



# Centre for Environmental Rights

## Advancing Environmental Rights in South Africa

Mr Asgar Bawa

Secretary to the National Council of Provinces' Select Committee on Land Reform, Environment, Mineral Resources and Energy  
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Copied to:

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Department of Environment, Forestry and Fisheries  
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Our ref: CER\_Comments\_NEMLAB [14D-2017] AQA/Waste

24 January 2020

Dear Mr Bawa

### **PRELIMINARY SUBMISSIONS RELATING TO AIR QUALITY AND WASTE ON THE NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL [B 14D-2017]**

1. We address you as the Centre for Environmental Rights in relation to the National Environmental Management Laws Amendment Bill ("the Bill"), as amended by the Portfolio Committee on Environmental Affairs and published on 6 December 2019 for further public comment by 24 January 2020.
2. The Centre for Environmental Rights (CER) is a non-profit organisation and firm of environmental rights lawyers who help communities and civil society organisations in South Africa realise our Constitutional right to a healthy environment by advocating and litigating for environmental justice.
3. We confirm that we have previously submitted extensive comments on the NEMLA Bill to the Department of Environment, Forestry and Fisheries ("the Department") and to the then Portfolio Committee on Environmental Affairs.<sup>1</sup>
4. We enclose our comments on the latest iteration of the Bill relating only to the National Environmental Management: Air Quality Act, 2004, and the National Environmental Management: Waste Act, 2008 in the form of a table containing our comments and our proposed amendments / insertions. For the reasons set out below,

<sup>1</sup> Our comments of 19 April 2018 on NEMLAB [B14-2017] are available at [https://cer.org.za/wp-content/uploads/2020/01/CER-Table-of-Comments-for-PPCEA-submission\\_NEMLAB-4-19-April-2018.pdf](https://cer.org.za/wp-content/uploads/2020/01/CER-Table-of-Comments-for-PPCEA-submission_NEMLAB-4-19-April-2018.pdf).

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we have not been in a position to provide comprehensive submissions on all aspects of the Bill, and have asked for an extension of time within which to provide additional submissions.

5. The CER makes its submissions on the Bill based on its experience in applying the National Environmental Management Act, 1998, the National Environmental Management: Protected Areas Act, 2003, the National Environmental Management: Biodiversity Act, 2004, the National Environmental Management: Air Quality Act, 2004, the National Environmental Management: Integrated Coastal Management Act, 2008, and the National Environmental Management: Waste Act, 2008..
6. We have requested an extension to 13 February 2020 (at the latest) in which to supplement this submission with comments relating to proposed amendments to the National Environmental Management Act, 1998 (NEMA), as well as comments on mining and related matters. We respectfully requested this extension as the commenting period fell largely over the festive season when our offices were shut. We also note that the period between 15 December and 5 January is excluded from public participation and that timeframes are extended to accommodate public holidays under the Environmental Impact Assessment Regulations, 2014, to which may of these provisions relate.
7. We submit that there is no prejudice to the Committee in accommodating this request, which would be fair and reasonable in the circumstances. The Bill has been in process for almost 4 years, and we submit that an additional short commenting period is also in keeping with the requirements for fair, reasonable, and lawful administrative action in terms of the Promotion of Administrative Justice Act, 2000. If the CER were denied this opportunity to have its submissions considered, this would, by contrast, be of significant prejudice to us, and, we submit, to our clients and partners. The CER has substantial expertise and experience, which we believe, would be of significant assistance to the process.
8. In addition, we have today been in contact with the Department seeking advice and assistance regarding the intention behind certain of the proposed amendments to the NEMA appeal provision (section 43). Ms Garlipp was kind enough to provide some guidance in relation to the proposed amendments and undertook to consider other aspects in more detail and revert. We are most grateful for this assistance, which will place us in a far better position to make our further submissions.
9. In the circumstances, we reiterate our extension request; and will, in any event, endeavour to file our further submissions as soon as possible and well before 13 February 2020.

#### Comments on proposed amendments to the National Environmental Management: Air Quality Act, 2004 (NEMAQA)

10. Section 13 of the NEMAQA provides for the establishment of the National Air Quality Advisory Committee. Clause 51 in the Bill seeks to amend this section to provide the Minister with a discretion to establish the committee. We strongly oppose this amendment to the provision and argue that this should not be a discretionary power for the reasons provided in our table of comments.
11. The proposed amendment to section 22A fails to indicate what consequences will follow the unlawful conduct of a listed activity resulting in atmospheric emissions in instances where no application is brought by a person who operated a scheduled process under the Atmospheric Pollution Prevention Act, 1965, or conducted a listed activity (as referred to in subsections 22A(1)(a) and (b) of NEMAQA) without an atmospheric emission licence (AEL). This must be clarified. We have proposed that such persons are required to apply for an AEL.
12. We wish to point out that there does not appear to be clarity as to the licensing authority for independent power producer coal-fired power station AEL applications - in certain cases it is the province, in some, it is the municipality, and in others, it is the Department. These concerns, around the current lack of certainty, and

resultant lack of accountability, have been brought to the attention of the Department and the National Assembly in previous submissions. This situation should be rectified, and the necessary legislative guidance provided.

13. It is not clear from section 47, which deals with renewals of AELs that public participation is required. It is submitted that PAJA and the Constitution of the Republic of South Africa, 1996 ("the Constitution") require that there be public participation in the renewal of an AEL. We propose the amendment of subsection (5) to make clear the requirement for there to be public participation in renewal applications.

#### Comments on proposed amendments to the National Environmental Management: Waste Act, 2008

14. In relation to proposed amendments to contaminated land provisions, we note that there are still gaps and arbitrary ambiguities in the proposed amendments. It is not clear why a person undertaking activities on land has a higher threshold for notification than an owner (in whose case there must merely be a likelihood of contamination). We suggest that the requirement must be one of likely contamination for all parties, which should trigger the requirement for a site assessment.
15. In relation to the duty to submit site assessment reports, we argue that the proposed amendment is misleading as it implies that the obligation to submit the report and plan lies with the Minister or MEC, which cannot be correct. We recommend that this provision be amended further, to specify the time period within which the site assessment report and remediation plan must be submitted.
16. Furthermore, as the Bill intends to do away with a contaminated land register of investigation areas, provision should be made for public notice where land has been identified as an investigation area. This is important information, the publication of which is in the public interest and which may impact human health and/or the environment.
17. We submit that the words "if applicable" in relation to section 38(1) of the Waste Act create ambiguity which should be urgently remedied to clarify the circumstances in which a remediation plan is required and what it should contain. In addition, the provision must expressly state that the Minister or MEC's decision made under this provision must be published in the Gazette and made available online. Clearly it is in the public's interest to know whether or not an investigation area is contaminated and the plan to address this. This is information that has the potential to impact human health and/or the environment.
18. We propose that the definition of "contaminated" in section 1 be clarified to make clearer in which circumstances the definition would apply. The threshold should always be whether or not levels of contamination exist which pose a risk for the environment and/or human health. Provision should also be made for the sampling of groundwater as a means to indicate contamination in the surrounding soil.
19. It is still unclear who will be responsible for and must bear the costs of the remediation. Naturally, this will be subject to extensive dispute by land occupiers or owners who have inherited land with a legacy of pollution, or who otherwise argue that they are unable to pay the costs of remediation.
20. While we welcome the duty to notify a person to whom contaminated land is being transferred that the land is contaminated, we believe the phrasing of the provision opens the door to much uncertainty around the question of when land is contaminated and the additional responsibilities and obligations of landowners.
21. We request clarity on the method by which remediation is to be verified and confirmed once the remediation process has been completed.
22. Kindly acknowledge receipt of our submissions.

Yours faithfully

**CENTRE FOR ENVIRONMENTAL RIGHTS**

A handwritten signature in black ink, appearing to read "Midgley".

per:

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