



Centre for Environmental Rights

Advancing Environmental Rights in South Africa



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Our ref: CER/RH/SK
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Dear Mr Munyai

Comments on the Draft National Atmospheric Emissions Inventory System (NAEIS) Reporting Regulations

1. We address you on behalf of groundWork, Earthlife Africa Johannesburg, the Vaal Environmental Justice Alliance, and the South Durban Community Environmental Alliance.¹
2. Given the short time period provided for comment, and various other obligations, these submissions are limited. The Draft NAEIS Regulations ("the Draft Regulations") were sent to stakeholders by the Department of Environmental Affairs (DEA) by email on 23 January 2014 in anticipation of a workshop on 6 February 2014. There was no mention in that email that recipients should prepare comments on the Draft Regulations, or of a deadline within which to do so. In the email to stakeholders, the DEA stated:

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. 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. 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. Among other things, it aims to promote a culture of environmental awareness and sustainable development.

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"As promised, herewith the draft NAEIS reporting regulations & Offset Policy document in preparation for the workshop on the 06 February 2014. Please note that the attached offset policy is a draft and shall undergo some modifications following the meeting with authorities next week. We look forward to your invaluable participation and input to the workshop."

3. It was only on 6 February 2014 that stakeholders attending the workshop in Johannesburg were advised that comments on the Draft Regulations were expected to be submitted by 21 February 2014. On the same occasion, stakeholders were advised that comment on the Draft Air Quality Offset Policy was also required on 21 February 2014. We alerted the DEA to the fact that this was an unreasonable period for comment, given that, in addition to other demands on our and our clients' time, comments on Eskom's 32 applications for postponement of the minimum emission standards and variation of its station's atmospheric emission licences (accompanied by numerous technical supporting documents) were due on 12 February 2012. Comments on Eskom's application to vary the atmospheric emission licence for Duvha were due on 14 February 2014.
4. In the circumstances, our clients have not had adequate time to comment on the Draft Regulations. In terms of section 33 of the Constitution of the Republic of South Africa, 1996 (Constitution), our clients are entitled to administrative action that is lawful, reasonable and procedurally fair. The Promotion of Administrative Justice Act 3 of 2000 was enacted to give effect to this right. Procedurally fair administrative action requires, amongst other things, that our clients be given adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations.
5. We submit that the period given for comment is far from reasonable. As a result, these are preliminary submissions and we reserve the right to make further comments at a later date.

Overview

6. Given the short period for comment, our submissions focus on Draft Regulations 11 and 12 in relation to access to information.
7. We submit that information relevant to the reporting of atmospheric emissions must be made publicly accessible as provided for by explicit public participation provisions in terms of our Constitution, the National Environmental Management Act 107 of 1998 (NEMA), the National Environmental Management: Air Quality Act 39 of 2004 (AQA), and the 2012 National Framework for Air Quality Management² (Framework) - all of which highlight the importance of public participation in air quality management. We elaborate on this below.

Confidentiality of Information: Draft Regulation 11

8. This draft provision provides that:

*"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."*
9. The Draft Regulations aim to "regulate the reporting of data and information from identified point, non-point and mobile sources of atmospheric emissions on the internet-based National Atmospheric Emissions Inventory System (NAEIS) towards the compilation of atmospheric emission inventories."³ Because, as elaborated upon below, "confidential information" is not defined, Regulation 11 creates the impression that all atmospheric

² The Framework for Air Quality Management of 2007 was recently reviewed and updated on 29 November 2013.

³ Regulation 2.

emission data and information may be confidential. This is not the correct legal position, having regard to section 32 of the Constitution or the Promotion of Access to Information Act, 2 of 2000 (PAIA).

10. 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. As environmental justice and community organisations, our clients are interested in requesting the emission inventory information for purposes of pursuing their constitutional right to an environment that is not harmful to their health or wellbeing 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.
11. The fact that no definition has been given for what comprises “confidential information” provides unacceptable leeway for industries to raise confidentiality at any time as the basis for not making emission data available – and it has certainly been our experience to date that industries abuse this term to avoid any disclosure, including atmospheric emission licences themselves. We submit that what comprises confidential information in the context of atmospheric emissions should be clearly defined and delineated to avoid spurious objections to the provision of NAEIS information in the name of confidentiality. The position in the United States provides useful guidance in this regard.

12. United States of America (US) Approach to dealing with Confidential Business information

- 12.1. In the US, the Environmental Protection Agency (EPA) has made several changes to the requirements for claiming information as confidential. On February 11, 2013, EPA released the non-confidential 2012 Chemical Data Reporting information Regulations (CDR regulations)⁴ on chemical production and use in the U.S. These Regulations provide that information submitted to EPA under the CDR Regulations may be claimed as confidential, but such claims must be made at the time of submission, and substantiated in accordance with the 40 Code of Federal Regulations (CFR) part 711:30. Each processing and use data element claimed as Confidential Business Information (CBI) requires upfront substantiation. Submitters must also provide upfront substantiations of confidentiality claims for site or chemical identity. A blank response or a response that is designated as "not known or reasonably ascertainable" may not be claimed as confidential.⁵

- 12.2. In addition, EPA highly recommends that all confidentiality claims are carefully considered to ensure that the CBI in question fully meets the requirements set forth in 40 CFR Part 2, Subpart B⁶ – which is a provision on the substantive criteria for use in confidentiality determinations. It provides:

*“(b) **Chemical identity.** A person may assert a claim of confidentiality for the chemical identity of a specific chemical substance only if the identity of that chemical substance is treated as confidential in the Master Inventory File as of the time the report is submitted for that chemical substance under this part. The following steps must be taken to assert a claim of confidentiality for the identity of a reportable chemical substance:*

(1) The submitter must submit with the report detailed written answers to the following questions signed and dated by an authorized official.

(i) What harmful effects to your competitive position, if any, or to your supplier's competitive position, do you think would result from the identity of the chemical substance being disclosed in connection with reporting under this part? How could a competitor use such information? Would the effects of disclosure be substantial? What is the causal relationship between the disclosure and the harmful effects?

(ii) How long should confidential treatment be given? Until a specific date, the occurrence of a specific event, or permanently? Why?

⁴ Title 40 - Protection of Environment [40 CFR] Part 711 – Toxic Substances Control Act (TSCA) Chemical Data Reporting Requirements 40 CFR 711.

⁵ Available at <http://www.epa.gov/oppt/cdr/pubs/guidance/confidentiality.html>

⁶ 40 CFR part 711:30

(iii) Has the chemical substance been patented? If so, have you granted licenses to others with respect to the patent as it applies to the chemical substance? If the chemical substance has been patented and therefore disclosed through the patent, why should it be treated as confidential?

(iv) Has the identity of the chemical substance been kept confidential to the extent that your competitors do not know it is being manufactured or imported for a commercial purpose by anyone?

(v) Is the fact that the chemical substance is being manufactured (including imported) for a commercial purpose available to the public, for example in technical journals, libraries, or State, local, or Federal agency public files?

(vi) What measures have been taken to prevent undesired disclosure of the fact that the chemical substance is being manufactured (including imported) for a commercial purpose?

(vii) To what extent has the fact that this chemical substance is manufactured (including imported) for commercial purposes been revealed to others? What precautions have been taken regarding these disclosures? Have there been public disclosures or disclosures to competitors?

(viii) Does this particular chemical substance leave the site of manufacture (including import) in any form, e.g., as product, effluent, emission? If so, what measures have been taken to guard against the discovery of its identity?

(ix) If the chemical substance leaves the site in a product that is available to the public or your competitors, can the chemical substance be identified by analysis of the product?

(x) For what purpose do you manufacture (including import) the chemical substance?

(xi) Has EPA, another Federal agency, or any Federal court made any pertinent confidentiality determinations regarding this chemical substance? If so, please attach copies of such determinations.

(2) If any of the information contained in the answers to the questions listed in paragraph (b)(1) of this section is asserted to contain confidential business information (CBI), the submitter must clearly identify the information that is claimed confidential by marking the specific information on each page with a label such as "confidential business information," "proprietary," or "trade secret."

12.3. The EPA states that CBI claims should be limited to only those data elements the release of which would likely cause substantial harm to the business' competitive position. Interested persons are reminded that with regard to chemical substance use information, EPA is interested in aggregated, general uses, not detailed uses associated with specific customers.⁷

12.4. In essence, the default position in the US is that the public/stakeholders have access to atmospheric emission information and the submitter of the information has to take the initiative to notify the EPA when the information is considered confidential business information. What is considered confidential is also specifically set out.

13. It is submitted that a similar approach should be adopted in the Draft Regulations. The fact that there is some confidential information within a document does not prohibit making such document available. The confidential information can be redacted or severed from the document.⁸ Limiting the definition of "confidential information" is also in keeping with our submission – from paragraph 19 below – that NAEIS data must be automatically available and accessible to the public.

Publishing Data and Information: Draft Regulation 12⁹

14. This Draft Regulation provides that:

"12(1) The relevant authority may only place NAEIS data and information in the public domain if-
(a) it does not promote unfair competition;

⁷ Available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2009-0187-0393>

⁸ See, for instance, section 28 of the Promotion of Access to Information Act 2 of 2000, which deals with severability.

⁹ There appears to be a numbering error with Regulation 12 cited as 12(1), unless there is an intention to provide for a sub-regulation here.

(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)".

15. It is submitted that the "unfair competition" sub-regulation (Regulation 12(1)(a)) is unnecessary, as it has already been adequately catered for by sub-regulation 12(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." (our emphasis)

16. We submit that, in the circumstances, the current Draft Regulation 12(1)(a) should be deleted.

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

"12(1) The relevant authority must [**may only**] place NAEIS data and information in the public domain unless [if]-
(a) [**it does not promote unfair competition**];
[(b)] 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)"

18. The explanation for this is elaborated upon below.

19. Public access to emissions inventory data

19.1. At the 6 February 2014 workshop, one of the main concerns raised by industry players in attendance was that confidential information regarding the nature of their business would be revealed during the reporting and provision of data to the NAEIS. Industry made it clear that this was a concern and would be a factor that would result in resistance to making the emission information available.

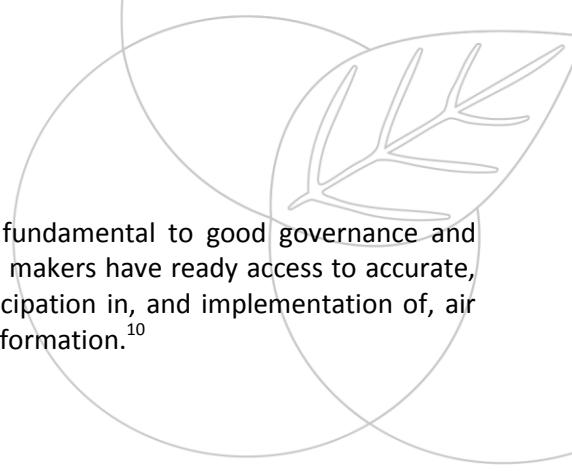
19.2. In response to this, we point out that the compilation of a credible emission inventory is impossible without accurate timeous and complete input data. Any atmospheric emission information that is held back by industries will curtail proper decision making. We again reiterate that our clients have no interest in information of which the confidentiality is already protected by law, such as trade secrets or other proprietary information.

19.3. 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 add the burden of trying to assess what information is confidential, and what is not. The Department will also increase its load of PAIA requests for information that would be in the public interest.

19.4. The benefits of disclosure of emission data in terms of improved compliance and management are well documented. Given the short timeframe provided to us to comment on these Draft Regulations, we

have not had enough time to pull together a selection of research reports in support of this statement – should the Department be prepared to grant us time to do so, we will provide this information.

- 19.5. The right of access to environmental information, guaranteed by section 33 of the Constitution, will be severely limited if emission inventory data is not publicly accessible. The importance of public participation in environmental decision-making and particularly in air quality management matters is recognised in both NEMA and AQA, as well as in international principles – as described below.
- 19.6. Section 24 of the Constitution 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.
- 19.7. NEMA gives effect to this 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.”*
 - “(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.”*
- 19.8. 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.
- 19.9. In terms of section 7(1) of the AQA, the Minister was required, by September 2007, to establish a national framework for achieving the object of the AQA Act, which had to include:
 - 19.9.1. mechanisms, systems and procedures to attain compliance with ambient air quality standards;
 - 19.9.2. mechanisms, systems and procedures to give effect to SA’s obligations in terms of international agreements;
 - 19.9.3. national norms and standards for the control of emissions from point and non-point sources;
 - 19.9.4. national norms and standards for air quality monitoring;
 - 19.9.5. national norms and standards for air quality management planning;
 - 19.9.6. national norms and standards for air quality information management; and
 - 19.9.7. any other matter which the Minister considered necessary for achieving the object of the AQA.
- 19.10. Section 7(2) further states that the national norms and standards established above must be aimed at ensuring opportunities for public participation in the protection and enhancement of air quality, public access to air quality information, the prevention of air pollution and degradation of air quality.



19.11. The Framework recognises that informed decision making is fundamental to good governance and decisions can only be informed if decision shapers and decision makers have ready access to accurate, relevant, current and complete information. Constructive participation in, and implementation of, air quality management matters are also dependent on the same information.¹⁰

19.12. The Framework further states that:

*"The public may be directly affected by air pollution. The public and civil society groups therefore contribute local perspectives and also have an important watchdog role to play in bringing to the attention of the authorities through their municipal [air quality officer], matters of concern or of non-compliance."*¹¹

*Active participation and contributions from individual citizens and citizens groups is of utmost importance in developing, implementing and enforcing air quality management decisions within the context of the AQA.*¹²

19.13. The Framework also recognises that all aspects of implementing its guidelines require the dissemination of information and states that:

*"The main instrument of dissemination of information is the South African Air Quality Information System (SAAQIS), however the SAAQIS has limitations in this regard in that it does not necessarily provide access to all stakeholders, especially those that do not have the necessary technology or prior exposure to air pollution information. This means that a strategy for reaching these parts of the population must be developed and tools other than the SAAQIS are needed."*¹³

19.14. 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.

19.15. Principle 10 of the Rio Declaration on Environment and Development¹⁴ provided the foundation for a right of access to environmental information. It states:

"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."

19.16. Agenda 21 provides that:

¹⁰ At 41.

¹¹ 3.5 at 29.

¹² 5.9.1.1 at 85.

¹³ 5.9.3 at 90.

¹⁴ Adopted at the Fourth Ministerial Conference by the United Nations Conference on Environment and Development in Rio de Janeiro in 1992.

*"the principle of the right of the community and workers to know these risks should be recognised but balanced with industry's right to protect confidential business information."*¹⁵

19.17. The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (otherwise known as the Aarhus Convention)¹⁶ 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 recognised –

"the importance of the respective roles that individual citizens, non-governmental organisations and the private sector can play in environmental protection".

19.18. The importance of public access to environmental information for the protection of rights has also been recognised by our courts. For instance, in an application to compel the disclosure of information requested in terms of PAIA, the South Gauteng High Court, in the September 2013 judgement of **Vaal Environmental Justice Alliance (VEJA) v Company Secretary, ArcelorMittal South Africa** (AMSA) judgment,¹⁷ ordered the disclosure of information held by ArcelorMittal. Carstensen AJ held that:

*"A community based, civil society organisation such as the applicant, is entitled to monitor, protect and exercise the rights of the public at least by seeking the information to enable it to assess the impact of various activities on the environment and like-minded individuals must be encouraged to exercise a watch-dog role in the preservation and rehabilitation of our national resources."*¹⁸

19.19. In objecting to VEJA's request for access to information, AMSA argued that VEJA's approach envisaged usurping the State's role in order to directly enforce a regulatory provision of environmental legislation.¹⁹ The presiding judge rejected this argument and held that:

*"The participation in environmental governance, the assessment of compliance, the motivation of the public, the mobilisation of the public, the dissemination of information does not usurp the role of the State but constitutes a vital collaboration between the State and private entities in order to ensure achievement of constitutional objectives."*²⁰

19.20. Our clients are similarly-placed organisations (in fact VEJA was the applicant in this case) and require access to the emission inventory data for similar reasons. To obviate the need for unnecessary and time-consuming PAIA applications, internal appeals and court applications (which are also expensive), it is submitted that, such data should be made automatically available – apart from such information as is confidential.

19.21. For the reasons set out above, public access to atmospheric emission data is essential and the Regulations should make provision for this. Our clients – and other members of the public – are entitled to protect and exercise their right to a healthy environment, by seeking information to enable them to

¹⁵ Article 19.8

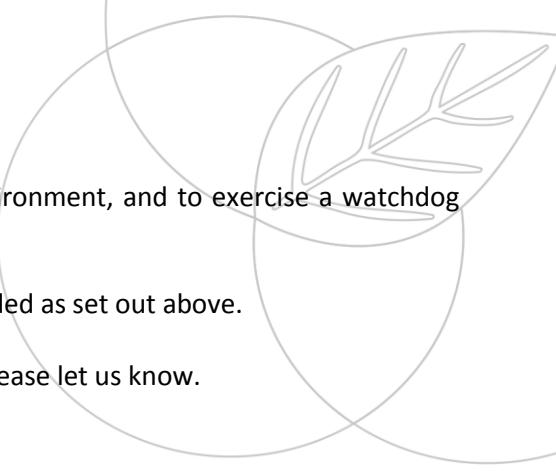
¹⁶ Adopted by the United Nations Economic Commission for Europe on 25 June 1998.

¹⁷ Case no. 39646/12, South Gauteng High Court

¹⁸ Paragraph 16 of the Judgment.

¹⁹ Paragraph 17

²⁰ Paragraph 18.



assess the impact of atmospheric emission activities on the environment, and to exercise a watchdog role in the preventative and rehabilitative measures taken.

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

21. Should you require more information on any aspect of our submissions, please let us know.

CENTRE FOR ENVIRONMENTAL RIGHTS

per:



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