an environment that is not harmful to our health or well-being, in terms of section 24 of the Constitution. The proper interpretation, implementation and enforcement of the aforementioned provisions cannot be understated.

31. Kindly revert to us on the abovementioned issues – particularly those questions in paragraphs 17, 21, 27, 28 and 29 - as soon as possible and by no later than **19 February 2018**. We would also be happy to meet with you to discuss these concerns.

32. We await your response.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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