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

Director-General
Department of Environmental Affairs
Attention: Advocate Avhantodi Munyai
By email: amunyai@environment.gov.za

CER/MF/RH/SK
9 November 2015

Dear Advocate Munyai

COMMENTS ON THE DRAFT REGULATIONS FOR THE PROCEDURE AND CRITERIA TO BE FOLLOWED IN THE DETERMINATION OF AN ADMINISTRATIVE FINE IN TERMS OF SECTION 22A OF THE NATIONAL: ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT

1. In this document, the Centre for Environmental Rights (CER or "the Centre") submits its written comments on the draft Regulations for the Procedure and Criteria to be followed in the Determination of an Administrative Fine in terms of section 22A of the National: Environmental Management: Air Quality Act, 2004 (AQA), published for public comment in Government Gazette 39236 of 25 September 2015 ("the draft Regulations"). The CER makes submissions on the draft regulations based on its experience in applying the AQA and the National Environmental Management Act, 1998 (NEMA), both in its own name and on behalf of numerous civil society and community clients. We confirm that the CER was granted an extension for the submission of its comments on the draft Regulations, and we were afforded until 9 November 2015 to submit our comments, which we hereby do.

2. We also note that, on 13 October 2015, the Honourable Minister Molewa, in Notice 986 of 2015, published the National Environmental Management Laws Amendment Bill, 2015 (NEMLAB), which proposes changes to, *inter alia*, NEMA and AQA, including proposed changes to s22A of AQA which are directly relevant to the draft regulations addressed herein. Our comments on the proposed amendments as contained in NEMLAB will be submitted separately. Insofar as NEMLAB's amendments to s22A of AQA are relevant to these draft Regulations, we reserve our rights to make additional comments on these draft Regulations after submitting our comments on NEMLAB.

3. As a general comment, you may be aware that the CER has argued for some time that South Africa's environmental governance regime and compliance would benefit enormously from a true administrative penalty system, as is implemented in numerous other domestic and international jurisdictions. While both section 24G of NEMA and – more recently – section 22A of AQA attempt to incorporate a fine mechanism for unauthorised commencement of listed activities, for various reasons these provisions do not yet constitute the proper, overarching administrative penalty system our environmental governance regime requires.[1] One of the major

[1] Section 24G currently only provides for fines to be imposed on application by an offender; if the offender fails to apply, the competent authority is not empowered to impose a fine and criminal prosecution is then the only option available to impose a

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benefits of an overarching administrative penalty system applicable to violations of NEMA - and all specific environmental management Acts - is a consistent, transparent approach to fines. Unfortunately, these regulations – which deviate[2] in notable, yet unexplained, ways from the draft section 24G fine regulations[3] – do not promote that goal.

Background

4. Section 21(1)(a) of AQA requires the Minister to publish a list of activities which result in atmospheric emissions and which the Minister reasonably believes have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage. A national list of activities has been published.[4]

5. Section 22 of AQA provides that no person may, without a provisional atmospheric emission licence (AEL) or an AEL conduct an activity: listed on the national list anywhere in the Republic; or listed on the list applicable in a province anywhere in that province.

6. When section 22A was first proposed to be included in AQA, the CER objected to its inclusion for reasons that included that it would amount to a duplication of section 24G of NEMA. We refer to our 25 August 2015 submissions on the procedure and criteria for determining a section 24G NEMA fine, attached as **Annexure 1**, in which we highlighted several of the Centre's concerns regarding section 24G as a whole.

7. Section 24G of NEMA is already applicable to a person who has commenced with a listed (in terms of NEMA) activity without authorisation. The effect of section 22A as it stood in the Air Quality Amendment Bill, 2013, would have been that, where an applicant commenced a NEMA listed activity that required an AEL without such AEL, two applications would have to be made – one in terms of section 24G of NEMA for commencing a NEMA section 24(2) listed activity without authorisation, and one in terms of section 22A of AQA, for commencing an AQA section 21 listed activity without authorisation. This, we pointed out, would amount to an unnecessary duplication, and posed the risk of inconsistent or contrary decisions by different authorities on related *ex post facto* applications. We indicated that section 22A should be deleted, but that the fact that an applicant had, in such circumstances, contravened two statutes, should be taken into account in the calculation of an appropriate fine. We refer, for example, to the submissions made to the Department in September 2013, attached as **Annexure 2**.

8. Nevertheless, section 22A was included in AQA. When it was promulgated, section 22A distinguished between:
   8.1. the commencement, without an environmental authorisation, of a listed activity or the activity specified in item 2 in Listing Notice 1 and items 5 and 26 in Listing Notice 2, relating to air quality in terms of Chapter 5 of NEMA: to which section 24G of NEMA applies (s.22A(1)); and
   8.2. the conducting, without a provisional AEL or an AEL, of an activity listed in terms of section 21 of AQA which results in atmospheric emissions: to which section 22A of AQA applies (s.22A(2)-(3)).[5]

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monetary penalty. Section 24G is also linked to an authorisation process, in other words there is no way for authorities to impose a non-criminal monetary penalty without dealing with an application for authorisation. Section 24G also deals only with unauthorised commencement of listed activities – no such non-criminal penalties are available for other contraventions, including most notably violations of section 28 of NEMA, or failure to comply with a section 31L compliance notice. Finally, fines for section24G fines are currently capped at R5 milllion per offence, while a proper administrative penalty system does not have those constraints.

2 See, for example, the inclusion of a pre-determined minimum penalty for fines determined under s22A.

3 Regulations relating to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of section 24G, GNR 636, published in Government Gazette 39024 of 24 July 2015.

4 GN 893 in GG 37054 of 22 November 2013.

5 Provision was also made for s22A to apply to the operation, without a provisional registration or registration certificate, of a scheduled process in terms of the Atmospheric Pollution Prevention Act, 1965, at any time prior to the commencement of AQA.

9. It remains unclear what the position is when both 8.1 and 8.2 above apply - when an activity commences without environmental authorisation and without an AEL. It is assumed that two parallel administrative fine processes will then be conducted.

10. In any event, section 22A of AQA provides that:
    10.1. a person who has conducted an activity without an AEL must make an application to the licensing authority (s.22A(4));
    10.2. which may direct the person to do certain things (which may include the submission of reports or other information) (s.22A(4));
    10.3. the licensing authority must consider any reports or information submitted and thereafter may:
        (a) refuse to issue an AEL;
        (b) issue an AEL to such person to conduct the activity subject to such conditions as the licensing authority may deem necessary; which AEL shall only take effect from the date on which it has been issued; or
        (c) direct the applicant to provide further information or take further steps prior to making a decision in terms of paragraphs (a) or (b) (s.22A(5)).
    10.4. as part of this decision, the licensing authority may direct the applicant to: rehabilitate the environment within such time and subject to such conditions as the licensing authority may deem necessary; prevent or eliminate any source of atmospheric emission from the activity within such time and subject to such conditions as the licensing authority may deem necessary; or take any other steps necessary under the circumstances (s.22A(6));
    10.5. in making this decision, the licensing authority may take into account whether or not the applicant complied with any directive issued (s.22A(7));
    10.6. the licensing authority must determine an administrative fine – which may not exceed R5 million – and the applicant must pay that fine, before the licensing authority decides whether to refuse or issue an AEL (s.22A(7));
    10.7. the submission of an application, the issuing of an AEL, or the payment of an administrative fine: do not derogate from the environmental management inspector's or the South African Police Services' authority to investigate any transgression of AQA or the National Prosecuting Authority's legal authority to institute any criminal prosecution; and do not indemnify the applicant from liability in terms of section 51(1)(a) for having contravened section 22;
    10.8. if at any stage after the submission of an application, it comes to the attention of the licensing authority, that the applicant is under criminal investigation for the contravention of or failure to comply with section 22, the licensing authority may defer a decision to issue an AEL until such time that the investigation is concluded and—
        (a) the National Prosecuting Authority has decided not to institute prosecution in respect of such contravention or failure;
        (b) the applicant concerned is acquitted or found not guilty after prosecution in respect of such contravention or failure has been instituted; or
        (c) the applicant concerned has been convicted by a court of law of an offence in respect of such contravention or failure and the applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review.

11. In terms of regulation 53(lA) of AQA, the Minister may make regulations that are not in conflict with this Act, including regarding the procedure and criteria to be followed in the determination of an administrative fine in terms of s22A.

12. While s22A remains in place, the CER supports the attempt by the Department to clarify and standardise the criteria to be considered when determining an appropriate fine in terms of section 22A, but we are primarily concerned that the way in which these regulations require a different method of fine determination from the

method proposed in the draft s24G fine regulations[6] will cause confusion and uncertainty. Our further concerns with the draft regulations are set out below.

Procedure and criteria

No provision for public participation

13. We note upfront that no provision is made for public participation in the determination of an appropriate fine.[7]

14. In the section 22A process, the applicant may be directed by the licensing authority to compile a report containing—
    (a) a description of the need and desirability of the activity;
    (b) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment, including the ambient air, and human health of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity;
    (c) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment, including the ambient air, and human health of the activity;
    (d) **a description of the public participation process followed** during the course of compiling the report, including **all comments received** from interested and affected parties and an indication of **how issues** raised have been **addressed**; and
    (e) an environmental management programme (s22A(4)(f)).

15. However, unless an applicant has been directed to compile a report which includes public participation, it appears that there will not be public participation in the s22A process of the determination of the fine. It is submitted that the section 22A process must at least require that, where the competent authority concerned has not directed the applicant to compile a report in terms of section 22A(4)(f) of NEMA, information comparable to that which would have been included in such a report must be considered in determining the quantum of the fine. It is also procedurally unfair and in violation of the Promotion of Administrative Justice Act, 2000 (PAJA) not to invite representations from interested and affected parties in relation to the determination of a fine in terms of section 22A. We refer you also to paragraphs 26-31 of Annexure 1.

16. The proposed amendments to s22A AQA in terms of NEMLAB prescribe a different process to that currently provided in s22A as discussed above. The proposed new s22A provides for the bringing of an application by a person who operated a scheduled process under the Atmospheric Pollution Prevention Act, 1965 (APPA) without a provisional registration or registration certificate or conducted or is conducting a listed activity in terms of AQA without a provisional AEL or AEL, which application must be accompanied by "*such documentation and information as may be required by the licensing authority*".[8] It is not clear whether this would include submissions by interested and affected parties. It is submitted that this should be expressly provided for, for the reasons set out above and in Annexure 1.

Minimum fine and aggravating circumstances

17. It is assumed that the minimum fine of R200 000 for operating illegally is not intended to be applicable to the regulation 3(4) circumstances (in which the maximum fine amount is payable). To avoid confusion in this regard, we recommend that the regulation 3(4) circumstances are addressed upfront.[9]

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6 GNR 636 in GG 39024 of 24 July 2015.

7 To the extent that this is not the case, it is submitted that, when a s22A process is conducted, this must be done in terms of sections 37 and 38 of AQA, and there must be public participation in the s22A process.

8 S24 NEMLA, draft s22A(1) and (2) AQA.

9 We note that there is no regulation 3(3) in the draft regulations. The numbering should be corrected.

18. It is submitted that the regulation 4(a) circumstances should be extended to address the applicant's compliance history more broadly and to include:
    18.1. applicants to whom final administrative notices or directives have previously been issued in terms of NEMA, AQA or any other specific environmental management Act;
    18.2. offences committed not only in respect of "the commencement of a listed activity", but any offences in terms of NEMA, AQA or any other specific environmental management Act; and
    18.3. applicants who have previously submitted an application in terms of section 24G of NEMA.

Suggested re-formulation of draft regulation 3

19. In the circumstances, we recommend that regulation 3 be redrafted so that it provides as follows:

"**Procedure and Criteria**

[(1) The procedure and criteria to determine… table below.]

[(2) The administrative fine is determined as indicated below:]

[(a)](1) Because the outcome of the Section 22A process is an atmospheric emission licence granted or not granted, the applicant shall pay an administrative fine determined in terms of these Regulations as well as the atmospheric emission licence processing fee stipulated in the regulations developed in terms of Section 37(2)(a) of the Act.

[(b) The following minimum fine… table below]

[(4) An applicant…. promote the objectives of the Act]

(**2**) **In order to determine an administrative fine, the licensing authority must have regard to:**

- **(a) any reports or information submitted in terms of section 22A(4) of the Act;**
- **(b) such information as allows the licensing authority to comply with the provisions of the Promotion of Administrative Justice Act, 2000;**
- **(c) any compelling reasons provided by the applicant as to why the maximum fine specified in Section 22A of the Act would not promote the objectives of the Act;**
- **(d) the prescribed minimum fine and the factors contained in regulation 3(4) below; and**
- **(e) any representations from interested and affected parties on (a)-(d) above.**

(3) Unless an applicant –

- **(a) on which/whom final administrative notices or directives have previously been issued in terms of this Act or the National Environmental Management Act, 1998;**
- **(b) previously convicted for an offence in respect of this Act, the National Environmental Management Act, 1998 or any other specific environmental management Act;**
- **(c) that/who has previously submitted an application to the licensing authority in terms of Section 22A of the Act; or**
- **(d) that/who has previously submitted an application in terms of section 24G of the National Environmental Management Act, 1998**

can provide compelling reasons why the imposition on it of the maximum fine amount specified in Section 22A of the Act would not promote the objectives of this Act, such applicant is liable to pay this maximum fine amount.

(4)

(a) In circumstances where the maximum fine specified in Section 22A of the Act is not imposed, the applicant is liable to pay a minimum fine amount of R200 000. This fine amount shall be increased based on the aggravating factors set out in (b) below, as well as the information provided in terms of regulation 3(2)(a), (b), and (e) above.

(b) The minimum fine specified in (a) should at least be increased as follows:

(i) for each year, or portion thereof, that the facility operated without an atmospheric emission licence, the applicant is liable to pay an additional amount of R200 000; and

(ii) if the facility for which the application is made is situated in a priority area declared in terms of this Act, the applicant is liable to pay an amount of R1 million in addition to any amount determined in terms of regulation 3(4)(b)(i) above."

Conclusion

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

21. 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

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