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Dear Ms. Tshabalala

SUPPLEMENTARY SUBMISSION ON THE PROPOSED REGULATIONS FOR IMPLEMENTING AND ENFORCING PRIORITY AREA AIR QUALITY MANAGEMENT PLANS IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT, 2004

Introduction

1. We address you on behalf of our clients, groundWork and Vukani Environmental Justice Movement in Action ("**VEJMA**"). Referred to herein as ("**our clients**").

2. We refer to the government notice distributed by the Department of Forestry, Fisheries and Environment (the "**Department**") on 5 August 2022, inviting the public to submit written input or comments on draft regulations proposed for implementing and enforcing priority area air quality management plans (the "**proposed implementation regulations**").[1] These regulations would apply to the implementation and enforcement of the air quality management plans in all three of the existing air-shed priority areas, including the Highveld priority area ("**HPA**"), as well as priority areas that are subsequently declared by government.

[1] Government Notice R. 2353, dated 5 August 2022, *GG* No. 47199.

3. We also refer to our clients' preliminary submission on these proposed implementation regulations, dated 14 March 2022 ("**the preliminary submissions**"). For your convenience, these preliminary submissions are attached as "**Annexure 1**". We note with concern that none of these submissions have been incorporated into the current proposed implementation regulations. We stand by the preliminary submissions and request that they be read into these submissions as well.

4. In the preliminary submissions, we respectfully cautioned the Department in proceeding with the public consultation process on the proposed implementation regulations, as well as the stakeholder process for the 2nd Generation Air Quality Management Plan ("**AQMP**") for the HPA, in the absence of a judgment and order in the matter of *The Trustees for the Time Being of GroundWork Trust and Another v The Minister of Environmental Affairs & Four Others* (NGHC case no. 39724/19)[2]. Accordingly, we reserved groundWork and VEJMA's rights in full, including, but not limited to, the submission of these supplementary comments following receipt of the judgment and order in this matter.

5. This caution was on the basis that the outcome of this litigation process will set parameters for, and direct, both the provisions in, and application of, the documents produced through these consultation processes. Shortly after the submission of our clients' preliminary submissions, the judgment and order in the above matter were handed down electronically on 18 March 2022 ("**the judgment**").[3] This judgment is a fundamental milestone for South Africa and more particularly, for the protection of the health and wellbeing of people living with the harmful impacts of air pollution. For your ease of reference, this order is attached as "**Annexure 2**". As anticipated, the High Court's finding and reasoning in its judgment, and the relief granted in the order, do have a significant constitutional bearing, not only in the context of promptly implementing and enforcing approved priority area AQMPs, but also more generally within South Africa's Just Transition process "*to achieve a good life for all South Africans, in the context of climate resilient and zero-emissions development*".[4] This judgment, and order, must inform the development of these proposed implementation regulations.

6. We point out that in making these comments on the proposed implementation regulations, we do so with complete reservation of our clients' rights as parties to the above-mentioned litigation. Further, we note that any omission of particular recommendations or comments on the proposed implementation regulations does not constitute an admission of their constitutionality nor preclude any submissions thereon at a later stage.

7. These supplementary submissions warrant due consideration, before the proposed implementation regulations are finalised and published in terms of sections 56 and 57 of the National Environmental Management: Air Quality Act, 2004 (the "**AQA**").

8. These submissions are set out as follows:

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[2] *The Trustees for the Time Being of GroundWork Trust and Another v The Minister of Environmental Affairs & Four Others* (NGHC case no. 39724/19) ("***the judgment***").

[3] http://www.saflii.org/za/cases/ZAGPPHC/2022/208.html.

[4] Presidential Climate Commission, '*Framework for a Just Transition in South Africa - Draft for Discussion*' (February 2022), at page 7; https://pccommissionflow.imgix.net/uploads/images/South-Africas-Just-Transition-Framework-for-Stakeholder-Consultation-Feb-2022_2022-02-23-092221_xtvt.pdf.

8.1. As a process point, we address the application filed by the Minister of Environmental Affairs (per the case citation) for leave to appeal parts of the abovementioned order and the Minister's undertaking, under oath, to develop and publish implementation regulations;

8.2. Given the significant bearing and relevance for the proposed implementation regulations, we address the standing High Court declaration regarding the breach of section 24(a) constitutional rights in the HPA. This portion of the judgment remains executable, along with the obligations that flow from selected reasoning and conclusions in the judgment; and

8.3. We make general and specific comments and queries on the proposed implementation regulations.

The Minister's application for leave to appeal

9. On 8 April 2022, the Minister of Environmental Affairs (per the case citation), filed an application for leave to appeal paragraphs 2 to 5.11 of the attached High Court order (paragraphs 241.2 - 241.5.11 of the judgment) regarding the interpretation of section 20 of the National Environmental Management: Air Quality Act, 2004. Namely she has sought to appeal: the declaratory order that the Minister has a legal duty to prescribe regulations under section 20 of the AQA; that she has unreasonably delayed in initiating the regulations; that she must prescribe initiate and prepare regulations within twelve months of the order; and that in preparing the regulations, the Minister must pay due regard to the considerations listed in the court order.[5] This application is now in process. We and our clients strongly recommend, and request, that the preparation and adoption of these proposed implementation regulations, should not be delayed by the Minister's appeal.

10. We note that the Minister's application for leave to appeal, does not bar the Minister and the Department from paying due regard to the considerations listed in paragraphs 241.5.1 to 241.5.11 of the judgment in developing these regulations that will be applicable to all three existing priority areas as well as those to be subsequently declared by government. In fact, it would be prudent that the proposed implementation regulations give effect to the judgment and order, as the outcome of the application for leave to appeal, and appeal are pending. Our clients reiterate the importance of these considerations and hereby request that the Minister and the Department pay due regard to these considerations, as listed in the order, in preparing and finalising the regulations:

    10.1. the need to give **legal effect** to the air quality management plan goals, coupled with **appropriate penalties** for non-compliance;

    10.2. the need for **enhanced monitoring of atmospheric emissions in priority areas**; including through the urgent improvement, management, and maintenance of the air quality monitoring station network to ensure that verified, reliable data are produced, and that real-time emissions data are publicly available online and on request;

    10.3. the need for **enhanced reporting of emissions by industry in the priority areas**, including the requirement that: atmospheric emission licences, monthly, and annual emission reports, real-time emission data, and real-time ambient monitoring data from all licence-holders should be publicly available online and on request;

[5] The Minister has filed an application for leave to appeal against paragraphs 241.2 to 241.5, inclusive, of the order made on 18 March 2022.

10.4. the need for a **comprehensive air quality compliance monitoring and enforcement strategy**; including a programme and regular progress reports on the steps taken against non-compliant facilities in the priority areas;

10.5. the need to appoint and train an **adequate number of appropriately-qualified officials**, with the right tools and equipment in order to implement and enforce air quality management plans and the AQA;

10.6. the need for **all relevant national departments, municipalities, provincial departments and MECs to participate in priority area processes** and to co-operate in the implementation and enforcement of the air quality management plans; demonstrated by published, **written commitments signed by the relevant Ministers**;

10.7. the need for **regular review of air quality management plans**; including reporting on implementation and enforcement progress to all stakeholders as required by air quality management plans;

10.8. the need to address **the postponement and/or suspension of compliance with Minimum Emission Standards (MES) in the priority area**; including to ensure that the atmospheric emission licences of all facilities that have not obtained once-off suspension of compliance and that cannot meet new plant MES by April 2025 are withdrawn, and decommissioning and rehabilitation of those facilities is enforced;

10.9. the need for further or **more stringent dust-control measures in the priority areas**; including to ensure adequate monitoring, measurement, and reduction of dust emissions, and penalties for non-compliance;

10.10. the need for **a coordinated response to address air pollution in low-income, densely populated areas**; and

10.11. the need for **adequate financial support and resources, and adequate human resource capacity** to ensure that all of these issues can be addressed.

11. While the proposed implementation regulations, touch on some of these considerations, for example, in providing for the review of AQMPs and financial support, more must be done (as per our recommendations below) to strengthen and align the proposed implementation regulations with the above considerations.

12. We reiterate that, paragraph 1 of the High Court order – **the declaration that the poor air quality in the Highveld priority area is in breach of residents' section 24(a) constitutional right to an environment that is not harmful to their health and well-being** – is not subject to appeal. This part of the order therefore stands and must be executed and duly remedied by all competent authorities, by means of co-operative governance, directed by the applicable reasoning and conclusions set out in the High Court judgment. Importantly, this provides an imperative to ensure strong implementation regulations that promote the realisation of the 24(a) right.

<u>The unsafe levels of ambient air pollution in the HPA are in breach of residents' section 24(a) right</u>

13. It is important at this stage to reiterate the findings made in the High Court's judgment. As stated above the judgment found that the poor air quality in the HPA is in breach of residents' section 24(a) constitutional right to an environment that is not harmful to their health and well-being. The judgment notes that it cannot be said that all air pollution violates the right to a healthy environment, however, where the air quality fails to meet the National Ambient Air Quality Standards ("**NAAQS**"), it is a *prima facie* violation of the right.

14. The High Court's judgment further found that pollution resulting from the failure to meet NAAQS not only results in the violation of section 24(a) but also automatically results in the interference with other Constitutional rights, such as the right to dignity, bodily integrity, life and the right to have children's interests considered paramount

in matters relating to children.[6] Without drawing less importance on the other affected rights, the violation of children's rights and the right to life are especially concerning as the health impacts arising from the high levels of pollution in the priority areas are so detrimental to the extent that they include premature deaths, a deterioration of essential organs in the human body, and the development of fatal diseases, such as cancer and tuberculosis.[7] Children and the elderly are at greater risk of developing these conditions.

15. As reflected in section 20 of the AQA, implementation regulations are necessary in ensuring that specific action is taken to give effect to AQMPs and provide penalties for non-compliance. The absence of these regulations renders AQMPs unenforceable and contributes to non-compliance with the NAAQS, which brings about the health impacts mentioned above.

General comments on the proposed implementation regulations

16. As general and overall comments on the proposed implementation regulations, particularly in light of the judgment, we highlight and/or request clarity on the following:

    16.1. In our and our clients' experience the implementation of air quality management laws and atmospheric emission licence ("**AEL**") conditions in South Africa, particularly in priority areas is generally poor – with a number of large emitting facilities failing to comply with AEL conditions or minimum emission standards. We request clarity as to how the Department intends to address this particular issue of compliance, monitoring and enforcement in these regulations; and how these regulations could overcome some of these issues, resulting in required improved emission reductions. In other words, **how will the Department ensure that these regulations are effectively implemented and enforced?** In this regard, we refer to our recommendations on penalties below.

    16.2. In our and our clients' experience, a big obstacle with the implementation of the HPA AQMP has been the shifting of timeframes for various goals, or simply, failure to meet the timeframes. We note with concern that a majority of the HPA AQMP objectives were not achieved. It is imperative that **once finalised, the timeframes referred to in the regulations should not be shifted or deviated from,** as doing so would be in breach of section 24(a) of the Constitution.

    16.3. In order to achieve compliance with NAAQS within the priority areas, bold interventions will be required. For example, we know that in the HPA, just 14 facilities (12 Eskom coal power stations, Sasol's coal to liquids facility and the Natref refinery), are responsible for the lion's share of the air pollution.[8] Bold steps must be set out, in these regulations, to address these sources of large industrial pollution, if the regulations are to be effective. It is **important that the regulations are explicit in setting out strict parameters and requirements for legal certainty** and in order for government to meet its constitutional section 24(a) obligations as per the judgment. In this regard we recommend that the proposed implementation regulations make express provision for the following measures:

        16.3.1. A **moratorium on any new coal-fired power stations; coal mines; or large-scale industrial facilities** in priority areas in circumstances where NAAQS are being exceeded; and

[6] Sections 10, 12(2), 11 and 28(2) of the Constitution.

[7] High Court's Judgment at para 70.

[8] See report by Dr. Andrew Gray - https://cer.org.za/wp-content/uploads/2019/06/Andy-Gray-Report.pdf

16.3.2. **All facilities situated in priority areas must comply with (and show evidence of compliance with) 2020 new plant minimum emission standards**, without exception, failing which **detailed plans must be presented for their decommissioning and/or repurposing, as well as rehabilitation of the facility site by 2025, and decommissioning must be complete by 2030**, as per the listed activities under AQA.[9] This is in line with paragraph 241.5.8 of the judgment.

17. Below we make substantive recommended changes on the provisions of the proposed implementation regulations.

Substantive comments on proposed implementation regulations

18. CER, together with our clients, welcome the progress made towards adopting these regulations, and call for the promulgation of robust implementation regulations in line with the judgment as a matter of urgency – in light of the ongoing rights violations and the need to adequately implement the AQMP in the HPA. We welcome additional reasonable legislative and other measures initiated by the Department to realise the objects of the AQA, and to ensure the proper implementation and enforcement of the regulatory tools under the AQA, in this case, section 19 AQMPs in South Africa's air-shed priority areas.

19. In relation to section 24(b) of the Constitution, it is trite in South African law that the promulgation and publication of reasonable legislative and other measures is not sufficient on its own, but legislative and other measures – such as these proposed implementation regulations – must be reasonably implemented, in accordance with the empowering statute and within the prescripts of the Constitution. The content and operation of these proposed implementation regulations must comply with this legal standard.

20. Below, where we propose changes to the specific wording of the provisions of the proposed implementation regulations, we do so by indicating amendments in **bold and underlined**, with deletions in bold **[brackets]**). Please note that:

20.1. our proposed recommendations to the wording of some provisions are purely suggestions in line with our comments. We and our clients are open to alternative wording and formulations that would give effect to our comments and recommendation; and

20.2. we have not made recommended amendments to the specific wording of provisions to correspond with each and every comment and recommendation in these submissions. We request that our recommendations in their entirety are given due consideration – not only the proposed amendments to the wording of the regulation provisions.

Comments on regulation 2: Purpose

21. While we note, and do not dispute, the purpose of these regulations as being to prescribe the requirements for implementing and enforcing AQMPs, we recommend that the stated purpose of these regulations be made more clear and ambitious. The regulations should explicitly state the objective of: bringing air quality in the priority

[9] The listed and associated Minimum Emission Standards identified in terms of section 21 of the AQA, as published in Government Notice R.1207, dated 31 October 2022, *GG* No. 42013.

areas into compliance with NAAQS; protecting human health and the environment; as well as realising the rights in the Bill of Rights.

22. In this regard, we recommend the following amendments to the wording of regulation 2 (amendments in bold and underlined, with deletions in bold [brackets]):

2. Purpose

*(1) The purpose of these Regulations is to prescribe the requirements for implementing and enforcing existing and future approved priority area air quality management plans referred to in section 19(1)(a) and 19(5) of the Act**, and to: achieve compliance with ambient air quality standards in the priority areas, protect human health and the environment, and realise the rights in the Bill of Rights**.*

Comments on regulation 3: Application of the proposed implementation regulations

23. We note that regulation 3 of these proposed implementation regulations would apply to identified stakeholders including operators of section 21 listed activities, section 23 controlled emitters, mining operations – as defined in section 1 of the Mineral and Petroleum Resources Development Act, 2002 - and national, provincial, and local spheres of government.

24. The specific addition of section 23 controlled emitters is both important and supported.

25. The implementation and enforcement of AQMPs is, among other fundamental pillars, dependent on intergovernmental co-operation between national departments. We submit that regulation 3(1) should apply broadly to relevant national departments holding shared-responsibility for the implementation and enforcement of air quality management plans. This provision should make express mention of the departments of Mineral Resources and Energy, Health, Public Enterprises, Human Settlements, and Water and Sanitation, along with Forestry, Fisheries and Environment. The Departments of Transport and Agriculture are also duty-bound stakeholders that should be specifically identified.

26. We make the following proposed amendments to the wording of this regulation (underlined and in bold, with deletions in bold [brackets]):

3. Application

(1) These Regulations apply to stakeholders identified in a priority area air quality management plan referred to in section 19(1)(a) and 19(5) of the Act, including:

(a) Any person conducting a listed activity;

(b) *Any person operating a controlled emitter;*

(c) *Any holder of a right related to a prospecting operation, exploring operation, mining operation, and production operation as defined in section 1 of the Mineral and Petroleum Resources and Development Act, 2002 (Act No 28 of 2002);*

(d) *Every national department, provincial department, and organ of state responsible for preparing an environmental management plan in terms of Chapter 3 of National Environmental Management Act, 1998 (Act No. 107 of 1998); and*

(e) *National, provincial and local sphere of government within the boundaries of the priority area,* ***including the following National and Provincial Departments: Mineral Resources and Energy; Health; Public Enterprises; Human Settlements; Water and Sanitation; and Environment Forestry and Fisheries.***

Comments on regulation 4: Emission reduction interventions and management plans

27. The provisions in regulation 4 are noted. These emission reduction interventions and management plans are necessary binding instruments for the purposes of regular monitoring by interested and affected stakeholders and enforcement by competent authorities. We also note that, in terms of regulation 8, it is deemed to be an offence if an identified stakeholder either fails to submit an emission reduction intervention and/or an emission reduction plan, or fails to implement emission reduction interventions and approved plans within specified timeframes. This is supported.

28. We recommend that – in order to be effective in ensuring emission reductions – this regulation must specify what must be in these plans (we note that the February 2022 draft regulations contained a list of requirements for these plans – this is no longer reflected in the current proposed regulations). Importantly, these plans must be required to specify what measures are to be taken to reduce emissions as well as the anticipated emission reductions to be achieved. It is crucial that these plans have clear and measureable targets – such as anticipated emission reductions to be reported against.

29. In terms of timing, it is also fundamental that clear timeframes be provided in **these** regulations to avoid the potential for backsliding on timeframes under the AQMPs, which can be subject to regular amendments. There is no reason why the submission of these plans should be subjected to timeframes in the AQMPs, as opposed to under these regulations, where the requirement for emission reduction and management plans is legally entrenched and enforceable. On this basis regulations 4(1) and (2) should require that the plans be submitted within 6 months of these regulations and within 6 months of a new AQMP coming into effect.

30. We make the following proposed amendments to the wording of this regulation (underlined and in bold, with deletions in bold [brackets]):

*4. Emission reduction and management plan**s***

(1) The identified stakeholder listed under regulation 3(1)(a) to (c) of these Regulations must, within ***[the timeframes specified in the priority area air quality management plan] six months of the promulgation of these regulations and within 6 months of a new air quality management plan coming into effect****, submit the emission reduction interventions and management plans to the relevant licensing authority or air quality officer for approval.*

(2) The identified stakeholders listed under regulation 3(1)(d) and (e) of these Regulations must, within ***[the timeframes specified in the priority area air quality management plan] six months of the promulgation of these regulations and within 6 months of a new air quality management plan coming into effect****, submit emission reduction interventions and management plans for the activities which they are responsible for, to the National Air Quality Officer for noting by the Minister.*

(3) ***The emission reduction and management plan must include:***

(a) Identified stakeholder name;

(b) Emission reduction activities;

(c) Full description of the emission reduction activities and estimated emission reductions to be achieved;

(d) Implementation timeframes; and

(e) Monitoring and evaluation process.

(4) The licensing authority must incorporate emission reduction interventions and management plans into the atmospheric emission licence in line with section 46(1) of the Act.

(5) The identified stakeholders listed under regulation 3(1) of these Regulations must implement the approved reduction interventions and management plans submitted in terms of sub-regulation 4(1) and (2) within the timeframes specified in the priority area air quality management plan.

Comments on regulation 5: Funding and/or resources for the implementation of the air quality management plan

31. It is imperative that National, Provincial and Local government must allocate adequate financial and human resources to fulfil air quality management functions, including the right tools, training and equipment to enable reduction of emissions and improvement of the ambient air quality. This proposed regulation is unduly vague and ought to provide more detail on how funding and resources for the implementation of air quality management plans is to be provided.

32. In this regard we refer to paragraph 241.5.5 of the judgment, which confirms that – in preparing the regulations – consideration must be given to: the need to appoint and train an adequate number of appropriately-qualified officials, with the right tools and equipment in order to implement and enforce air quality management plans and the AQA.

33. Municipalities have a fundamental role to play in these regulations and serve as a key pillar in effective air quality management within priority areas and more generally. Moreover, there need to be time-bound and measurable requirements for the resourcing of the implementation of these regulations, in particular for the appointment, training and capacity-building of air quality officers.

34. We accordingly submit that putting the following measures in place will go some way towards achieving the aforementioned objectives:

    34.1. In order to bolster resources for compliance monitoring and enforcement, the Department must give due consideration to requiring all existing facilities in priority areas to pay a substantial annual licensing fee, rather than simply a once-off application fee.

    34.2. **Municipalities must take urgent steps to ensure the appointment and training of suitable Air Quality Officers, Environmental Management Inspectors, the development of air quality management plans, and the incorporation of those plans into Integrated Development Plans within set timeframes provided for in these recommendations (we submit this should not be longer than 1 year)**.

    34.3. It is evident from the above considerations that there are several monitoring, implementation, and enforcement related priority actions, within the present air quality management context, that require complimentary resources from the national departments to support provincial and municipal levels of

government. Resource support will also be an ongoing process. We therefore submit that **regulation 5 should explicitly require the Department – as an identified stakeholder – to: review and assess, every six months, the implementation of these regulations, the AQA and AQMPs at local government level, and oversee the appointment and training of an adequate number of appropriately-qualified officials, with the right tools and equipment** in order to implement and enforce AQMPs and the AQA (as per paragraph 241.5.11 of the judgment); and report its funding and resource support activities to the committee contemplated in section 19(6)(c) of AQA, as a standing agenda item.

35. Consistent with the necessary parameters in regulation 4, we submit that the wording "***to the extent possible***" be removed. We submit that the current proposed wording in the proposed implementation regulations, leaves room for government - as an identified stakeholder - to rely to the lack of financial resources to avoid compliance with regulation 5(1). Should the Department maintain the proposed wording we submit that identified stakeholders should demonstrate why they are unable to provide financial resources for the implementation of the priority area AQMPs.

36. We make the following recommendations for amendments to this regulation (underlined and in bold, with deletions in bold [brackets]):

5. Funding and resources for the implementation of a priority area air quality management plan

(1) *The identified stakeholder must **[to the extent possible]** provide adequate financial support funding and necessary resources **to ensure [for]** the implementation of the priority area air quality management plan **within the specified timeframes as set out in the plan**.*

(2) ***The national department must oversee and provide adequate financial support to enable the appointment and training of an adequate number of appropriately-qualified officials at national, provincial and local government level, in order to implement and enforce air quality management plans and the Act.***

(3) ***The national department must review and assesses the capacity and implementation of the regulations at the local authority level, within the priority areas, every six months and take any necessary interventions to address any capacity or resource constraints impacting on the effective implementation of these regulations and/or AQMPs and the AQA at local government level.***

(4) ***The department must report on its funding and resource support activities to the committee contemplated in section 19(6)(c) of the Act.***

Comments on regulation 6: Reporting requirements

37. The objective of reporting on the implementation of emission reduction interventions and management plans should primarily be to inform the National Air Quality Officer on progress in meeting these plans, and in circumstances where plans are not being complied with, to respond with appropriate interventions. Simply requiring the NAQO to incorporate these reports into his/her reports, as is currently required in the regulations, is not enough. Without any provision in the regulations for interventions and quick responses on information presented in reports, there can be little expectation of the emission reduction intervention and management plans, and reports against these plans, yielding tangible results and improvements in air quality in the priority areas.

38. In order to promote transparency, accountability and the effective governance of all identified stakeholders in the regulation, monitoring and compliance in priority areas, where air pollution poses a threat to human health and well-being, we submit that the following steps must be taken:

    38.1. Atmospheric emission licences for all facilities and mines in priority areas must require real-time emissions monitoring, and real time emissions data must be publicly available online and on request;
    38.2. The air quality monitoring station network must urgently be improved and adequately managed and maintained, so as to produce verified, reliable priority area air quality data, that are readily and publicly available;
    38.3. The Department and all licensing authorities within priority areas must make all atmospheric emission licences and annual emission reports submitted to them publicly available automatically on request and online, and all licence-holders must be required to make these documents available on their websites and on request; and
    38.4. Regular and transparent reporting from the identified stakeholders that or who are required to reduce emissions through mandatory interventions, plans, licences, and applicable laws, as well as the identified government stakeholders responsible for monitoring and enforcing these emission reduction obligations, is an essential accountability mechanism and principle of open democracy.

39. The proposed regulations in their current form provide for yearly reporting on the implementation of emission reduction interventions and management plans. We submit that regulation 6 should provide for more regular progress reporting i.e., bi-annually (every 6 months). We wish to reiterate the importance of making these 6-monthly reports publicly available.

40. Finally, our clients seek **clarity on the measures that the Department has in place to verify the authenticity and veracity of the reports submitted by identified stakeholders listed in regulation 3(1)(a) to (c)**. We recommend that the regulations make provision for the verification of reports submitted.

41. We make the following recommendations for amendments to this regulation (underlined and in bold, with deletions in bold [brackets]):

    6. Reporting requirements

    *(1) The identified stakeholders must by 31 March **and 30 September** of every calendar year submit progress reports to the National Air Quality Officer on the implementation of emission reduction interventions and management plans for the preceding [calendar year] six months.*
    *(2) Where 31 March **and 30 September** fall**[s]** on a Saturday, Sunday or public holiday, that period must be extended to the end of the following day which is not a Saturday, Sunday, or public holiday.*
    *(3) The National Air Quality Officer **must respond with any interventions needed as indicated by the reports, for non-compliances with, or deviations from, the emission reduction and management plans, and** consolidate the stakeholders annual progress reports for inclusion thereof in the reporting on the implementation of the air quality management plans in terms of section 17 of the Act.*

(4) *Reporting on emissions by holders of atmospheric emission licenses in priority areas must be done in line with the atmospheric emission licenses and regulations published in terms of section 12 of the Act; and* ***must be published on the department's website and made automatically available on request****.*

(5) *The reports contemplated in sub-regulation 6(1) must be submitted in a format specified by the National Air Quality Officer.*

Comments on regulation 7: Review and monitoring of the emission reduction and management plans & air quality management plans

42. We note that regulation 7(1), requires the review of the emission reduction and management plans every five years or as deemed necessary by the Minister. We submit that this review period is far too long and ought to be reduced to **at least every two years**.

43. In this regard, we refer to the preamble to the AQA, where it is recognised that the "*minimisation of pollution through vigorous control, cleaner technologies and cleaner production practices is key to ensuring that air quality is improved"*. Pollution control technologies and cleaner alternative production practices are constantly evolving and improving – it is essential that the mandatory emission reduction interventions and management plans envisaged in these proposed implementation regulations readily adopt and implement these technology advancements to ensure that air quality is improved. Further, given the high risks of harm to health, wellbeing and human rights in the priority areas – it is crucial that reviewing takes place on a more regular basis to ensure that the plans are able to keep up with and respond to current circumstances on air quality within the priority areas. A five-year review cycle is inadequate to take advantage of technological advancements, or to account for any changes in air quality circumstances that require timeous interventions. It is therefore submitted that identified stakeholders should be required to review these plans biennially (every 2 years). These revised plans must be automatically disclosed to civil society stakeholders.

44. The review of the air quality management plan should also be verified by an independent and qualified advisory body to ensure its reliability.

45. In addition, we submit that regulation 7 should explicitly provide for, and accommodate, stakeholder comments and input during the air quality management plan review process. Stakeholders must have an opportunity to provide inputs on any planned revisions to AQMPs and these inputs must be submitted to the Minister together with the revised plan.

46. We make the following recommendations for amendments to this regulation (underlined and in bold, with deletions in bold [brackets]):

7. Review and monitoring of a priority area air quality management plan

(1) *The priority area air quality management plans must be reviewed every* ***[five] two*** *years or* ***more frequently*** *as deemed necessary by the Minister.*

(2) *The identified stakeholders must review their emission reduction interventions and management plans in line with the review of the priority area air quality management plan and submit the revised plan to*

the relevant licensing authority or air quality officer for the approval thereof, within the timeframes specified in the priority area air quality management plan.

(3) ***The revised emission reduction interventions and management plans contemplated in sub-regulation 7(1) must be made available to the public and relevant stakeholders for a reasonable period for consideration and comments.***

Comments on regulation 9: Penalties

47. The penalties in regulation 9 are noted and supported. However, we recommend the additions below, in order to strengthen and incentivise compliance with these regulations.

48. Our clients are concerned with the absence in the regulations of mechanisms to hold government and government officials accountable for any failure to implement these regulations adequately or at all.

49. In our and our clients' experience with the existing air quality management and licensing regime – polluters are rarely held accountable for offences under AQA, and when prosecution steps are initiated (for example, in the case of Eskom's Kendal power station) the criminal legal process is lengthy and seldom results in tangible emission reductions, in circumstances where a polluter simply pays a fine. For this reason, it **is crucial that express provision be made in these regulations for administrative penalties under these regulations and for the revocation and/or suspension of licences or authorisations to operate in instances of non-compliance with these regulations**.

Comments on regulation 10: Transitional provisions

50. While we do not object to, or have any proposed rewording to this proposed regulation, we submit that, in the development of these proposed regulations, the consideration of section 24(a) of the Constitution should be a priority. The High Court judgment highlighted that the right in section 24(a) of the Constitution is an immediately realisable and unqualified right, meaning that it is realisable here and now. This implies that any steps taken to implement the AQMPs and address air quality within the priority area, must be taken with some urgency and as a matter of priority.

Comments on regulation 11: General requirements

51. Regulation 11 is noted. Paragraph 241.5.9 of the judgment calls for the regulations to give consideration to the need for further or more stringent dust-control measures in the priority areas; including to ensure adequate monitoring, measurement, and reduction of dust emissions, and penalties for non-compliance.

52. We understand that the Department is currently revising the National Dust Control Regulations, 2013. We submit that the amended National Dust Control Regulations must ensure adequate monitoring, measurement and reduction of significant dust emissions, particularly from mining sources, in the priority areas.

53. As the present Dust Control Regulations are not adequate to control significant emissions of dust within the HPA (in this regard we refer to previous submissions on the Dust Control Regulations, 2013),[10] and as it may be some time before amendments to the Dust Control Regulations are effected, without any guarantee that these amendments will make adequate provision for regulating dust; and because dust emissions are often a particular problem and significant contributor to harmful air pollution in the priority areas – owing to the number of mines in the priority areas – we submit that the **proposed implementation regulations must include specific requirements for the abatement; control and monitoring of dust emissions in priority areas**. It is not enough to simply to defer to the National Dust Control Regulations in this instance.

Conclusion

54. In summary, we reiterate the following submissions:
    54.1. We request that the Minister and the Department pay due regard to the considerations listed in paragraph 10 above.
    54.2. As part of ensuring effective air quality management within the priority areas, these regulations must be amended in accordance with our recommendations above and must provide for, inter alia:
        54.2.1. air quality management plans, atmospheric emission licences, emission reduction plans of identified stakeholders, progress reports, and national department's environmental implementation plans and related documents, to be publically available online and on request;
        54.2.2. emission reduction and management plans must be submitted within 6 months of the coming into operation of these regulations. The regulations must prescribe the contents for the plans, including the emission reduction activities and anticipated emission reductions;
        54.2.3. reporting contemplated in regulation 6 to be done bi-annually (every 6 months) and the information provided in the reports must be authenticated and independently verified. The regulations must make express provision for the national air quality office to make any necessary interventions following receipt of the reports;
        54.2.4. emission reduction and management plans should be reviewed every two years by identified stakeholders and these revised plans should be automatically disclosed to members of the public for consultation and comment. These reviews should be independently verified;
        54.2.5. the regulations must make provision for supporting municipalities in: appointing and training suitable Air Quality Officers and Environmental Management Inspectors; developing air quality management plans, and the incorporation of those plans into Integrated Development Plans within clear timeframes. Regulation 5 should explicitly require the Department to: review and assess, every six months, the implementation of these regulations, the AQA and AQMPs at local government level, and oversee the appointment and training of an adequate number of appropriately-qualified officials, with the right tools and equipment in order to implement and enforce AQMPs and the AQA; and

[10] Please see CER's previous submissions on the amendments to the National Dust Control Regulations, 2013, which can be accessed here: https://cer.org.za/wp-content/uploads/2018/05/CER-submissions-Dust-Control-Regulations-proposed-amendments-30-November....pdf ; https://cer.org.za/wp-content/uploads/2018/06/CER-Written-Submissions-Dust-Control-Regulations-25-June-2018-1.pdf and https://cer.org.za/wp-content/uploads/2016/08/CER-Letter-to-Minister-of-Environmental-Affairs-requesting-the-strengthening-of-the-National-Dust-Control-Regulations-16-Oct-2015.pdf; https://cer.org.za/wp-content/uploads/2016/08/CER-comments-2012.pdf

54.2.6. provision must be made for administrative penalties and for the suspension and revocation of licences to operate in the event of non-compliances with the provisions of these regulations, in addition to the penalties provided for in regulation 9.

55. Please contact us should you have any queries in relation to these comments.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per:

:

Michelle Sithole
Attorney
Direct email: msithole@cer.org.za

Annexure 1

Nomfundo Tshabalala
Director - General
Department of Forestry, Fisheries and the Environment
Att: Olebogeng Matshediso
By email: OMatshediso@environment.gov.za

Copied to:

Victor Loate
Director: Atmospheric Policy Regulations and Planning
Department of Forestry, Fisheries and the Environment
By email: Vloate@dffe.gov.za

Date: 14 March 2022

Dear Ms. Tshabalala

PRELIMINARY SUBMISSION ON THE PROPOSED REGULATIONS FOR IMPLEMENTING AND ENFORCING PRIORITY AREA AIR QUALITY MANAGEMENT PLANS IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT, 2004

Introduction

1. We address you on behalf of our clients, groundWork and Vukani Environmental Justice Movement in Action (VEJMA). Referred to herein as "**our clients**".

2. We refer to the government notice distributed by the Department of Forestry, Fisheries and Environment (the "**Department**") on 15 March 2022, inviting the public to submit written input and comments on draft regulations proposed for implementing and enforcing priority area air quality management plans (the "**proposed implementation regulations**").[1] These draft regulations would apply to the implementation and enforcement of the air quality management plans in all 3 of the existing air-shed priority areas, including the Highveld Priority Area (HPA), as well as priority areas that are subsequently declared by government.

3. As you are aware, our clients are the Applicants in the matter of *The Trustees for the Time Being of GroundWork Trust and Another v The Minister of Environmental Affairs & Four Others* (NGHC case no. 39724/19), concerning the constitutional and statutory duties and responsibilities that flow from the ongoing high levels of ambient air pollution in the HPA, which was declared as a priority area in 2007. The Applicants are represented by the Centre

[1] Government Notice R. 1738, dated 11 February 2022, *GG* No. 45894.

for Environmental Rights (CER). Following the hearing in May 2021, judgment is pending before the High Court of South Africa, Gauteng Division, Pretoria.

4. Against this background, and having considered the content of the proposed implementation regulations, we are instructed by our clients to record the following at the outset:

    4.1 We reiterate the same qualification communicated on behalf of groundWork and VEJMA ahead of the multi-stakeholder workshop on the proposed implementation regulations held by the Department in November 2020. The submission of these preliminary written comments, on behalf of groundWork and VEJMA, should in no way be construed as a concession in relation to any of the allegations raised, or relief sought, in the abovementioned application still pending before the Pretoria High Court. groundWork and VEJMA's rights remain fully reserved, including, but not limited to, the submission of supplementary comments following receipt of the judgment and order in this matter, and / or, an application for leave to appeal in the event that it is in the interests of justice for our clients to do so.

    4.2 In general, CER, together with our clients, welcome additional reasonable legislative and other measures initiated by the Department to realise the objects of the National Environmental Management: Air Quality Act, 2004 (the "AQA"), and to ensure the proper implementation and enforcement of the regulatory tools under the AQA; in this case, section 19 air quality management plans (AQMPs) in South Africa's air-shed priority areas. However, we respectfully caution the Department in proceeding with this public consultation process, as well as the stakeholder process for the 2nd Generation AQMP for the HPA (workshop held on 23 February 2022) in the absence of a judgment and order in the above matter. The outcome of this litigation process will — one way or another — set parameters for, and direct, both the provisions in, and application of, the documents produced through these consultation processes.

5. In the event that the Department elects to proceed with both of these consultation processes, despite the above reservations, the remainder of our clients' preliminary submissions are set out below in a general comment section, followed by specific comments and queries, in response to the content of the proposed implementation regulations.

<u>General comments</u>

6. <u>Firstly</u>, the preamble text to the proposed implementation regulations is duly noted, particularly the following important acknowledgements and implementation objectives:

    - "*Despite concerted attempts to implement various emission control measures and tools in the areas declared as Priority Areas, including specific air quality management interventions to bring these areas into compliance with the National Ambient Air Quality Standards, emissions of certain pollutants continue to result in persistent non-compliance with these standards*.";
    - "*These Regulations set out the requirements necessary for implementing and enforcing approved Priority Area air quality management plans . . .[o]nce implemented, the Regulations will provide for mandatory implementation of interventions; provide mechanisms for government to monitor and evaluate the effectiveness of the plans, as well as to activate enforcement measures where non-compliance is identified.*";

- "*They apply to all key stakeholders identified to be significant contributors to poor air quality*";
- "*The anticipated outcome of the Regulations is improved implementation of, and compliance with, Priority Area air quality management plans resulting in ambient air that complies with National Ambient Air Quality Standards with the concomitant reduction in negative public health impacts*"; and
- "*The main beneficiaries of the effective implementation of the Regulations are the communities within the Priority Areas who will benefit from reduced medical costs and a reduced burden of upper respiratory disease, especially vulnerable groups such as the aged, children, and people with underlying health issues*."

7. It is submitted that, read together with the preamble and objects in the AQA, relevant provisions in the National Environmental Management Act, 1998 (NEMA), and the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (the "**Constitution**"), this preamble in the notice must set the tone for the mandatory emission reduction and reporting obligations in the proposed implementation regulations, and the manner in which compliance with air quality laws is enforced in South Africa's air-shed priority areas.

8. In relation to the HPA, a court declaration that there is an existing breach of residents' section 24(a) right to an environment that is not harmful to their health and well-being – per part 1 of the relief in the abovementioned application – *would* also have a direct and significant bearing on the "*effective implementation*" of these proposed implementation regulations.

9. Secondly, pending a High Court order that may direct the Minister of Forestry, Fisheries and Environment (the "**Minister**") to pay due regard to the 11 considerations specified in part 6 of the relief in the abovementioned application, our clients re-emphasise the importance of these considerations, and – subject to the pending High Court order – we request that the Minister and the Department pay due regard to these considerations:

    9.1 the need to give **legal effect** to the air quality management plan goals, coupled with **appropriate penalties** for non-compliance;

    9.2 the need for **enhanced monitoring of atmospheric emissions in priority areas**; including through the urgent improvement, management, and maintenance of the air quality monitoring station network to ensure that verified, reliable data are produced, and that real-time emissions data are publicly available online and on request;

    9.3 the need for **enhanced reporting of emissions by industry in the priority areas**, including the requirement that: atmospheric emission licences, monthly, and annual emission reports, real-time emission data, and real-time ambient monitoring data from all licence-holders should be publicly available online and on request;

    9.4 the need for a **comprehensive air quality compliance monitoring and enforcement strategy**; including a programme and regular progress reports on the steps taken against non-compliant facilities in the priority areas;

    9.5 the need to appoint and train an **adequate number of appropriately-qualified officials**, with the right tools and equipment in order to implement and enforce air quality management plans and the AQA;

    9.6 the need for **all relevant national departments, municipalities, provincial departments and MECs to participate in priority area processes** and to co-operate in the implementation and enforcement of the air

quality management plans; demonstrated by published, **written commitments signed by the relevant Ministers**;

9.7 the need for **regular review of air quality management plans**; including reporting on implementation and enforcement progress to all stakeholders as required by air quality management plans;

9.8 the need to **address the postponement and/or suspension of compliance with Minimum Emission Standards (MES) in the priority area**; including to ensure that the atmospheric emission licences of all facilities that have not obtained once-off suspension of compliance and that cannot meet new plant MES by April 2025 are withdrawn, and decommissioning and rehabilitation of those facilities is enforced;

9.9 the need for further or **more stringent dust-control measures in the priority areas**; including to ensure adequate monitoring, measurement, and reduction of dust emissions, and penalties for non-compliance;

9.10 the need for **a coordinated response to address air pollution in low-income, densely populated areas**; and

9.11 the need for **adequate financial support and resources, and adequate human resource capacity** to ensure that all of these issues can be addressed.

10. Thirdly, we refer again to the text in the preamble in the government notice, where it is envisaged that the "*anticipated outcome of the Regulations is improved implementation of, and compliance with, Priority Area air quality management plans resulting in ambient air that complies with National Ambient Air Quality Standards with the concomitant reduction in negative public health impacts".* During the stakeholder workshop on the 2nd Generation Air Quality Management Plan for the HPA, groundWork highlighted the need for a systematic health risk assessment approach to quantify the costs and benefits of the impacts of air pollution, on a regular basis, by the National Department of Health, or a similar qualified health institution such as the South African Medical Research Council (SAMRC). We are instructed to reiterate this submission here. In order to be able to monitor and measure the concomitant reduction in negative public health impacts caused by the air pollution in the priority areas, a baseline study of this nature is both appropriate and necessary.

11. If it is the Department's view that, in relation to the HPA, the 'Highveld Health Study' conducted by SAMRC and the Council for Scientific and Industrial Research, serves as an element of this baseline approach, we request access to the final version of this report. At present, our clients are only in possession of the draft report, dated 29 March 2019. The final, actionable, version of this report, including its findings, conclusions, data and methodology, is in the public interest, especially the vulnerable groups identified above - the aged, children, and people with underlying health issues.

Specific comments

12. We note the *mandatory* provisions in the proposed implementation regulations, aligned with section 20 of the AQA. Such measures are — severally and collectively — necessary to ensure the proper coordination, implementation, and enforcement of air quality management plans and the AQA tools on which the timely realisation of these plans depend.

13. We, and our clients, maintain that section 24(a) of the Constitution is an *unqualified* right to an environment that is not harmful to human beings' health or well-being. It is a right to a safe environment here and now.

14. In relation to section 24(b) of the Constitution, it is trite in South African law that the promulgation and publication of reasonable legislative and other measures is not sufficient on its own, but legislative and other measures – such as these proposed implementation regulations – must be reasonably implemented, in accordance with the empowering statute and within the prescripts of the Constitution. The content and operation of these proposed implementation regulations must comply with this legal standard.[2]

15. At this stage and with reference to the 11 considerations listed above, we are instructed by our clients to raise the following initial comments, queries, and recommendations, in response to certain provisions in the proposed implementation regulations.

Application of the proposed implementation regulations

16. We note in regulation 3 that these proposed implementation regulations would apply to identified stakeholders, including operators of section 21 listed activities, section 23 controlled emitters, mining operations – as defined in section 1 of the Mineral and Petroleum Resources Development Act, 2002, and national, provincial, and local spheres of government.

17. The specific addition of section 23 controlled emitters is both important and supported.

18. The implementation and enforcement of air quality management plans is, among other fundamental pillars, dependent on intergovernmental co-operation between national departments. We submit that regulation 3 should specify "*all national departments*", alternatively, it should cite the relevant national departments holding shared-responsibility for the implementation and enforcement of air quality plans. This could be based on the national departments represented in the Working Group for Air Quality Priority Areas, established by the Minister, which currently includes the departments of Mineral Resources and Energy, Health, Public Enterprises, Human Settlements, and Water and Sanitation. The departments of Transport and Agriculture are also duty-bound stakeholders that should be specifically identified.

19. In this regard, we reiterate consideration 9.6 above – the utility of written agreements between these responsible departments, which should also be published for the record.

Emission reduction interventions and management plans

20. The provisions in regulations 4 and 5 are noted. These emission reduction interventions and management plans are necessary binding instruments for the purposes of regular monitoring by interested and affected stakeholders and enforcement by competent authorities. We also note that, in terms of regulation 10, it is deemed to be an offence if an identified stakeholder either fails to submit an emission reduction intervention and/or an emission reduction plan, or fails to implement emission reduction interventions and approved plans within specified timeframes. This is supported.

[2] *Government of the Republic of South Africa v Grootboom* ZACC 19; 2000 (11) BCLR 1169, at para 42; *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs* [2004] ZAGPHC 18.

21. It is presumed that the "*departmental environmental implementation plan*" in regulation 4(3)(c) is in terms of section 14 of NEMA; if so, it is recommended that this be explicitly referenced. Once published in a government gazette, as required, we submit that all departmental environmental implementation plans — incorporating emission reduction interventions — are circulated to civil society stakeholders. We further submit that, per consideration 9.3 above, the atmospheric emission licences and emission reduction plans of identified stakeholders, must be publicly available online and on request. Given the nature of these plans and the vulnerable groups who stand to benefit from the proper implementation thereof, this is a category of information where the public interest override demands the automatic disclosure of these documents.

22. In relation to regulation 5(3), it appears that there is a duplication of requirements; subsection (b) – '*emission reduction activities*', and subsection (c) – '*full description of the emission reduction activities'*. We submit that subsection (b) should be amended to read '*description of emission sources'* and subsection (c) should be retained. In addition, the emission reduction and management plan should make provision for the following:

    22.1 a '*grievance and complaint mechanism'* that allows affected parties to register complaints for investigation, prompt remedial action where appropriate, and reporting to the committee identified in regulation 7(2); and

    22.2 subsection 5(3)(e) should be extended to require quarterly reporting on monitoring and evaluation to the committee identified in regulation 7.

Funding and/or resources for the implementation of the air quality management plan

23. We reiterate considerations 9.5 and 9.11 above – the need for adequate financial support, equipment, and resources, and adequate human resource capacity, as a further foundational pillar to ensure the effective implementation and enforcement of air quality management plans in South Africa's priority areas. This is of paramount importance.

24. Consistent with the necessary parameters in regulations 4 and 5, we submit the following insert for regulation 6(1) – '*The identified stakeholder must provide necessary resources [to ensure] the implementation of the air quality management plan [within the specified timeframes as set out in the plan]*'.

25. It is evident from the above considerations that there are several monitoring, implementation, and enforcement related priority actions, within the present air quality management context, that require complimentary resources from the national departments to support provincial and municipal levels of government. Resource support will also be an ongoing process. We therefore submit that regulation 6 should explicitly require the Department – as an identified stakeholder – to report its funding and resource support activities to the committee identified in regulation 7, as a standing agenda item.

Reporting requirements

26. Regular and transparent reporting from the identified stakeholders that/who are required to reduce emissions through mandatory interventions, plans, licences, and applicable laws, as well as the identified government

stakeholders responsible for monitoring and enforcing these emission reduction obligations, is an essential accountability mechanism and principle of open democracy.

27. Considering the 'monitoring, evaluation, and review' section in the current air quality management plan for the HPA,[3] we submit that regulation 7 should provide for more regular progress reporting on the implementation of air quality management plans i.e. bi-annually (6 months). Again, these 6-monthly reports must be publically available.

28. Section 19(6)(c) of the AQA provides:

> *"A priority area air quality management plan must—*
>
> *(a) be aimed at coordinating air quality management in the area;*
> *(b) address issues related to air quality in the area; and*
> *(c) provide for the implementation of the plan by a committee representing relevant role-players."*

29. It is unclear as to whether regulation 7(2) requires the establishment of a new/separate multi-stakeholder committee, or if this role would be fulfilled by existing multi-stakeholder reference groups established in priority areas? We request that this is clarified in these proposed implementation regulations. In the event that it is the latter, we submit that regulation 7(2) should explicitly require this multi-stakeholder committee/group to function in accordance with agreed upon terms of reference (ToR), such as the ToRs that the Department is in the process of revising for the HPA.

Review of the emission reduction and management plans & air quality management plans

30. We note regulation 8(1), which requires the review of the emission reduction and management plans every five years from the date of submission of the air quality management plan.

31. In this regard, we refer to the preamble to the AQA, where it is recognised that the "*minimisation of pollution through vigorous control, cleaner technologies and cleaner production practices is key to ensuring that air quality is improved"*. Pollution control technologies and cleaner alternative production practices are constantly evolving and improving – it is essential that the mandatory emission reduction interventions and management plans envisaged in these proposed implementation regulations readily adopt and implement these technology advancements. . . to ensure that air quality is improved. A 5-year review cycle is inadequate to take advantage of these technology advancements and it is therefore submitted that identified stakeholders should be required to review these plans biennially (every 2-years) to incorporate cleaner technologies and best practices. These revised plans must be automatically disclosed to civil society stakeholders.

32. Finally, our clients submit that regulation 9(1) should explicitly accommodate stakeholder comments and input during the air quality management plan review process, which are addressed during the review of the air quality management plan and submitted to the Minister together with the revised plan. The implementation review of

[3] Pages 130 – 1.

the air quality management plan should also be verified by an independent and qualified advisory body to ensure its reliability.

Conclusion

33. In summary, we reiterate the following preliminary submissions:

    33.1 groundWork and VEJMA's rights remain fully reserved and we respectfully caution the Department in proceeding with these public consultation processes in the absence of a judgment and order in the above matter;

    33.2 subject to the pending High Court order – we request that the Minister and the Department pay due regard to the considerations listed in paragraph 9;

    33.3 in order to be able to monitor and measure the concomitant reduction in negative public health impacts caused by the air pollution in the priority areas, a health risk assessment approach beginning with a baseline study is both appropriate and necessary;

    33.4 air quality management plans, atmospheric emission licences, emission reduction plans of identified stakeholders, progress reports, and national departments' environmental implementation plans, must be publicly available online and on request;

    33.5 regulation 6 should explicitly require the Department – as an identified stakeholder – to report on the status of its funding and resource support activities to the committee identified in regulation 7, as a standing agenda item;

    33.6 clarity as to whether regulation 7(2) requires the establishment of a new/separate multi-stakeholder committee, or if this role would be fulfilled by existing multi-stakeholder reference groups established in priority areas; and

    33.7 emission reduction and management plans should be reviewed every 2-years by identified stakeholders and these revised plans should be automatically disclosed to civil society stakeholders and interested members of the public.

34. Please contact CER should you have any queries in relation to these comments.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per:

Timothy Lloyd
Attorney
Direct email: tlloyd@cer.org.za

Annexure 2

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 39724/2019

PRETORIA 18 MARCH 2022

BEFORE THE HONOURABLE MADAM JUSTICE COLLIS

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF GROUNDWORK TRUST	1ST	APPLICANT
VUKANI ENVIRONMENTAL JUSTICE ALLIANCE MOVEMENT IN ACTION	2ND	APPLICANT
AND		
THE MINISTER OF ENVIRONMENTAL AFFAIRS	1ST	RESPONDENT
NATIONAL AIR QUALITY OFFICER	2ND	RESPONDENT
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	3RD	RESPONDENT
MEMBER OF THE EXECUTIVE COUNCIL FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONEMENTAL AFFAIRS GAUTENG PROVINCE	4TH	RESPONDENT
MEMBER OF THE EXECUTIVE COUNCIL FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS MPUMALANGA PROVINCE	5TH	RESPONDENT
AND		
THE UNITED NATIONS SPECIAL RAPPORTEUR ON HUMAN RIGHTS AND THE ENVIRONMENT		AMICUS CURIAE

HAVING HEARD counsel(s) for the parties and having read the documents filed the court reserved its judgment.

THEREAFTER ON THIS DAY THE COURT ORDERS

JUDGMENT

1. It is declared that the poor air quality in the High veld Priority Area is in breach of residents' action 24(a) constitutional right to an environment that is not harmful to their health and

well-being.

2. It is declared that the Minister of Environmental Affairs ("Minister") has a legal duty to prescribe regulations under section 20 of the National Environmental Management: Air Quality Act 29 of 2004 to implement and endorse the Highveld Priority Area Air Quality Management Plan ("Highveld Plan").

3. It is declared that the Minister has unreasonably delayed in preparing and initiating regulations to give effect to the Highveld Plan.

4. The Minister is directed, within 12 months of this order, to prepare, initiate, and prescribed regulations in terms of section 20 of the Air Quality Act to implement and enforce the Highveld Plan.

5. In preparing regulations, the Minister is directed to pay due regard to the following considerations:

   5.1. The needs to give legal effect to the Highveld Plan goals, coupled with appropriate penalties for non-compliance;

   5.2. The need for enhanced monitoring of atmospheric emissions in the priority area; including through the urgent improvement, management, and maintenance of the air quality monitoring station network to ensure that verified, reliable data are produced, and that real-time emissions date are publicly available online and on request;

   5.3. The need for enhanced reporting of emissions by industry in the area, including the requirement that: atmospheric emission licences, monthly, and annual emission reports, real-time emission data, and real-time ambient monitoring data from all licence-holders should be publicly available online and on request;

   5.4. The need for a comprehensive air quality compliance monitoring and enforcement strategy; including a programme and regular progress reports on the steps taken against non-compliant facilities in the Highveld Priority Area;

   5.5. The need to appoint and train an adequate number of appropriately-qualified officials, with the right tools and equipment in order to implement and enforce the Highveld Plan and their Air Quality Act;

   5.6. The need for all relevant national departments, municipalities, provincial departments and MECs to participate in the Highveld Priority Area process and co-operate in the implementation and enforcement of the Highveld Plan; demonstrated by published, written commitments signed by the relevant Ministers;

   5.7. The need for regular review of the Highveld plan; including reporting on implementation and enforcement progress to all stakeholders as required by the Highveld Plan;

   5.8. The needs to address the postponement and/or suspension of compliance with MES in the priority area; including to ensure that the atmospheric emission licences of all facilities that have not obtained once-off suspension of compliance and that cannot meet new plant MES by April 2025 are withdrawn, and decommissioning and rehabilitation of those facilities is enforced;

5.9. The need for further or more stringent dust-control measures in the area; including to ensure adequate monitoring, measurement, and reduction of dust emissions, and penalties for non-compliance;

5.10. The need for a coordinated response to address air pollution in low-income, densely populated areas; and

5.11. The need for adequeate financial support and resources and adequate human resource capacity to ensure that all of these issues can be addressed.

6. It is further ordered that any of the parties may re-enrol this matter for hearing at any stage, if necessary, on duly supplemented papers, to address the need for further orders arising from the orders set out above.

7. The costs of this application, including the costs of three counsel, are to be paid jointly and severally, by the first and second respondents.

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Private Bag X67, Pretoria 0001

2022 -03- 23

GD-PRET-016

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

BY THE COURT

REGISTRAR

HH
Attorney: CENTRE FOR ENVIRONMENTAL RIGHTS