Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

The Director General
Department of Environmental Affairs
Attention: Mr Jongikhaya Witi
By email: jwiti@environment.gov.za

Copy to:
Ms Lungile Manzini
By email: lmanzini@environment.gov.za

Your ref: Jongikhaya Witi
Our ref: CER/RH
Date: 4 August 2015

Dear Mr Witi

SUBMISSIONS ON THE DRAFT NATIONAL GREENHOUSE GAS EMISSION REPORTING REGULATIONS

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

2. We refer to the draft National Greenhouse Gas Emission Reporting Regulations ("the Draft Regulations") published under Government Notice 541 of 2015, Government Gazette 38857 on 5 June 2015. The notice confirms that "these Regulations will replace National Gazette no 38779 which was published on 11 May 2015" and confirms a period of 60 days of publication for the submission of representations or objections to the Regulations. Accordingly, comments are due on 4 August 2015.

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

2nd Floor, Springtime Studios,
1 Scott Road, Observatory, 7925
Cape Town, South Africa
Tel 021 447 1647, Fax 086 730 9098
Email info@cer.org.za, www.cer.org.za

3. In considering the Draft Regulations we have referenced and taken note of – in addition to national law and policy - international law and best practice, as well as the laws and policies governing greenhouse gas reporting in other jurisdictions such as the USA.

Background

4. At the outset, we point out that greenhouse gas (GHG) emissions are a matter of global, and not merely national, concern, given that GHG emissions constitute transboundary air pollution giving rise to global warming and climate change. The regulation of GHG emissions in South Africa is therefore a matter of international interest.

5. South Africa is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, international agreements which seek to address climate change and set internationally-binding emission reduction targets.

6. Parties to the UNFCCC, which include South Africa, have committed to communicate information related to the implementation of the UNFCCC. Article 12 requires countries to submit, to the Conference of the Parties - through the secretariat – their GHG inventories; a description of 'steps taken and envisaged'; and any other information the country considers relevant. Frequency of the communication was previously not specified, but it has now been agreed that this will occur every 4 years, with biennial update reports to be submitted every 2 years.[2]

7. Although South Africa does not, at this stage, have any set emission reduction obligations under the Kyoto Protocol: it has undertaken to make commitments for national contributions towards GHG emission reductions for the period 2020-2030; it has expressed an intention to participate in a legally-binding universal agreement on climate change to be entered into at the 21st session of the Conference of the Parties (COP21) to the UNFCCC in Paris in December 2015;[3] it is paving the way towards addressing climate change through a desired emission reduction outcomes (DERO) system and a carbon tax intended to be effective in 2016; and it acknowledges - in the National Climate Change Response White Paper ("the White Paper") - that "*the science is clear that action to address the causes and impacts of climate change by a single country or small group of countries will not be successful. This is a global problem requiring a global solution through the concerted and cooperative efforts of all countries*".[4] It is therefore incumbent on the state to ensure that its actions, laws and decision-making coincide with its evident intentions to fulfill its GHG emissions inventory reporting obligations, to address climate change and take into account the high probability of internationally-binding climate change obligations in the near future.

8. GHG emission regulation is, however, also relevant on a national level, as South Africa, as a country, will be particularly susceptible to the effects of climate change, with impacts which include: increased temperatures; changes in rainfall patterns; and impacts on biodiversity and agriculture.[5] The Long Term Adaptation Scenarios (LTAS) report,[6] which aims to respond to the White Paper argues that impacts on South Africa are likely to be felt primarily via effects on water resources.[7]

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[2] See IPCCC 2010 and http://www.erc.uct.ac.za/Research/publications/14-Winkler-Transparency_of_MAs.pdf at p4.
[3] See https://www.environment.gov.za/event/deptactivity/cop21_indc_stakeholderconsultations.
[4] Pages 8 and 9, Introduction, National Climate Change Response White Paper.
[5] See the COP17 website at http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change/effects-of-climate-change-on-south-africa.html and the Long Term Adaptation Scenarios Reports at https://www.environment.gov.za/sites/default/files/docs/implications_waterbookV4.pdf.
[6] See https://www.environment.gov.za/sites/default/files/docs/ltasphase2report7_longterm_adaptationscenarios.pdf and https://www.environment.gov.za/sites/default/files/docs/implications_waterbookV4.pdf.
[7] Page 6, Long Term Adaptation Strategies: Summary for Policy-Makers. Available at http://www.sanbi.org/sites/default/files/documents/documents/ltassummary-policy-makers2013high-res.pdf.

9. South Africa is already a significant emitter of GHGs, having produced around 544 Mt of carbon dioxide equivalent (CO2-eq) in 2010 - according to the GHG Inventory for South Africa[8] - and the White Paper recognises the urgent need for mitigation.

10. National legislation recognises the need to curb GHG emissions and address climate change, in that the National Environmental Management: Air Quality Act, 2004 (AQA) requires that an atmospheric emission licence (AEL) specifies GHG emission measurements and reporting requirements,[9] and the 2012 Framework for Air Quality Management acknowledges that "*in view of this, specialist air quality impact assessments must consider greenhouse gas emissions as well*."[10]

11. The White Paper includes a National Climate Change Response Strategy ("the Response Strategy"), which has listed, as one of its strategic priorities, the need to "*prioritise the mainstreaming of climate change considerations and responses into all relevant sector, national, provincial and local planning regimes such as, but not limited to, the Industrial Policy Action Plan, Integrated Resource Plan for Electricity Generation, Provincial Growth and Development Plans, and Integrated Development Plans.*"[11] The Response Strategy, as a national policy document, speaks to and should direct decision-making in respect of authorisations for any developments.

12. It is therefore the duty of the state to ensure that the legislative system for regulating and reporting on GHG emissions in South Africa is effective, consistent with international best practice, and meaningfully contributes to the national and international objectives of addressing climate change.

Overview

13. We herein first give an overview of our clients' concerns and general views on the Draft Regulations; whereafter we make submissions on the specific provisions of the Draft Regulations.

14. We point out that, in order for the Draft Regulations 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 for National Greenhouse Gas Inventories ("the IPCC Guidelines");[12] enables the identification of mitigation opportunities and actions; enables the tracking of its emissions trajectory; and establishes and maintains a national GHG inventory,[13] it is essential that the Draft Regulations provide for, inter alia:
    14.1. 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;
    14.2. 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;
    14.3. 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
    14.4. public disclosure of the GHG data submitted in terms of the Draft Regulations.

15. We elaborate on these points below.

[8] P255 Appendix A, total excluding FOLU (Forestry and Other Land Use), GHG Inventory South Africa 2000 – 2010 of November 2014. Available at http://unfccc.int/resource/docs/natc/zafnir1.pdf .
[9] Section 43(1)(l) AQA.
[10] Paragraph 5.5.3.7, page 80, 2012 National Framework for Air Quality Management.
[11] Page 15, National Climate Change Response Strategy, National Climate Change Response White Paper.
[12] 2006 IPCC Guidelines available at http://www.ipcc-nggip.iges.or.jp/public/2006gl.
[13] Referenced from draft Regulation 2, which sets out the purpose and objectives of the Regulations.

Identification of Key Categories

16. We note that the Draft Regulations purport to rely on the IPCC Guidelines' methods for determining GHG emissions,[14] yet they make no provision for the identification of key categories of emission sources,[15] which would require more stringent emissions estimation methodologies and a broader scope of data to be provided by data providers when reporting.

17. According to the IPCC Guidelines, "*a key category is 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*".[16] 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*",[17] and, "*it is good practice to give additional attention to key categories with respect to quality assurance and quality control*".[18]

18. The IPPC Guidelines suggest a methodology for selecting key categories of emission source sectors, for example, ranking each category by absolute emission level and selecting the categories that cumulatively account for 95% of total emissions as key categories. The importance of clarity as to which sectors are designated key sectors is clear – these key sectors collectively account for an estimated 95% of total GHG emissions, they therefore require a higher level (tier) method for determining their GHG emissions, and they are obliged to submit information in addition to a mere statement of their total GHG emissions in order to provide further clarity with respect to data quality assurance and quality assurance.[19]

19. We note that the GHG National Inventory Report for South Africa 2000 – 2010 of November 2014 ("the National Inventory Report") recognises and makes provision for key category analysis as prescribed by the IPCC Guidelines.[20] It is submitted that the Draft Regulations should be – but are not - informed by the key category analysis contained in the National Inventory Report. We therefore suggest that the Draft Regulations, particularly Annexures 1 to 3, provide for the identification of key categories in accordance with the IPCC Guidelines, and that the listing of key categories be transparently based on a key category analysis of the National Inventory Report.

Detailed Reporting

20. We point out 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.

21. Simply requiring a data provider to submit the total GHG emissions per company, without requiring detailed information on the GHGs emitted, and the facilities from whence they emanate, will render it extremely difficult to obtain an accurate reflection and true understanding of South Africa's contributions to GHG emissions.

22. The absence of such information would ultimately render the GHG inventory ineffective, and the authorities and the public will have difficulty in effectively ascertaining industry's GHG emissions. The National Inventory Report confirms that "*the main challenge in the compilation of South Africa's GHG inventory remains the*

[14] See definition of 'tier' in the Draft Regulations.
[15] Chapter 4 Volume 1 of the IPCC Guidelines. Available at http://www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/1_Volume1/V1_4_Ch4_MethodChoice.pdf.
[16] S4.1.1, Chapter 4, Volume 1 IPCC Guidelines.
[17] S4.1.2, Chapter 4, Volume 1 IPCC Guidelines.
[18] S4.1.2, Chapter 4, Volume 1 IPCC Guidelines.
[19] S4.1.2, Chapter 4, Volume 1 IPCC Guidelines.
[20] P53 National Inventory Report, 2014. Available at http://unfccc.int/resource/docs/natc/zafnir1.pdf.

availability of accurate activity data."[21] We submit that the Draft Regulations provide an invaluable opportunity for obtaining access to all relevant data from industry for a comprehensive GHG inventory.

23. We point out that the GHG Reporting Program in the USA requires that each regulated facility provides its total GHG emissions **as well as** ancillary information that allow the Environmental Protection Agency (EPA) to quantify, characterise, and verify the emission reports.[22]

24. We refer to the national and international laws and policies referred to above which highlight the importance of effective GHG regulation to mitigate the impacts of climate change. It is also important, in terms of the Constitutional values of openness and transparency, that companies be required to give full disclosure of their operations and processes where the emissions of GHGs are concerned. In addition, there are an increasing number of reports which support the need, on a global level, for countries to implement stricter measures to combat GHG emissions within their jurisdictions.[23]

25. Failing to ensure that South Africa's GHG reporting regulations provide for disclosure by industry of the full details of their operations - including activity data at a facility level, and resultant GHG emissions - not only contradicts the international and national stance on climate change, but would also fail to achieve any valuable outcome in addressing climate change.

Public Disclosure

26. The right of access to environmental information is guaranteed by section 32 of the Constitution and by the Promotion of Access to Information Act, 2000 (PAIA), and will be severely limited if GHG data in the National Atmospheric Emission Inventory System (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 AQA, as well as in international law and principles – as described below.

27. Section 24 of the Constitution[24] ("the environmental right") provides that everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

28. NEMA gives effect to the environmental right and section 2 sets out the national environmental management principles, which must inter alia "*guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment*." These principles include the following under subsection 2(4):
"*(f) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured."*

[21] P40, available at https://www.environment.gov.za/sites/default/files/reports/2000_2010_nationalghginventoryreport.pdf.
[22] The general content of the required annual GHG report is outlined in 40 C.F.R. § 98.3(c).
[23] See the following reports: 'Pathways to Deep Carbonisation: South Africa Chapter' published by the Sustainable Development Solutions Network at page 167 http://unsdsn.org/wp-content/uploads/2014/09/DDPP_Digit.pdf; The Organisation for Economic Co-operation and Development's 2015 report entitled 'Aligning Policies for a Low-Carbon Economy' http://www.keepeek.com/Digital-Asset-Management/oecd/environment/aligning-policies-for-a-low-carbon-economy_9789264233294-en#; and the 2015 report of the International Monetary Fund entitled 'How Large are Global Energy Subsidies?' http://www.imf.org/external/pubs/ft/wp/2015/wp15105.pdf.
[24] Act 108 of 1996.

"(h) Community wellbeing and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means." (our emphasis)
"(o) The environment is held in public trust for the people. The beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage."

29. Section 32 of the Constitution recognises that all South Africans have the right of access to information held by the state, and any information that is held by another person and that is required for the exercise and protection of any rights. PAIA was enacted to give effect to this right.

30. Under international law, it is also well recognised that the exercise and protection of environmental rights requires public participation and public access to information on pollution, hazardous material and activities, and environmental impacts. These procedural rights have accordingly been afforded special recognition and protection in international and foreign law. The Constitution requires that a court interpreting the Bill of Rights must consider international law and may consider foreign law.[25]

31. Principle 10 of the Rio Declaration on Environment and Development[26] provides the foundation for a right of access to environmental information. It states that "*environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided*."

32. The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention")[27] recognises in its preamble that, "*in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns*" and further recognises "*the importance of the respective roles that individual citizens, non-governmental organisations and the private sector can play in environmental protection*".

33. The importance of public access to environmental information for the protection of rights has also been recognised by our courts. In the Supreme Court of Appeal (SCA) judgment in the case of *Company Secretary, ArcelorMittal South Africa (AMSA) v Vaal Environmental Justice Alliance (VEJA)*,[28] which entailed an application by VEJA to compel the disclosure of information requested in terms of PAIA from AMSA. The SCA upheld the decision of the South Gauteng High Court, granting judgment in VEJA's favour. The SCA held that, "*[i]t is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative governance in relation to the environment*",[29] and that "*[c]orporations operating within our borders … must be left in no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced*".[30]

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[25] S39(1)(b) and (c) and S233 of the Constitution.
[26] Adopted at the Fourth Ministerial Conference by the United Nations Conference on Environment and Development in Rio de Janeiro in 1992.
[27] Adopted by the United Nations Economic Commission for Europe on 25 June 1998.
[28] *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA), 26 November 2014.
[29] Paragraph 71.
[30] Paragraph 82.

34. Accordingly, it is fundamental that the Draft Regulations are aligned with the above national law and international instruments, to ensure adequate access to the data made available under the Draft Regulations, in order to enable members of the public to exercise their Constitutionally-enshrined rights.

35. We refer to a report published by the World Resources Institute entitled 'Designing Greenhouse Gas Reporting Systems: Learning from Existing Programs'.[31] Table 9 of the report provides an overview of publicly-available GHG information among various jurisdictions with reporting programmes - including whether the jurisdiction discloses facility-level data.[32] It is evident from the table that in all the countries represented, data are publicly accessible. The report provides that "*immediate investments in capacity building and stakeholder engagement can assist in strengthening implementation later*."[33]

36. As highlighted above, the foreseen impacts of climate change are significant, and this is a matter of both national and international concern. In light of the international and national law which highlights the importance of transparency and openness - particularly where environmental considerations are concerned - there can be no justification for maintaining that GHG emission data can be confidential and/or for withholding such information from the public.

37. Therefore the Draft Regulations should, at the very least, provide for public disclosure of GHG emission data - submitted in terms of the Draft Regulations - in the NAEIS, as the default position, unless it can be demonstrated that there are justifiable reasons to withhold the information. We refer to the detailed submissions below in this regard.

Submissions on the Draft Regulations

38. Our clients' submissions on various specific provisions of the Draft Regulations are set out below.

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

Definitions: Draft Regulation 1

40. With regard to the definition of "competent authority":
    40.1. It is noted that the "competent authority" for purposes of these Draft Regulation is the "*National Inventory Unit at the National Department of Environmental Affairs*". However, the role of local authorities in the monitoring and verification of GHGs should not be disregarded. In this regard we point out that:
        40.1.1. metropolitan and district municipalities are charged with implementing the atmospheric emission licensing system under AQA and they must perform the function of licensing authority set out in Chapter 5 of AQA;[34] and
        40.1.2. 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*"

    40.2. 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, these reports

[31] Available at http://www.wri.org/sites/default/files/designing_greenhouse_gas_reporting_systems.pdf and http://www.wri.org/publication/designing-greenhouse-gas-reporting-systems-learning-existing-programs.
[32] P18 - 19.
[33] See 'Key Findings' http://www.wri.org/publication/designing-greenhouse-gas-reporting-systems-learning-existing-programs
[34] S36(1).

would presumably be submitted and administered by the relevant municipalities as the licensing authorities in respect of the AELs. This information will be in the control and possession of the relevant municipalities. The relevant municipalities would therefore be well-placed to perform many of the functions, which the National Inventory Unit is currently solely mandated to perform under the Draft Regulations.

40.3. It is recommended that the Draft Regulations be amended to include municipalities and air quality officers as competent authorities to assist the Department of Environmental Affairs (DEA or "the Department") in the monitoring and verification of GHG 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.

41. With regard to the definition of "tier", we refer to our submissions regarding the identification of key categories and in paragraphs 53 to 57 below.

Purpose of these Regulations: Draft Regulation 2

42. It is submitted that, as the Draft Regulations currently stand, they would not meet the objectives or fulfil the purpose referred to in regulation 2(b) namely "*for the Republic of South Africa to meet its obligations under the United Framework Convention on Climate Change and any other international treaties to which it is bound*". This is so because, as already submitted above in the overview:
    42.1. there is only a hollow obligation on data providers to submit their annual total GHG emissions per company, with no obligation to report on the emissions of individual GHGs, the emission sources, the production processes, details of monitoring and measuring methods used or other relevant information pertaining to GHG emissions. There will therefore be insufficient information to make any determination on the quality and accuracy of reported emissions, the main contributors to South Africa's GHG emissions and the extent and details of their emissions;
    42.2. there is no provision for the GHG emission information to be publicly available; and
    42.3. the means provided for calculating, reporting on and verifying GHG emissions are vague and inadequate - as explained below.

43. It is important that the Draft Regulations be amended where necessary so that they are aligned with their stated purpose.

44. It is recommended that Draft Regulation 2(a) be amended to read "*to inform policy formation and guide the implementation of policy*".

Reporting Requirements: Draft Regulation 7

Draft Regulation 7(1) and (3)

45. It is noted that Draft Regulations currently only require reporting by a data provider of the total of all its facility level emissions at company level. The implication is that data providers are not required to submit emission data for individual facilities – the effect of this is that relevant information such as the following is not provided:
    45.1. how many facilities are operated by the data provider and how much is emitted by each individual facility;
    45.2. the geographical location and layout of the facilities, whether they are located in an air quality priority area, and which air quality management plans apply to them;
    45.3. the production and operation methods used by a data provider; and
    45.4. the monitoring and measuring methods applied by the data provider.

46. Requiring only one company total to be reported would make it possible for a company to conceal individual facilities with particularly bad track records behind the company's total average GHG emissions figure, and it would render it impossible to ascertain the individual emission sources or to make a true assessment of South Africa's GHG emitters and those in need of further monitoring and regulation. Opportunities for mitigation of GHG's would be missed.

47. The calculation methods for different GHG's differ markedly. Failing to calculate and report the emissions of individual GHG's as well as the relevant activity and other data used in the calculation of emission levels would render it impossible to assess the quality of the reported emissions data or to estimate the uncertainty associated with the reported values.

48. Simply requiring one total company-level GHG emission figure also disregards the fact that emission reductions may have been traded as certified emission reductions (CERs) under the Clean Development Mechanism (CDM). It is important that the GHG inventory and any GHG emission data indicate clearly whether emission reductions have been traded under the CDM, and the details of the transaction must be included.

49. This lack of information would not be conducive to an effective GHG inventory system, to upholding the Constitutional right to an environment not harmful to health or wellbeing, or to ensuring compliance by South Africa with its international obligations to address climate change.

50. In comparison, in the USA, reporting is done at a facility level. In explaining the rationale for this, the EPA stated that: "*public release of the information collected under [the Greenhouse Gas Reporting Program] that are emission data … is important because it ensures transparency and promotes public confidence in the data. For example, facility identification data (e.g., name and physical address of a direct emitter) allows the public to identify which facilities are emitting GHGs and how much they are emitting. This information is useful for comparing the GHG emissions of different facilities and for evaluating changes in a facility's GHG emissions over time. Comparisons of facility-specific data will improve our understanding of the factors that influence GHG emission rates and actions facilities could in the future or already take to reduce emissions. By tracking changes in facility-specific data, EPA and other stakeholders will be able to track trends in GHG emissions from industries and facilities over time and assess responses to policies and potential regulations*."[35]

51. It is submitted that the Draft Regulations must provide for detailed and compulsory reporting of both relevant activity data and the GHG emissions of each facility - including relevant facility layout and operations information, and monitoring and measuring methods - particularly where a facility has been designated as being within a key category. We reiterate the submission that the Draft Regulations should provide for the identification of key categories in terms of the IPCC Guidelines.

52. It is therefore recommended that draft Regulation 7(3) be amended to read "*a data provider required to submit emission data in terms of these regulations must report all facility level GHG emissions, [**the total of all its facility level emissions at company level**] and all such information necessary to enable effective auditing and verification of the emission data provided. A data provider which falls within a key category, and which is required to calculate its GHG emissions using tier 2 or 3 methods must report all facility level GHG emissions for each GHG, and information pertaining to the location, layout, processes and operations at each of its facilities and methodologies used to calculate and monitor and measure the total emissions for each GHG".*

Draft Regulation 7(4)

53. Draft Regulation 7(4) states that "*A data provider required to submit greenhouse gas emissions in terms of these Regulations and listed in Annexure 3 must determine the emissions to be reported using tier 2 or tier 3 methods and in compliance with the requirements set out in the 'Technical Guidelines for Monitoring, Reporting and Verification of Greenhouse Gas Emissions by Industry" available at the Department website*."

[35] 75 Fed. Reg. 39099 (July 7, 2010) available at http://www.gpo.gov/fdsys/pkg/FR-2010-07-07/pdf/2010-16317.pdf.

54. We were unable to locate the Technical Guidelines for Monitoring, Reporting and Verification ("the Technical Guidelines") referred to in this Draft Regulation - and which are, it is assumed, necessary for determining the calculation methods - on the DEA website, as it seems they have not yet been made available.

55. We are therefore unable to make any submissions on the appropriateness or adequacy of the tier 2 and 3 calculation methods provided. This, we note, is a limitation of our clients' rights to consider and make submissions on the Draft Regulations, and our clients' rights to make submissions on the Technical Guidelines at a later stage - once these have become available - are reserved.

56. We do, nevertheless, point out that affording the data provider the choice between applying tier 2 calculation methods (the more lenient of the two) or tier 3 methods (which are more stringent) would have the likely effect of rendering tier 3 methods redundant - as data providers would, logically, rely on tier 2 as the least burdensome option. It is recommended therefore that the Draft Regulations and/or the Technical Guidelines provide unequivocal guidance for instances where tier 3 must apply.

57. We also re-iterate our submissions above regarding the need for the Draft Regulations to provide for the identification of key categories where more stringent measuring methods – in this case tier 2 or 3 - and reporting requirements would apply, and submit that the Draft Regulations should be amended to ensure that all Annexure 3 key category data providers report not only their estimated GHG emissions at facility level, for each relevant greenhouse gas, using tier 2 or 3 methods, but, in addition, all activity and process data, including emission factors, used in the estimation of each of their GHG emissions.

Draft Regulation 7(8)

58. Draft Regulation 7(8) allows for a deviation from the Technical Guidelines by a data provider upon approval by the competent authority. It is submitted that this provision should be amended to provide an opportunity for public participation on the making of such a decision – in line with the need for transparency, just administrative action and openness in the process.

Draft Regulation 7(9)

59. Draft Regulation 7(9) states that "*a Category B data provider must submit activity data arising from the activity or activities set out in Annexure 2 when requested by the competent authority*." It is submitted that this list of activities in Annexure 2 is redundant and arbitrary. We refer to our submissions below in paragraphs 102 and 103 in this regard.

60. It is recommended that Draft Regulation 7(9) be amended to refer instead to the activities set out in Annexures 1 and 3.

<u>Reporting Boundaries: Draft Regulation 8</u>

61. Draft Regulation 8(1) states that "*a data provider must define the reporting boundaries for each installation based on operational control*." It is submitted that it should not be for the data provider to define the reporting boundaries, but for the competent authority under the Draft Regulations.

62. At the very least, if the determination of the reporting boundary is to be left in the power of the data provider, this should be subject to the approval of the competent authority.

<u>Completeness: Draft Regulation 9</u>

63. Draft Regulation 9(1) states that "*Monitoring and reporting must be complete and cover all process and combustion emissions from all emission sources and source streams belonging to activities listed in Annexure 1 of these Regulations*."

64. It is submitted that, in order for this provision to be effective and enforceable, it is necessary that reporting include not only a total of all GHG emissions at company level, but also details of the emissions of each GHG and details regarding the individual facility emissions, their layout, operations and processes, and the monitoring and measuring methods used. It will be impossible to ascertain whether there has been compliance with Draft Regulation 9 in the absence of this information.

Alternative Emission Factors: Draft Regulation 10

65. Draft Regulation 10 allows for a data provider who "*reasonably believes that any emission factor referred to the Technical Guidelines for Monitoring, Reporting and Verification of Greenhouse Gas Emission in South Africa for a particular activity is not appropriate under the specific condition of emission*" to make a submission to the competent authority requesting a review of the applicable emission factor.

66. It is submitted that this Draft Regulation should make provision for the public to participate and comment on the data provider's request – given the fact that such a decision would impact the public's right of access to information and environmental rights.

Verification of Information: Draft Regulation 12

67. Draft Regulation 12(1) provides that "*if the competent authority reasonably believes that the information submitted to the NAEIS is incomplete or incorrect the competent authority, must instruct, in writing, a data provider to verify the information submitted*."

68. Draft Regulation 12(2) places an obligation on the competent authority to conduct an on-site verification of emissions estimated using tier 2 and 3 methodologies once every 2years. It is submitted that the two year interval between verifications is far too long to achieve the desired outcome of verifying compliance: verification should be conducted at least once a year.

Confidentiality of Information: Draft Regulation 13

69. Draft Regulation 13 states that "*(1) No person may disclose confidential information obtained in terms of these Regulations, unless -*
(a) the information is disclosed in compliance with the provisions of any law;
(b) the person is ordered to disclose the information by a court of law;
(c) the information is disclosed to enable a person to perform a function in terms of these Regulations."

70. "Confidential information" is not defined in the Draft Regulations. This creates uncertainty for the interpretation and application of Draft Regulation 13, and provides unacceptable leeway for industries to raise confidentiality at any time as the basis for not making GHG emission data available. It has certainly been our experience to date that industries abuse this term to avoid any disclosure. We submit that what comprises confidential information in the context of GHG emissions should be clearly defined and delineated to avoid spurious objections to the provision of GHG emission information in the name of "confidentiality". The position in the United States - as referred to below - provides useful guidance in this regard.

71. GHG emission reporting in the USA is regulated by EPA under the GHG Reporting Program[36] and is also subject to the provisions of the Clean Air Act. The following should be noted:
    71.1. the default position in the USA is that data collected under the GHG Reporting Program must be available to the public, unless the data qualify for confidential treatment under the Clean Air Act;

[36] See http://www.epa.gov/climate/ghgreporting/index.html.

71.2. the Clean Air Act unequivocally states that emission records and data, among other information obtained by the EPA through its regulatory activities, "*shall be available to the public*."[37] The only exception is for records, reports, or information, **other than emission data,** which, if made public, "*would divulge methods or processes entitled to protection as trade secrets*"; and

71.3. confidentiality provisions are outlined in more detail within the EPA's regulations, which serve as guidelines for evaluating a facility's claim that information must be withheld from public disclosure for confidentiality reasons. In EPA's regulations, "business confidentiality" is defined as "*the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information*."[38]

72. We note that non-compliance with this Draft Regulation would constitute a criminal offence under Draft Regulation 16. It is submitted that this is misaligned with section 31Q(1A) NEMA, which provides an exemption from the criminal offence of disclosure where information disclosed pertains to environmental quality or the state of the environment, any risks posed to the environment or public safety or compliance with or contraventions of any environmental legislation.[39] Disclosure of GHG emission data would certainly fall within this exemption. If this Draft Regulation is to be retained, and the offence provision in Draft Regulation 16 – which we strongly recommend be amended as per our suggestion below - is to retain the reference to regulation 13, then it should make provisions for exemption such as those in section 31Q(1A) NEMA.

73. Draft Regulation 13, as it currently stands, has the effect of protecting the provider of data without defining what constitutes confidential information, and without providing any public interest exceptions to such disclosure. Not only would this be a clear loophole through which data providers could restrict all emissions data and avoid control by DEA, but also effectively excludes all oversight by the public and the scientific community. It also discourages important disclosure in the public interest.

74. Not defining what constitutes confidential information and criminalising the provision of confidential information places employees, contractors and others in precarious situations and may lead to the provision of incomplete and inaccurate data due to fear of committing an offence.

75. It is submitted that a similar approach to that followed by the USA should be adopted in the Draft Regulations. It is submitted further that there is no rational basis to justify that GHG emission data could in any way be regarded as confidential. Even if this could be shown, the public interest in having access to this information would outweigh any potential harm that could be caused by disclosing such information.[40]

76. Furthermore, the fact that there is some genuinely confidential information[41] within a document does not prevent the disclosure of such document. The confidential information can be redacted or severed from the document.[42] Limiting the definition of "confidential information" is also in keeping with our submission – see below – that NAEIS data must be automatically available and accessible to the public.

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[37] 42 U.S.C. § 7414(c) available at http://www.law.cornell.edu/uscode/text/42/7414.

[38] 40 C.F.R. § 2.201(available at http://www.ecfr.gov/cgi-bin/text-idx?SID=2fa7518af7e1d859278279c103038171&tpl=/ecfrbrowse/Title40/40tab_02.tpl). EPA has also produced tables summarising its confidentiality determinations for various reporting elements. These are available at http://www.epa.gov/ghgreporting/documents/pdf/2014/documents/GHGRP-Table-Reported-data-direct-emitters-subparts.pdf and http://www.epa.gov/ghgreporting/documents/pdf/2014/documents/GHGRP-Table-Reported-data-Suppliers-subparts.pdf

[39] S31Q(1A) NEMA.

[40] See s 46 PAIA.

[41] See *Walter McNaughtan (Pty) Ltd v Schwartz and Others* 2004 (3) SA 381 (C) "for For information to be confidential it must (a) be capable of application in trade or industry, that is, it must be useful; not be public knowledge or property; (b) it must be known only to a restricted number of people or a closed circle; and (c) be of economic value to the person seeking to protect it."[41]

[42] See, for instance, section 28 of the Promotion of Access to Information Act 2 of 2000, which deals with severability.

77. In light of the above submissions, it is recommended that regulation 13 be deleted entirely from the Draft Regulations.

78. However, in the event that the above recommendation is not accepted and Draft Regulation 13 is not deleted, it is recommended that the Draft Regulations be amended to include a definition of "confidential information". It is further submitted that it must be clear, from the Draft Regulations and the definition of "confidential information", that the onus is on the data provider to show that the relevant information is confidential and that the harm that would result from its disclosure would outweigh any harm to the public and the environment.

Publishing Data and Information: Draft Regulation 14

79. Draft Regulation 14 states that "*(1) The competent authority may only place NAEIS data and information in the public domain if it does not-*
(a) it does not promote unfair competition in terms of the Competition legislation;
(b) it does not contravene section 36 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); and
(c) it does not contravene section 17 of the Statistics Act, 1999 (Act No. 6 of 1999)."

80. It is pointed out that "it does not" has been unnecessarily repeated at the beginning of subparagraphs (a), (b) and (c) and that this should be deleted.

81. We also point out that the "unfair competition" sub-regulation (Regulation 14(1)(a)) is unnecessary, as it has already been adequately catered for by sub-regulation 14(1)(b) – which refers to section 36 of PAIA. Section 36 of PAIA deals with the "mandatory protection of commercial information of third party" and states that:
"*(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains –*
(a) trade secrets of a third party;
(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or
(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected –
(i) to put that third party at a disadvantage in contractual or other negotiations; or
(ii) to prejudice that third party in commercial competition."

82. We submit that, in the circumstances, the current Draft Regulation 14(1)(a) is superfluous and should be deleted.

83. In addition, it submitted that this section should be reworded, so that placing data and information in the public domain is the default position.

84. In this regard, we point out that many other jurisdictions, such as the USA, the European Union (EU) and Australia – as indicated below - subscribe to a default position of disclosure, and that such an approach would be in line with international best practice.

85. The position regarding public disclosure of GHG emission information in the USA is that members of the public may access GHG emission information through a database maintained by EPA, known as Facility Level Information on GreenHouse Gases Tool. [43]

86. In the EU the position is as follows:

[43] available at http://ghgdata.epa.gov/ghgp/main.do.

86.1. the Environmental Information Directive[44] - which member states were required to implement through legislation by 2005 – provides, with regard to commercial and business interests, that environmental information may be withheld from public release only if disclosure will adversely affect the confidential business information that is necessary to protect a "legitimate economic interest" or intellectual property rights.[45] The directive also provides that public authorities are not allowed to assert business confidentiality as a ground for withholding information on emissions into the environment,[46] and that all grounds for refusal "*shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure*";[47]

86.2. the EU regulation governing monitoring and reporting of GHG emissions states that "*emission reports held by the competent authority shall be made available to the public by that authority subject to national rules adopted pursuant to [the environmental information Directive]*"[48]; and

86.3. in a 2013 European Court case, it was held that that there is a strong public interest in access to information about emissions into the environment that overrides commercial interests. The Court declared that an agency must disclose a document "*where the information requested relates to emissions into the environment, even if such disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person, including that person's intellectual property, within the meaning of Article 4(2) of the Environmental Information Directive*."[49]

87. The position in Australia in terms of the National Greenhouse Gas and Energy Reporting Act[50] is as follows:

87.1. Section 24, part 4 of the Act requires annual publication by the regulator, on its website of, inter alia, total GHG emissions of registered corporation groups and their net energy consumption, as well as total emissions disclosed in terms of certain reports required by the Act;

87.2. the Act also provides a wide list of information which the regulator may publish, such as the total GHGs for each business unit;[51] the methods used to measure the totals for the corporation's group and the totals of energy consumption.[52] This information can be published as long as the corporation group meets certain threshold requirements.

87.3. a registered corporation can submit a request for information not to be published.[53] The default position, however, is that emission data an energy consumption information can be published and it lies with the corporation to show that it cannot be made publicly available.

88. It is submitted that Draft Regulation 14 should be aligned with the position of default publication of GHG emission information as demonstrated above.

89. As submitted above, there is no basis for alleging that GHG emission data could be regarded as confidential. However, even if a data provider could show that it would suffer harm from the disclosure of the data, it is submitted that section 46 of PAIA,[54] which requires mandatory disclosure in the public interest, would, in any

[44] Directive 2003/4/EC of the European Parliament and of the Council on Public Access to Environmental Information, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF.
[45] Art. 4(2)(d), (e).
[46] Art. 4(2)(h).
[47] Art 4(2)(h).
[48] Commission Regulation 601/2012 of 21 June 2012 on the Monitoring and Reporting of Greenhouse Gas Emissions Pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Art. 71, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R0601&from=EN.
[49] *Stichting Greenpeace Nederland and Pesticide Action Network Europe v Commission*, Case T-545/11, para. 38, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=142701&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=223010.
[50] https://www.comlaw.gov.au/Details/C2014C00813.
[51] S 24(1A)(ii)
[52] S 24(1A)(d)
[53] S 25
[54] S 46 PAIA.

event, require that any information which falls under section 36 be disclosed, given the imminent risk to the environment and the public interest in the disclosure of the data.

90. It must be stated upfront that 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. Ass submitted above, there is 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 an environmental justice and community organisation, 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.

91. In addition, 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.

92. It is therefore recommended that this provision be amended to read, "*14(1) The relevant authority 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)."*

Transitional Arrangements: Draft Regulation 15

93. In terms of this provision, a competent authority may, for a transitional period of up to 4 years from the date of commencement of the Regulations, allow a data provider, in certain circumstances, to be exempt from the tier 2 or 3 calculation methods as provided for in Draft Regulation 7(4) and instead apply lower tier calculation methods – with tier 1 being the minimum applicable tier method.

94. Effectively, this would allow for postponement of compliance with the Draft Regulations, and it is submitted that there is no rationale for allowing lower tier methods to be applied. As the purpose of the Draft Regulations is simply to ensure reporting on GHG emissions, it is unclear what purpose would be served in allowing a data provider to apply a lower tier method.

95. In any event, it is submitted that the harm to the public through not applying the requisite, appropriate calculation methods would outweigh any prejudice that would be suffered by a data provider, should it be required to apply the applicable tier methods with immediate effect.

96. It is therefore recommended that this transitional provision be deleted.

97. Should the above recommendation not be accepted, it is submitted that the Draft Regulation should, at the very least, prescribe requirements to be complied with in order for such transitional exemptions to be allowed. In other words, the data provider must show good cause for applying tier 2 or 3 methods for the specified periods.

98. It is further submitted that the 4 year period provided is unjustifiably long and should be amended to allow for a maximum of 1 year for the transitional adjustment in terms of this Draft Regulation.

Offences: Draft Regulation 16

99. It is recommended that Draft Regulation 16(1)(a) be amended to read "*provides false or misleading information to the NAEIS or any other competent authority in terms of these Regulations of the National Environmental Management: Air Quality Act, 2004*".

100. It is further recommended that reference to Draft Regulation 13 be deleted from Draft Regulation 16(1)(b), and that the provision be amended to read *"fails to comply with regulations 5, 6(1), 6(3)7, 9, 11, 12 or [**13**]*".

Draft Annexure 1: List of Activities for which GHG Emissions Must be Reported to the Competent Authority

101. The activities listed under Annexure 1 have not been defined by reference to the IPPC Guidelines. We suggest that the Draft Regulations be amended to provide that the activities listed in Annexure 1 are defined as set out in the IPCC Guidelines, as has been done for draft Annexure 2.

Draft Annexure 2: Activities for which Activity Data to Estimate GHG Emissions may be Requested in terms of Regulation 7(9)

102. Draft Regulation 7(9) states that "*a Category B data provider must submit activity data arising from the activity or activities set out in Annexure 2 when requested by the competent authority*." A Category B data provider includes "*any organ of state, research institution or academic institution, which holds GHG emission data arising from an activity listed in Annexure 2 to these Regulations*".[55] We submit that no rationale is provided for this listing, which is confusing and redundant.

103. The activities in respect of which a competent authority can request information from Category B data providers should not be limited to the list in Annexure 2, particularly as Annexure 1 and 3 cover the activities in respect of which reporting must be conducted. It is recommended that Annexure 2 be deleted and that an obligation be placed on Category B data providers to submit activity data in respect of any activity listed in annexures 1 and/or 3.

Draft Annexure 3: Sectors and Subsectors for which Regulation 7(4) Applies

104. We note that Annexure 3 of the Draft Regulations lists 'Key Sectors' and corresponding 'Sectors' and 'Source Categories' for which regulation 7(4) applies, but the Draft Regulations make no other reference to key categories as provided for in the IPCC Guidelines or the methodologies or requirements that apply to them.

105. This categorisation in Annexure 3 is vague and unclear, and the listed categories, sectors and activities are ambiguous and inconsistent with the IPCC Guidelines and the National Inventory Report. It is recommended that the activities listed in Annexure 3 be aligned with the IPCC Guidelines and that they make provision for key categories of GHG emission sources in alignment with the key sector analysis in the National Inventory Report.[56]

106. Furthermore, the activities listed under Annexure 3 should be a subset of Annexure 1, but the descriptions used under these headings do not coincide with those under Annexure 1.

107. It must also be kept in mind that any key sectors listed in Annexure 3 will – if correctly determined in accordance with the IPCC Guideline – be susceptible to changes from time to time as key categories and sectors will change over time, and the Draft Regulations should make provision for this.

[55] Draft Regulation 4(1)(b).
[56] P53 National Inventory Report at http://unfccc.int/resource/docs/natc/zafnir1.pdf.

108. As submitted above, the effect of regulation 7 read with Annexure 3 is that data providers which would be categorised as key sector data providers under the IPCC Guidelines and the National Inventory Report, and which account for a cumulative total of 95% of total GHG emissions, are only required to report their emissions using tier 2 or 3 methods, but without being required to submit activity and other relevant data that was used to calculate these emissions. As already stated above, this would render any information submitted under the Draft Regulations un-auditable and an emission inventory compiled on the basis of such data would not comply with international best practice in terms of transparency, consistency, comparability and accuracy.

Conclusion

109. In the circumstances, it is submitted that the Draft Regulations should be amended as set out above.

110. Should you require more information on any aspect of our submissions, please let us know. Kindly keep us updated on the further processing of the Draft Regulations.

Yours sincerely
CENTRE FOR ENVIRONMENTAL RIGHTS

per:

Nicole Löser
Attorney
Direct email: nloser@cer.org.za