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

The Director-General: Department of Environmental Affairs
Attention: Mr Jongikhaya Witi
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Pretoria, 0001
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473 Steve Biko Road
Pretoria
By email: GHGReporting@environment.gov.za

7 October 2019

Dear Sir

COMMENTS ON PROPOSED AMENDMENT OF THE NATIONAL GREENHOUSE GAS REPORTING REGULATIONS

1. We address you on behalf of groundwork[1] and Earthlife Africa[2] ("our clients").

2. We refer to the proposed amendments to the National Greenhouse Gas Reporting Regulations, 2017 ("GHG Reporting Regulations") published under the National Environmental Management: Air Quality Act, 2004 (AQA) and published on 6 September 2019 ("the proposed amendments") for comment.

3. We submit herein our comments on the proposed amendments to the GHG Reporting Regulations, in particular, our comments focus on the following amendments and provisions (addressed in more detail below):

   3.1. the registration and reporting by data providers – we support the provision for facility-level reporting, but note that provision should be expressly made for more detailed reporting by data providers;

   3.2. reporting methodologies – we continue to object to any provision for deviation from the default United Nations Intergovernmental Panel on Climate Change (IPCC) reporting methodologies without the prescription of detailed, rigorous, scientific criteria to be complied with for the acceptance of country, or industry, alternative reporting methodologies, and highlight concerns around some key sectors being exempt from reporting obligations altogether;

   3.3. the publication of, and access to, data under the GHG Reporting Regulations – we continue to emphasise the importance of greenhouse gas (GHG) data being publicly accessible (without the need for a formal request in terms of the Promotion of Access to Information Act, 2000 (PAIA)), and strongly object to the stance being taken by government that GHG data, made available under the GHG Reporting Regulations and AQA's other climate regulations, are confidential and cannot be disclosed;

[1] https://www.groundwork.org.za/ groundWork is a non-profit environmental justice service and developmental organisation aimed at improving the quality of life of vulnerable people in South Africa (and increasingly in Southern Africa), through assisting civil society to have a greater impact on environmental governance. groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices.
[2] http://earthlife.org.za/ Earthlife Africa is an environmental justice organisation which promotes sustainable solutions to South Africa's challenges, without exploiting people or degrading the environment.

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3.4. the verification of data – this provision could still be much more rigorous and we remain concerned about the unreasonably short time-frames for the competent authority to check, interrogate and dispute the reported data; and

3.5. the omission of certain offences under the GHG Reporting Regulations.

4. At the outset we record and highlight the need for an urgent, robust and transparent climate law mechanism, with GHG reporting as a central and pivotal component.

5. We refer to our comments of 4 August 2015 ("2015 comments") and 7 July 2016 ("2016 comments") on the two published iterations of draft GHG Reporting Regulations – preceding their promulgation in 2017. We note that many of the concerns raised in these comments persist in the promulgated GHG Reporting Regulations, and in the proposed amendment. Copies of the 2015 and 2016 comments on the draft GHG Reporting Regulations are attached marked "**A**" and "**B**" respectively.

6. We also refer to our correspondence of 19 January 2018, wherein we highlighted concerns regarding the implementation of the GHG Reporting Regulations. Many of these concerns are not addressed by the proposed amendments to the Regulations, for example the submissions around the need for the GHG reports and data to be publicly available. The January 2018 letter is attached marked "**C**".

7. We stand by the submissions made in the 2015 and 2016 comments, as well as the January 2018 letter, particularly in relation to any issues not remedied or addressed by the promulgated GHG Reporting Regulations or proposed amendment. In this regard we request that our previous submissions be read into these submissions.

8. While these comments do not focus on all of the amendments to the GHG Reporting Regulations, the omission of comments on any specific amended provisions cannot be construed as an acceptance of the Constitutionality and lawfulness of those provisions. Our clients' rights are fully reserved in this regard.

Introduction: the urgent need for robust and clear climate change regulation in South Africa

9. A robust GHG reporting mechanism alongside clear and strict climate change legislation are urgently needed in South Africa. This means that:

9.1. it is crucial that the GHG Reporting Regulations provide for a diligently-monitored, enforced and verified reporting mechanism and a transparent platform for GHG reporting and data-gathering. In other words, it is vital that comprehensive GHG emission data are gathered, uniformly across sectors and emitters, which are easily accessible by the public; and

9.2. the reporting and gathering of GHG data is a crucial component of an urgently-required broader climate change regulatory mechanism – to be provided under a much-needed robust Climate Change Act.

10. We are concerned to note, from President Ramaphosa's statement of 23 September 2019, that the finalisation of the Climate Change Bill is only earmarked for completion "*up to the end of 2020*".[3] A Climate Change Act is needed long before December 2020, particularly as many of the mechanisms provided in the Bill, for regulations and strategies to give practical effect to the law, will likely take further time (years) to be drafted, adopted and implemented.

[3] http://www.dirco.gov.za/docs/speeches/2019/cram0923.htm.

11. The United Nations IPCC and other independent expert bodies have highlighted the increasing urgency of addressing climate change. In the IPCC Special Report of 2018 it was confirmed that we had 12 (now 11) years within which to curb global emissions and avoid the worst impacts of climate change.[4]

12. Government has confirmed South Africa's extreme vulnerability to the impacts of climate change in its own Climate Change Response Policy of 2011.[5] The IPCC report shows that even meeting the intended target of limiting temperature increases to 2 °C above pre-industrial levels (as set by the Paris Agreement) is not enough to avoid the catastrophic effects of climate change, while South Africa's Nationally Determined Contribution (NDC) under the Paris Agreement confirms that a global average temperature increase of 2°C equates to a 3 to 4°C increase for South Africa.

13. It goes without saying that we cannot have a functioning economy; jobs; education system; health or life without water, land, a liveable climate, and food – all of which will be imperiled as climate change continues to progress.

14. Already the South African government has spent billions in seeking to address climate-related disasters, such as drought, extreme floods and fires in the past 2 years.[6]

15. In order to reduce emissions within the requisite limited time period confirmed by the IPCC, adequate climate change legislation is required with the utmost urgency. Our comments[7] on the Climate Change Bill of 2018 highlighted the need for various changes to the Bill in order for it to have any hope of adequately regulating climate change in South Africa. A letter of 20 November 2018 to the then Minister of the then Department of Environmental Affairs, requested that the Climate Change Bill be prioritised and highlights the "rapid and far-reaching" action required to address the climate crisis before it is too late. A copy of this letter is attached as "**D**".

16. Taking immediate legislative steps to ensure an urgent and meaningful reduction of GHG emissions in South Africa is no longer simply a question of international commitments, it is an urgent Constitutional imperative. A strong GHG data-gathering and sharing mechanism forms a vital foundational component of this. On this basis it is crucial that the GHG Reporting Regulations be strengthened in line with the comments below and that the Climate Change Act is promulgated (with substantial improvements) without delay.

17. We implore government to treat this with the utmost priority. Failure to do so would, we submit, be in violation of the Constitution of the Republic of South Africa, and the duty of care in section 28 of the National Environmental Management Act, 1998 (NEMA).

Registration and reporting by data providers

18. We welcome the proposed amendment explicitly requiring reporting by data providers at facility-level. We have consistently highlighted the failure of the GHG Reporting Regulations to provide expressly for facility-level reporting as a major concern for the successful implementation of the Regulations.

19. Our 2016 comments called for much more detailed reporting, stating that in order for the regulations to be clear and comprehensive, they should expressly list and clarify the details and data that must be reported. These should include:

    19.1. relevant facility layout and delineation of facility boundaries;

[4] See https://www.ipcc.ch/sr15/.
[5] P8, National Climate Change Response Policy.
[6] Western Cape Climate Change Response Strategy 2nd Biennial Monitoring and Evaluation Report 2017/2018, p19 – 20. Available at https://www.westerncape.gov.za/eadp/files/atoms/files/WC%20Climate%20Change%20Response%20Strategy%20Biennial%20M%26E%20Report%20%282017-18%29_1.pdf.
[7] Available at https://cer.org.za/wp-content/uploads/2018/08/Life-After-Coal-Comments-on-CC-Bill_8-August-18.docx-1.pdf.

19.2. a facility map;

19.3. process operations information; and

19.4. activity data specific to the IPPC category and code in a reporting year.

20. We note that while annexures 2 (for registration) and 3 (for reporting) make provision for the listing of activity data (annexure 3) and IPCC codes, the additional details listed above are still not expressly required – this should be addressed, and we stand by the 2016 comments in this regard. Such a list should also not be exhaustive or exclusive, and should serve more as a means to provide certainty and clarification on the type of activity data that should be reported by a data provider, and to facilitate auditing of the data.

21. We recommend that regulation 7, and annexures 2 and 3, be amended to ensure that sufficiently detailed reporting is expressly required, as per the requirements stated above.

22. We further point out an ambiguity in annexure 1, footnote 1, in relation to the listed thresholds. It refers to 'combustion installations', but not all the listed activities are combustion installations. We recommend that footnote 1 be amended to state that these thresholds refer to "combined capacities" (instead of "combined combustion installations"), which include stationary combustion installations.

23. We also stand by our 2015 and 2016 comments calling for the identification of key categories of data providers. The IPCC Guidelines define a key category as "*one that is prioritised within the national inventory system because its estimate has a significant influence on a country's total inventory of greenhouse gases*".[8] The identification of key categories in a national inventory system is important as it "*enables limited resources available for preparing inventories to be prioritised. It is good practice to focus the available resources for the improvement in data and methods onto categories identified as key*",[9] and, "*it is good practice to give additional attention to key categories with respect to quality assurance and quality control*".[10] The IPCC Guidelines suggest a methodology for selecting key categories of emission source sectors, for example, ranking each category by absolute emission levels and selecting the categories that cumulatively account for 95% of total emissions as key categories.

24. We note that the distinction between Category A and B data providers has been removed from the proposed amendment. We have no objection to this, as long as accompanied by the power of the Minister to identify additional data providers (regulation 4(2)). However, we do propose that the GHG Reporting Regulations make provision for key categories of data providers that will be required to undertake more detailed reporting and submit more comprehensive activity data to the competent authority. We point out that detailed reporting for large emitters (the coal, oil and gas sectors, for example) is particularly fundamental for verification and validation purposes.

25. The meaning of regulation 5(1B) (stating that *"in a case where there are similar installations across a number of IPCC emission sources, the thresholds shall be considered across IPCC sources listed in Annexure 1 to these Regulations*") is unclear, as this provision is worded ambiguously. This should be rectified.

Reporting methodologies

26. We reiterate our concerns in relation to regulation 10(2), which would enable a data provider – according to the data provider's own "*reasonable belief*" that an emission factor for a particular activity is not appropriate - to make a submission to the competent authority and request a review of the applicable emission factor.

[8] S4.1.1, Chapter 4, Volume 1 IPCC Guidelines.
[9] S4.1.2, Chapter 4, Volume 1 IPCC Guidelines.
[10] S4.1.2, Chapter 4, Volume 1 IPCC Guidelines.

26.1. We have consistently maintained that reporting must be consistent and uniform, and have emphasised the importance of this in our previous submissions. The proposed regulation 10(2) could create loopholes allowing for lenient and inconsistent reporting – posing risks for the integrity of the data.

26.2. If regulation 10(2) is to remain, the Regulations must set out the minimum criteria for the acceptability of an alternative emission factor proposed by regulation 10(2).

26.3. We maintain that, in recognising the right to just administrative action, provision must be made for adequate public consultation and participation in respect of any proposed review of an emission factor. Failure to make provision for this would contravene the right to administrative justice and the provisions of the Promotion of Administrative Justice Act, 2000 (PAJA) and/or the principle of legality.

27. What is of particular concern is the fact that, under Annexure 1 to the GHG Reporting Regulations, some categories would be exempt from reporting altogether, owing to the fact that Annexure 1 expressly states that the categories marked "NA" and where no reporting method is provided, are not required to report. These include categories, which make up for a large portion of GHG emissions, such as:

2F1 Refrigeration and Air Conditioning
2H1 Pulp and Paper Industry
3A Livestock
3B1a Forest land Remaining Forest Land (but converted to plantations)
3B2b Land Converted to Cropland
3B3b Land Converted to Grassland
3B4b Land Converted to Wetlands
3B5b Land Converted to Settlements
3B6b Land Converted to Other Land
3C1 Emissions from Biomass Burning
3C2 Liming
3C4 Direct N2O Emissions from Managed Soils
3C5 Indirect N2O Emissions from Managed Soils
3C7 Rice Cultivations
3D1 Harvested Wood Products

28. We have previously emphasised the importance of reporting GHG emissions from refrigeration and air conditioning, including refrigeration and stationary air conditioning and mobile air conditioning. Reducing emissions of hydrofluorocarbons (HFCs) and perfluorocarbons (PFCs) in refrigerant uses should be a priority for averting catastrophic climate change, particularly as alternative refrigerants with much lower global warming potential are available. These emissions should be monitored and reported on, at least by: importers, wholesalers and distributors of refrigerants that are GHGs.

29. Platinum production should also be included in the annexures 1 table. Both platinum production and the pulp and paper industry should be required to apply tier 2 or 3 methodologies, with no threshold.

30. The use of a tier 2 or tier 3 methodology is important where GHG emissions are not associated with combustion of fossil fuels, but are associated with activities on land, for example: clearing of a forest or grassland or other natural landscapes, raising of livestock with enteric fermentation (an industrial farm), or cultivation of crops with high potentials for methane emissions, such as rice. While the identification of data providers may be difficult in certain instances, it is important that these emissions are not ignored and that contributors are not exempt from reporting under the GHG Reporting Regulations. The Agriculture, Forestry and Other Land Use (AFOLU) sector makes a significant contribution to South Africa's overall GHG emissions. For example, AFOLU (excluding the removals from the land and harvested wood products) contributed an average of 9.7% to the gross emissions

between 2000 and 2015[11] - the second largest contributor to South Africa's gross emissions. This omission must be addressed in the GHG Reporting Regulations.

31. The IPCC has announced the 2019 Refinement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories.[12] A final version has not yet been published, but advance copies of the various volumes can be found on the Task Force on National Greenhouse Gas Inventories.[13] Volume 4 provides guidance for preparing annual GHG inventories in the AFOLU Sector. This sets out details for the application of emission factors, activity data and other relevant information for purposes of calculating emissions in the AFOLU sector, and should be considered for purposes of amending Annexure 1 to the GHG Reporting Regulations.

32. In terms of the proposed amendments to the transitional provisions, we reiterate (as stated in the 2015 submissions) that there is no rational basis for allowing data providers lenience for a period as long as 5 years to choose which tier methodology to apply. 5 years is a significant period of time and a deviation from the obligations under these Regulations for a period of 5 years will have significant impacts on South Africa's international reporting obligations and will be a setback for the effective functioning of the National Atmospheric Emission Inventory System (NAEIS). It should be compulsory for relevant data providers to apply, at least, tier 2 methods within 1 year. This would not be too burdensome on data providers, particularly for large emitters, where the potential harm to South Africa nationally would outweigh any inconvenience and/or cost for the data provider.

The publication of and access to data

33. We have long maintained that the reports submitted (including any supporting or other data) under these Regulations must be public and automatically available.

34. This was raised as a priority in both sets of comments on the draft GHG Reporting Regulations prior to their promulgation.

35. In our letter of 19 January 2018 (annexure C), we advised that we were concerned with the limitations on public access to, and disclosure of, the data, that will be posed by sections 12 (Confidentiality of Information) and 14 (Publishing Data and Information) of the Regulations. These provisions have the effect of placing undue restrictions on the publication of vital NAEIS data. We warned that a competent authority will be reluctant to disclose any information under these Regulations, even though there is no reason why GHG emission data should be confidential. Indeed, this is the position we have seen emerging in practice from the Department of Environmental Affairs, Forestry and Fisheries ("the Department").

    35.1. In the 19 January 2018 letter, we requested information; including:

        35.1.1. confirmation of the number of Category A facilities that hade duly registered in accordance with the requirements of regulation 5(1), as well as a list of all the facilities registered to date;
        35.1.2. the envisaged steps that the Department intended to take in respect of those Category A facilities that did not register within the stipulated 30-day timeframe;
        35.1.3. whether the Department intended to proceed with enforcement action, given that failure to comply with regulation 5 is an offence in terms of regulation 16 of the GHG Reporting Regulations; and
        35.1.4. what steps the Department intended to take against those facilities that have not yet registered as required.

[11] P37 – 39, South Africa's Draft 3rd Biennial Update Report to the United Nations Framework Convention on Climate Change.
[12] https://www.ipcc.ch/report/2019-refinement-to-the-2006-ipcc-guidelines-for-national-greenhouse-gas-inventories/.
[13] https://www.ipcc-nggip.iges.or.jp/public/2019rf/index.html.

35.2. The Department's response was simply that "*as per the Regulations stipulate (sic), disclosure of information will be done in line with the provisions of existing laws in the country … 140 data providers have submitted their registrations in line with Annexure 2 of the regulations with a total of 595 facilities. Disclosure of this information shall be made in accordance with existing laws*" (emphasis added). No further information was disclosed. In relation to pollution prevention plans under the National Pollution Prevention Regulations ("PPP Regulations"), also under AQA, the letter stated "*the Department has thus far received pollution prevention plans from 35 companies – these include Eskom, Sasol and ArcelorMittal South Africa. The plans contain confidential information related to production processes which can compromise the competitiveness of these companies. Regulation 7 of the National Pollution Prevention Plan Regulations commits the Department to keep the information obtained confidential. The Department is therefore not in a position to share the copies of these plans with you*." A copy of this response letter is attached marked "**E**".

35.3. On 11 February 2019, we submitted a request in terms of PAIA for:

35.3.1. the database or list of data providers registered in terms of regulation 5 of the GHG Reporting Regulations;

35.3.2. the latest reports submitted in terms of regulation 7(1) of the GHG Reporting Regulations by the following entities:

35.3.2.1. Eskom Holdings SOC Ltd;
35.3.2.2. Sasol Ltd;
35.3.2.3. ArcelorMittal South Africa Ltd;
35.3.2.4. Exxaro Resources Ltd;
35.3.2.5. Glencore Plc;
35.3.2.6. African Rainbow Minerals Ltd;
35.3.2.7. Anglo American Plc;
35.3.2.8. Anglo Operations Ltd;
35.3.2.9. South32 Ltd;
35.3.2.10. Seriti Resources Holdings (Pty) Ltd;
35.3.2.11. Petmin Ltd;
35.3.2.12. Mbuyelo Coal (Pty) Ltd;
35.3.2.13. Kuyasa Mining (Pty) Ltd;
35.3.2.14. SAPPI Ltd;
35.3.2.15. PPC Ltd; and
35.3.2.16. Goldfields Ltd;

35.3.3. the database of or list of persons that had submitted pollution prevention plans under regulation 4(1) of the PPP Regulations;

35.3.4. the pollution prevention plans submitted for the period up to 31 December 2020 in terms of regulation 3(2) of the PPP Regulations, by the following companies set out in paragraph 34.3.2 above; and

35.3.5. the latest annual progress reports submitted by the entities listed above in terms of regulation 5(1) of the PPP Regulations.

35.4. Following*, inter alia*, the legislated 30 day response period and third party notice processes provided for in PAIA, some of the records were received in May 2019. We are still waiting for a portion of the requested records.

35.5. Large portions of the records made available in May 2019 have been redacted on the alleged basis of commercial confidentiality in terms of section 36 PAIA, without any reasons or justifications provided for why this is claimed to be so.

35.6. The Department advised that "*the Chief Directorate: Climate Change Monitoring and Evaluation did not receive reports in terms of Regulation 7(1) of the National Greenhouse Gas Emission Reporting Regulations, 2017 from the following entities/companies: Petmin Ltd; Mbuyelo Pty Ltd; Kuyasa Mining Pty Ltd; Exxaro Resources Ltd; and Gold Fields Ltd*". No explanation was given as to what steps have been, are being, or will be taken in relation to these non-compliances, against these companies.

35.7. We will be appealing the decision to redact the records as unlawful and impermissible under PAIA, in terms of section 74 of PAIA.

36. Clearly, gaining access to GHG emission data under the Regulations is not a simple or efficient process. A transparent and effective climate data-gathering system simply cannot function in this manner. It places an undue burden on stakeholders, who should be entitled to access this data as a matter of course and as swiftly as possible. It also places a burden on the authorities.

37. Having to submit a formal PAIA request whenever climate-related data and information are required, and then wait a number of months to obtain the records, only to find that vast tracts of information are redacted and inaccessible, with no justifiable basis for the redactions, and with no recourse other than a time and resource-consuming appeal, is simply not in the public interest or aligned with the Constitution and rights of access to information and just administrative action. Given the public importance of this kind of information – as climate change affects us all, and not only people within South Africa, but beyond our borders as well – there is a need for absolute transparency when it comes to GHG emissions. These records must be automatically available.

38. Other jurisdictions provide for GHG emission data and a wide range of additional information to be publicly available as a default. For example, California in the USA requires that "*emissions data submitted to the ARB [Air Resources Board] under this article is public information and shall not be designated as confidential*."[14]

39. There is no reason why certain data should be regarded as confidential in South Africa when they are not regarded as confidential in other jurisdictions. The default position must be public disclosure, given the fundamental public importance of GHG emission data.

40. We remind you again of the Supreme Court of Appeal's decision in *ArcelorMittal South Africa v Vaal Environmental Justice Alliance*.[15] Here the court held that, *"[i]t is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public After all, environmental degradation affects us all. One might rightly speak of collaborative governance in relation to the environment*" (emphasis added),[16] and that ***"[****c]orporations operating within our borders … must be left in no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced*"(emphasis added).[17]

41. We therefore reiterate our previous recommendations to:

41.1. delete the confidentiality provisions of regulation 12 (or to otherwise give clarity as to what information is to be regarded as confidential, as well as the reasons for this – and it should only apply in very limited circumstances and to personal information); and

[14] Cal Code Regs. tit. 17, § 95106(a), available at available at https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=IF29D06908B1711DF8121F57FB716B6E8&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default).

[15] *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* (69/2014) [2014] ZASCA 184; 2015 (1) SA 515 (SCA); [2015] 1 All SA 261 (SCA) (26 November 2014).

[16] Paragraph 71.

[17] Paragraph 82.

41.2. amend regulation 14 to make the default position one which requires publication of GHG emission data - online and automatically on request.

The verification of data

42. The verification scheme in the proposed amendments to the GHG Reporting Regulations is still not very rigorous. The primary onus for verification remains on the competent authority.

43. We note and support the extension of the time period, in regulation 11(3) from 30 to 60 days, for questions of clarification or corrections. Given that the uniform deadline for reporting is 31 March each year, we still submit that even 60 days for consideration of all data by all data providers in South Africa, is too short a period of time for the competent authority. Such a time limit is without justifiable basis and would be unduly burdensome on the competent authority. We submit (again) that the competent authority must be free to investigate, question, verify, validate and/or reject emission data submitted at any stage. It is for this reason that draft regulation 11(3) is wholly inappropriate and must be deleted. If it is to remain, we submit that the period provided should be extended to at least 6 months (180 days).

44. There is an arbitrary overlap and ambiguity between regulations 11(4) and (5) in the proposed amendments.

44.1. In terms of regulation 11(4), if the competent authority reasonably believes that the information submitted by a data provider is too complex to assess or "*may not be transparent, complete, or accurate*", the competent authority must instruct the data provider to verify the information and provide supporting documentation.

44.2. Regulation 11(5) provides that where a data provider fails to provide information or provides insufficient information in terms of regulation 7(2) and 7(3) for purposes of validation and verification, the competent authority must conduct an inspection or require third-party verification.

44.3. The reference to regulation 7(2) and (3) in regulation 11(5) is confusing. It is not clear how this is different from regulation 11(4)(b), in which case it would not be clear which steps to follow – whether verification and validation by the data provider (the 11(4) route) should be required in instances where information provided is insufficient or incomplete, or whether this would merit an inspection or appointment of an assessor right away (the 11(5) route).

44.4. If regulation 11(5) is intended to refer to regulation 11 (not regulation 7) this should be corrected. In any event, this provision should be reworded to read more clearly. If the intention for regulation 11(5) is that it is intended to apply only if a request for verification or validation under regulation 11(4) has been made and no response or an inadequate response is provided, then the provision should be amended to state this more clearly.

45. We again submit that the period of only 60 days is too short for the steps under regulations 11(4) to be taken, and would inhibit and restrict the necessary and important steps for validation and verification provided for in regulations 11(4) and (5) insofar as such further steps are necessary. Given the short timeframe for the competent authority to complete its verification assessments, it seems unlikely that data providers would be asked to verify their emissions, much less undergo third-party review. This would have the effect of undermining the integrity of the GHG emission data and confidence therein.

46. With regard to the insertion of a definition for "independent assessor" in the proposed amendments. We note that the reference to a "real or apparent" conflict of interest is not entirely clear and may lead to uncertainties around what would constitute a real conflict or an apparent conflict. This should be clarified. We also recommend that the definition should require there to be no affiliation whatsoever to the organisation to which the internal

audit activity belongs, in addition to "*not being part of or under the control of the organization to which the internal audit activity belongs*", as the provision currently stipulates.

47. The verification requirements should be strengthened by adding an additional layer of independent review through compulsory audits or third-party verification. To elaborate, the following examples are provided:

    47.1. The US state of California requires GHG emission reports to be independently verified each year by a state-approved verification body.[18]

    47.2. The European Union requires GHG emission reports to be independently verified.[19] The European Commission recently adopted a regulation that outlines verification requirements, as well as the accreditation and supervision of verification entities.[20]

    47.3. Australia provides for independent audits to verify information submitted in GHG emission reports. If the Clean Energy Regulator (CER) has reasonable grounds to suspect that a regulated entity has violated or is violating GHG reporting requirements, it may require the entity to undertake a third-party audit.[21] The Australian audit provisions have prompted regulated entities to voluntarily seek independent verification before submitting their GHG emission reports: "*given the risk of a mandatory audit ordered by the CER, and the threat of significant penalty, many companies have voluntarily utilized external auditors to audit their reports prior to submission to the CER in 2009-2014. For the period 1 July 2013 to 30 June 2014, audits (mandatory and voluntary) were conducted on liable entities covering greater than 98% of liable entity emissions*".[22]

Offences

48. We note that while the proposed amendments seek to add a number of provisions to the list of non-compliances which would constitute an offence under the Regulations, one notable removal from the list of offences by the proposed amendments is regulation 5(2) – the requirement to ensure that registration details are complete and an accurate reflection of the IPCC emission sources at each facility. We object to this unexplained amendment: regulation 5(2) must be added back to regulation 16(b).

49. We also note that regulation 7(3) – the amended provision requiring mandatory reporting at data provider and facility level – has not been listed as an offence under the amended regulation 16(b): this should be included in regulation 16(b).

50. Non-compliance with either of these provisions should constitute offences under the Regulations, as they are fundamental for the proper functioning of the GHG reporting system.

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[18] California Air Resources Board, "Mandatory GHG Reporting - Verification", available at https://ww2.arb.ca.gov/verification; Cal Code Regs. tit. 17 §§ 95103(f); 95130-95133, available at https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I20840D802EBC11E194EACEFFB46E37D1&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default);

[19] Directive 2003/87/EC, Arts. 14(3), 15 & Annex V, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003L0087.

[20] See Commission Implementing Regulation (EU) 2018/2067 of 19 December 2018 on the verification of data and on the accreditation of verifiers pursuant to Directive 2003/87/EC of the European Parliament and of the Council, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32018R2067.

[21] National Greenhouse and Energy Reporting Act, 2007, secs. 73-75, available at https://www.legislation.gov.au/Details/C2019C00263.

[22] International Partnership on Mitigation and MRV, "Improving national GHG inventories with corporate data in Australia" at p6, https://www.transparency-partnership.net/system/files/document/Good%20Practice-Australia-Improving%20national%20GHG%20inventories%20with%20corporate%20data.pdf.

51. In relation to the existing evidence of non-compliance, referred to in paragraph 35.6 above, we call on the Department to advise what steps are being taken against those data providers which fail to comply with the GHG Reporting Regulations and commit offences by virtue of their failure to register or report under the Regulations. Little purpose would be served in adopting GHG Reporting Regulations which are not strictly enforced. Data providers need to be left in no doubt that non-compliance and a failure to report emissions, accurately or at all, will be met with enforcement action and legal consequences.

Conclusion

52. We request that the above submissions and recommendations be incorporated into the amended GHG Reporting Regulations.

53. Our clients' rights are fully reserved.

54. Kindly notify us if you have any questions or would like to discuss the GHG Reporting Regulations and/or proposed amendments further.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per:

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