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Dear Advocate de Langa

STRENGTHENING OF THE WORK OF THE SOUTH AFRICAN WEATHER SERVICE THROUGH THE SOUTH AFRICAN WEATHER SERVICE AMENDMENT BILL, 2011

We address you at the instance of our clients, groundWork, the South Durban Community Environmental Alliance ("SDCEA") and the Vaal Environmental Justice Alliance ("VEJA").

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. SDCEA is an environmental justice organisation based in south Durban. It is made up of 16 affiliate organisations, and it has been active since its formation in 1996. It is considered successful for many reasons, one of which is that it is a vocal and vigilant grouping in terms of lobbying, reporting and researching industrial incidents and accidents in this area. It contributes to the struggle against environmental racism for environmental justice and environmental health. VEJA is a non-racist, non-sexist democratic alliance of empowered civil society organisations in the Vaal Triangle, who have the knowledge,

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expertise and mandate to represent the determination of the communities in the area to control and eliminate emissions to air and water that are harmful to these communities and to the environment.

Our clients are of the view that certain of the amendments to the South African Weather Services Act, 2001 (“the Act”) proposed by means of the South African Weather Service Amendment Bill, 2011 (“the Bill”) potentially have negative implications for the environment, public health, and particularly, civil society participation in environmental governance.

Below, we make submissions - on behalf of our clients - regarding certain clauses in the Bill. After setting out our clients’ concerns, below we propose that the phrase “or air pollution-related warning” be deleted from clause 12 (section 30A) of the Bill. In addition, we propose that: clause 2 of the Bill (section 3 of the Act) should provide that one of the objectives of the South African Weather Service (“the Weather Service”) is to implement the Act with due regard to section 24 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), and to the objectives of and environmental management principles described in the National Environmental Management Act, 1998 (“NEMA”), the National Environmental Management: Air Quality Act, 2004 (“the Air Quality Act”), and the National Framework for Air Quality Management provided for in section 7 of the Air Quality Act (“the AQM Framework”); and that section 6 of the Act should provide that the functions of the Board of the Weather Service also take this legislation into account when policy, standards and objectives are set and implemented.

Clauses 1 – 4, 13 and 14 of the Bill: definitions; objectives of Weather Service; functions of Weather Service; board of Weather Service and its composition; Schedules 1 (public good services) and 2 (commercial services)

1. The proposed amendments include the extension of the objectives and functions of the Weather Service to deal with ambient air quality information services. In this regard, the objectives of the Weather Service, as amended, will include the implementation of the ambient air quality information provisions of the Air Quality Act and the AQM Framework. The Weather Service will become the custodian of the South African Air Quality Information Service (“SAAQIS”) and the National Ambient Air Quality Monitoring Network (“NAAQMN”). The amendments also make provision for the Weather Service to issue air pollution-related warnings, if it deems this necessary. Amendments relating to SAAQIS and NAAQMN are also proposed to the “public good services” (Schedule 1) and “commercial services” (Schedule 2) provided by the Weather Service.
2. Upfront, our clients have some concerns regarding the transfer of air quality-related functions to the Weather Service. If the Weather Service is the custodian of these functions, this may create a silo between the information-gathering and dissemination functions and aspects such as enforcement and licensing of activities. Ideally, air pollution management and control should not be isolated from that of solid waste and water. In the atmospheric emissions licensing process, the Weather Service would have to ensure that all the relevant information is shared with all necessary parties in a format that is accessible and understood. In this regard, our clients regard it as essential that a strong link be maintained between the Department of Environmental Affairs (“the Department”) and the Weather Service. The Weather Service must, at all times, be fully accountable to the Minister of Water and Environmental Affairs (“the Minister”).
3. Apart from this concern, our clients do not have any difficulty with proposed amendments in the clauses listed above, but set them out to provide the background to clause 12, to which our client’s primary concern relates.

Clause 12: offences and penalties

4. The Act does not provide for offences. According to the Bill’s Explanatory Summary, offences and penalties have been introduced in order to ensure compliance with the provisions of the Act. Section 30A of the Bill provides as follows:

“30A. (1) No person may—

(a) issue a severe weather or air pollution-related warning without the necessary written permission from the Weather Service;

(b) supply false or misleading information about the Weather Service; and

(c) unlawfully, intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect the Weather Service.

(2) A person who contravenes any provisions of subsection (1) is guilty of an offence and is liable in the case of a first conviction, to a fine not exceeding five million rand, or imprisonment for a period not exceeding five years, and in the case of a second or subsequent conviction, to a fine not exceeding ten million rand or imprisonment for a period not exceeding 10 years or in both instances to both a fine and such imprisonment.

(3) Whenever any person is convicted of an offence under subsection (2) and it appears that such person has by that offence caused loss or damage to any organ of state or other person, the court may in the same proceedings at the written request of the Minister or other organ of state or other person concerned, and in the presence of the convicted person, inquire summarily and without pleadings into the amount of the loss or damage so caused.

(4) Upon proof of such amount, the court may give judgment therefore in favour of the organ of state or other person concerned against the convicted person, and such judgment shall be of the same force and effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court.

(5) Whenever any person is convicted of an offence under subsection (2) the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence, and, in addition to any other punishment imposed in respect of that offence, the court may order—

(a) the award of damages or compensation or a fine equal to the amount so assessed; or

(b) that such remedial measures as the court may determine must be undertaken by the convicted person.

(6) Notwithstanding anything to the contrary in any other law, a Magistrate’s Court shall have the jurisdiction to impose any penalty prescribed by this Act.”

5. As appears from the draft section 30A, one of the offences created by the Bill relates to issuing a severe weather or air pollution-related warning without the Weather Service’s written permission. In the case of a first offence, this is punishable by a fine not exceeding five million Rand, to imprisonment not exceeding five years, or to both such fine and imprisonment.
6. There is no indication in the Bill as to the specific circumstances in which the Weather Service’s permission is required; nor how such permission should be sought. Also, there is no indication of the time-frame within which the Weather Service would have to indicate whether or not it will provide this permission. Presumably, these issues would be prescribed in regulations.¹
7. In terms of the Bill, the Magistrates Court may also award compensation where the offence causes loss or damage. According to the Explanatory Summary, this is to deter the commission of an offence, as well as to avoid burdening the court unnecessarily by the institution of separate criminal and civil proceedings in the same matter. Judgment in respect of such compensation shall be of the same force and effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court.

¹ In terms of section 28(c) of the Act, following consultation with the Board of the Weather Service, the Minister may make regulations regarding any matter in respect of which it is necessary or expedient to make regulations in order to achieve the objectives of this Act.

8. In addition, a person convicted of such offence may also be ordered to pay damages, compensation, or a fine in the amount of the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence; or to undertake certain remedial measures.
9. We agree that offences and penalties are necessary in order to ensure compliance with the provisions of the Bill. In relation to the issuing of severe weather warnings, the Act specifically provides, in section 4(3) that *“(o)nlý the Weather Service may issue severe weather-related warnings over South Africa in order to ensure that there is a single authoritative voice in this regard”*. For this reason, we understand why an offence has been introduced in relation to the making of severe weather-related warnings without the written permission of the Weather Service.
10. However, for the reasons set out below, we have grave concerns regarding the offence that would be created as a result of a failure to obtain the Weather Service’s written permission to issue air pollution-related warnings. There is nothing in the Act or the Bill which purports to make the Weather Service the only entity entitled to issue air pollution-related warnings. As set out below, such provision would have extremely negative and far-reaching consequences for public health, the environment, and civil society participation in environmental governance. It is submitted that there is no justification for this proposed offence.
11. For some years, our clients have, from time to time, conducted independent monitoring of air quality and air pollution by taking samples and sending these for analysis at local or international laboratories. These organisations then advise government, private enterprises which may be responsible for the pollution, as well as members of the public (including through media releases) of the results of such analyses. Our clients and other organisations also disclose information in other circumstances, for instance information that is made available via SAAQIS. This strategy is a legitimate, relevant and well-established check and balance for information generated by authorities, and particularly by private enterprises.
12. Although this was unlikely the intention of the Minister or the Department, the effect of the Bill – if passed in its current format – would be that, by making the results of its analyses known or disclosing other air pollution-related information without first obtaining the permission of the Weather Service (which it may potentially never receive, or not receive timeously), these organisations may be committing an offence, and may also be civilly liable as set out above. This may well impinge on our clients’ and other organisations’ right to freedom of speech in terms of section 16 of the Constitution, as well as the environmental rights in section 24.² Section 30A of the Bill may limit these rights in a manner that does not appear to be reasonable and justifiable in terms of section 36 of the Constitution. This could result in a Constitutional challenge to the Bill, if passed.
13. In addition, “responsible persons” as defined in section 30 of NEMA may, simply by complying with their obligations in terms of this section, also commit an offence in terms of section 30A of the Bill.

Air Quality Act

14. One of the objects of the Air Quality Act – in section 2 – is generally to give effect to section 24 of the Constitution in order to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people. As set out above, one of the amendments proposed in the Bill is that the objectives of the Weather Service would include the implementation of the ambient air quality information provisions of the Air Quality Act and the AQM Framework. The Air Quality Act provides, in section 5, that it must be read with any applicable provisions of NEMA, and that its interpretation and application must be guided by the national environmental management principles set out in section 2 of NEMA.

² Among other things, everyone has the right, in terms of section 24, to an environment not harmful to their health or well-being, and to have the environment protected through reasonable legislative and other measures that prevent pollution

15. NEMA's preamble makes clear that it is aimed at giving effect to the Environment right in section 24 of the Constitution at a framework level.³
16. Among other things, the national environmental management principles set out in section 2 of NEMA "serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of [NEMA] or any statutory provision concerning the protection of the environment" (section 2(1)(c)) and "guide the interpretation, administration and implementation of [NEMA], and any other law concerned with the protection or management of the environment" (section 2(1)(e)).⁴
17. Section 30 of NEMA deals with the control of emergency incidents. This section defines "incident" as "an unexpected sudden occurrence, including a major emission, fire or explosion leading to serious danger to the public or potentially serious pollution of or detriment to the environment, whether immediate or delayed." The section indicates that "responsible person" includes any person who: is responsible for the incident; owns any hazardous substance involved in the incident; or was in control of any hazardous substance involved in the incident at the time of the incident.
18. In terms of section 30(3), as soon as an incident occurs, a responsible person must report, through the most effective means reasonably available: the nature of the incident; any risks posed by the incident to public health, safety and property; the toxicity of substances or by-products released by the incident; and any steps that should be taken in order to avoid or minimise the effects of the incident on public health and the environment. Such report must be made to: the Director-General; the South African Police Service and the relevant fire prevention service; the relevant provincial head of department or municipality; and all persons whose health may be affected by the incident. In terms of section 30(11), if a responsible person fails to comply with these obligations (and certain other obligations contained in section 30), such person is guilty of an offence and liable on conviction to a fine not exceeding one million Rand or to imprisonment for a period not exceeding one year, or to both such a fine and such imprisonment.

³ MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd 2008 (2) SA 319 (CC) at [24]

⁴ These principles include the following:

1. Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably (section 2(2)).
2. (P)ollution and degradation of the environment [must be] avoided, or, where they cannot be altogether avoided, [must be] minimised and remedied (section 2(4)(a)(ii)).
3. (N)egative impacts on the environment and on people's environmental rights [must] be anticipated and prevented, and where they cannot be altogether prevented, [must be] minimised and remedied (section 2(4)(a)(viii)).
4. The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured (section 2(4)(f)).
5. Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge (section 2(4)(g)).
6. Community well-being and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means ((section 2(4)(h)).
7. The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment (section 2(4)(i)).
8. Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law (section 2(4)(k)).
9. The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage (section 2(4)(o))."

19. In terms of section 34 of NEMA, a court can also give judgement against a person for loss or damage caused as a result of an offence committed in terms of section 30(11). Such judgment shall be of the same force and effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court. Among other things, a court may also assess the monetary value of any advantage gained or likely to be gained in consequence of that offence, and, in addition to any other punishment imposed, may order: the award of damages or compensation or a fine equal to the amount so assessed; or that such remedial measures as the court may determine must be undertaken by the convicted person.
20. We are concerned that the proposed wording of 30A(1)(a) of the SAWS Bill could contradict section 30 of NEMA insofar as responsible persons are concerned. A responsible person who reports an air pollution incident in terms of section 30 of NEMA is not required by that section to seek the Weather Service's permission before making such report. Failure to act in terms of section 30 of NEMA amounts to an offence, with the other consequences set out above.
21. When the air pollution reported by our clients and other organisations is unexpected and sudden, it would fall within the definition of "incident" in section 30. However, these organisations are not "responsible persons" as defined in the section. As a result, they cannot rely on this section to escape liability if they have issued air pollution-related information without the Weather Service's written permission.
22. Section 31 of NEMA deals with access to environmental information and protection of whistle-blowers. In terms of section 31(4):
- "(n)otwithstanding the provisions of any other law, no person is civilly or criminally liable or may be dismissed, disciplined, prejudiced or harassed on account of having disclosed any information, if the person in good faith reasonably believed at the time of the disclosure that he or she was disclosing evidence of an environmental risk and the disclosure was made in accordance with subsection (5)."*
23. Subsection (5) provides that subsection (4) applies only if the person:
- "(a) disclosed the information concerned to: (i) a committee of Parliament or of a provincial legislature; (ii) an organ of state responsible for protecting any aspect of the environment or emergency services; (iii) the Public Protector; (iv) the Human Rights Commission; (v) any attorney-general or his or her successor; or (vi) more than one of the bodies or persons referred to in subparagraphs (i) to (v);*
- (b) disclosed the information concerned to one or more news media and, at the time of the disclosure, the person believed, on clear and convincing grounds:*
- (i) that the disclosure was necessary to avert an imminent and serious threat to the environment, to ensure that the threat to the environment was properly and timeously investigated or to protect himself or herself against serious or irreparable harm from reprisals; or*
- (ii) giving due weight to the importance of open, accountable and participatory administration, that the public interest in disclosure of the information clearly outweighed any need for non-disclosure;*
- (c) disclosed the information concerned substantially in accordance with any applicable external or internal procedure, other than the procedure contemplated in paragraph (a) or (b), for reporting or otherwise remedying the matter concerned; or*
- (d) disclosed information which, before the time of the disclosure of the information, had become available to the public, whether in the Republic or elsewhere."*
24. Provided that our clients and other organisations disclose the air quality information to the persons and in the circumstances contemplated in section 31(5), and *"in good faith reasonably believed at the time of the disclosure that [they were] disclosing evidence of an environmental risk"*, section 31(4) provides that they may not be held civilly or criminally liable. This would be the case, irrespective of the provisions of the Act or any other legislation.
25. The organisations do, in some circumstances, comply with sections 31(4) and 31(5)(b). This is the case when they issue announcements regarding air pollution to the media, in the reasonable belief that they

are disclosing evidence of an environmental risk, and: that the disclosure is necessary to avert an imminent and serious threat to the environment or to ensure that the threat to the environment is properly and timeously investigated; or, giving due weight to the importance of open, accountable and participatory administration, that the public interest in disclosure of the information clearly outweighs any need for non-disclosure.

26. As with section 30 of NEMA, there is an apparent contradiction between section 30A of the Bill and section 31(4) and (5) of NEMA. There is no requirement in section 31(4) and (5) of NEMA that the Weather Service's permission be sought before evidence of an environmental risk is disclosed.
27. As set out above, our clients and other organisations do not only make disclosures in the circumstances envisaged in section 31(5) of NEMA. In these other circumstances, they would not be protected by section 31 of NEMA.
28. Also, requiring the Weather Service's permission prior to a disclosure of air pollution-related warnings could undermine the protection of public health. For instance, an acute air pollution incident by industry in close proximity to a school, requires speedy dissemination of information in order to evacuate the school timeously. In these circumstances, it cannot be appropriate to require permission from the Weather Service before alerting the school.
29. One of the many other possible effects of the section 30A offence is that academics and academic journals may be committing an offence by making statements which are routine in many scientific publications. For instance, there is a risk that a statement in an article which records the findings of a study that air pollution in a particular area is likely to result in increased asthma attacks and an increase in annual mortality might amount to issuing an "air pollution-related warning." Media reports would face the same problem.
30. Although the Explanatory Summary of the Bill provides that offences have been introduced "*(i)n order to ensure compliance with the provisions of the Act*", there is – as has been set out above (and contrary to the position insofar as severe weather warnings are concerned) – nothing in the Act or the Bill which provides that the Weather Services is the only entity entitled to issue air pollution-related warnings.

Proposed amendment: "air pollution-related warning"

31. In these circumstances, we propose the following simple amendment to clause 12 (section 30A) of the Bill:

"30A. (1) No person may—
 (a) ~~issue a severe weather or air pollution-related warning without the necessary written permission from the Weather Service;~~"
32. We propose this not only because of the uncertainty regarding the content of air pollution-related warnings, and the process of obtaining permission from the Weather Service to issue air pollution-related warnings (including uncertainty as to how long it would take for such permission to be granted), but also to retain the integrity of sections 30 and 31 of NEMA, and the importance of the reasons that our clients and the other organisations monitor and disclose air pollution-related information.
33. The reporting of emergency incidents in terms of section 30 of NEMA is crucial in order to prevent potentially serious pollution of or detriment to the environment. We are concerned that the proposed section 30A of the Bill may discourage people from reporting emergency incidents; especially because the penalty created in terms of the proposed section 30A of the Bill is five times the penalty for contravention of section 30 of NEMA.

34. The reasons our clients and other organisations disclose air pollution information are in keeping with the national environmental management principles in NEMA. Among other things, the organisations are concerned about the needs and interests of people. They are anticipating and preventing, or minimising and remedying negative impacts on the environment and on people’s environmental rights. They are promoting community well-being and empowerment through environmental education and/or the raising of environmental awareness and/or the sharing of knowledge and experience and/or other appropriate means. In addition, the organisations are disclosing dangers to the public and/or potentially serious pollution of or detriment to the environment, and/or disclosing evidence of environmental risks. We are concerned that the offence created by the proposed section 30A may discourage people for disclosing environmental risks.
35. We do not believe that excision of the phrase “or air pollution-related warning” will have a negative impact insofar as compliance with the Act is concerned. Rather, this deletion will serve to protect Constitutional rights and to ensure that crucial NEMA provisions and the important disclosure functions that our clients and other organisations carry out remain intact. To the extent that it could be argued that the exclusion of this phrase could have a negative impact on compliance, the Constitutional rights, NEMA provisions, and the crucial disclosure functions must, in our view, trump section 30A of the Bill.

Proposed amendment: the objectives of the Weather Service and functions of the Board of the Weather Service – public health, NEMA and the AQA

36. Section 3 of the Act sets out the objectives of the Weather Service, and section 6, the functions of its Board. Clause 2 of the Bill seeks to amend section 3 of the Act by extending the objectives of the Weather Service to include ambient air quality. No amendments are proposed to section 6 of the Act.
37. While the Act and the Bill are clearly subject to the provisions of the Constitution, there is no express mention of the Constitution in section 3 or 6 of the Act, nor anywhere else in the Act. Nor is there such mention anywhere in the Bill. Air quality has a direct bearing on the Constitutional rights in section 24, and the section 24 rights are recognised in both NEMA and the Air Quality Act. Air pollution has a negative impact on the right in section 24(a) to an environment that is not harmful to health and wellbeing, and well as to the right in section 24(b)(i) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation. For these reasons, our clients submit that it is important that there be specific mention of the section 24 rights in the Bill.
38. There is also no mention of NEMA in the Act, and the only reference in the Bill to NEMA is in relation to the definition of “pollution”. There is no mention of the Air Quality Act in the Act, and only mention of certain aspects of the Air Quality Act in the Bill. NEMA and the Air Quality Act are two extremely important pieces of legislation and both are clearly relevant to the mandate and powers of the Weather Service and its Board. So too is the AQM Framework, established in terms of section 7 of the Air Quality Act for achieving the object of the Air Quality Act. Our clients are of the view that the Bill should refer to NEMA, the Air Quality Act, and the AQM Framework in the objectives of the Weather Service and the functions of its Board.
39. In these circumstances, we propose –

the following simple addition to clause 2 (section 3) of the Bill:

“(e) the addition of the following paragraph:

(j) to implement this Act with due regard to section 24 of the Constitution, and to the objectives of and environmental management principles described in section 2 of the National Environmental Management Act, 1998 (Act No. 107 of 1998), the Air Quality Act, and the National Framework for Air Quality Management established in terms of section 7 of the Air Quality Act.”;

and the following simple amendment to section 6 of the Act:

“(c) set policy, standards and objectives within the framework issued by the Minister, and with due regard to section 24 of the Constitution, and to the objectives of and environmental management principles described in section 2 of the National Environmental Management Act, 1998 (Act No. 107 of 1998), the Air Quality Act, and the National Framework for Air Quality Management established in terms of section 7 of the Air Quality Act; and ensure that the executive management implements these policies, standards and objectives”.

40. These amendments do not create additional duties for the Weather Services or its Board. They are proposed simply to reinforce the importance of the alignment of the work of the Weather Service with section 24 of the Constitution, and the objectives of and the environmental management principles described in NEMA, the Air Quality Act, and the AQM Framework.

41. In these circumstances, it is proposed that both amendments should be effected.

We thank the Portfolio Committee for noting our concerns, and are hopeful that these can be addressed. Please contact us to discuss any queries you may have.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS

Per:



Melissa Fourie
Executive Director