



# Centre for Environmental Rights

Advancing Environmental Rights in South Africa

Director-General  
Department of Environmental Affairs  
Attn: Mr MA Makwarela  
By email: [MAMakwarela@environment.gov.za](mailto:MAMakwarela@environment.gov.za)

Our ref: CER/RH/SK  
Date: 8 February 2016

Dear Mr Makwarela

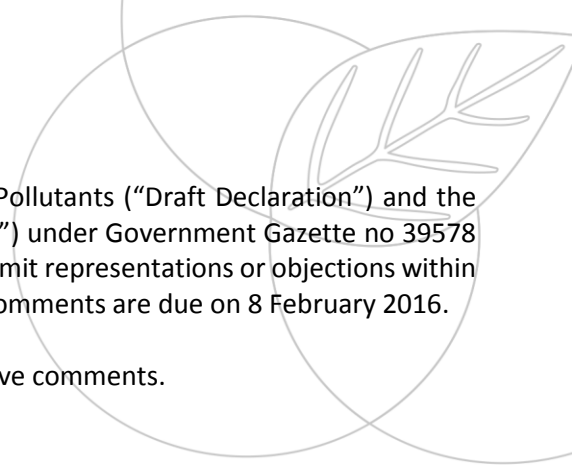
## Comments on the Draft Declaration of Greenhouse Gases as Priority Pollutants & the National Pollution Prevention Plans Regulations

1. We address you on behalf of groundWork, Earthlife Africa (Johannesburg) (ELA), the South Durban Community Environmental Alliance (SDCEA), the Vaal Environmental Justice Alliance (VEJA) and the Highveld Environmental Justice Network (HEJN).<sup>1</sup> HEJN is made up of the following community-based organisations: the Movement Environmental Defence; Earthnogenesis; Greater Middleburg Residents Association; Guqa Environmental Community Service; Mpumalanga Youth Against Climate Change; Outrageous Courage Youth; Ekurhuleni Environmental Organisation; SANCO Tokologo; SANCO Emalahleni; Khutala Environmental Care; Schoongesicht Residents Committee; Caroline Environmental Crisis Committee; Guide the People, and Wonderfontein Resettlement Forum.

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<sup>1</sup> 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. ELA is an environmental justice organisation which promotes sustainable solutions to South Africa's challenges, without exploiting people or degrading the environment. 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. VEJA is a democratic alliance of empowered civil society organisations in the Vaal Triangle, who have the knowledge, 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. HEJN is an organisation comprising of 14 community-based organisations who share a common vision. Their objectives are: to be a platform of solidarity for local communities against environmental injustices relevant to the Highveld area and/or its people; to educate, organise and mobilise with organisations and the public on environmental justice issues relevant to the Highveld; and to respond to grassroots concerns on environmental injustices relevant to the Highveld.

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2. We refer to the draft Declaration of Greenhouse Gases as Priority Air Pollutants (“Draft Declaration”) and the National Pollution Prevention Plans Regulations (“Draft PPP Regulations”) under Government Gazette no 39578 published on 8 January 2016. Members of the public were invited to submit representations or objections within 30 days after the publication of the notice in the Gazette. Accordingly, comments are due on 8 February 2016.
  3. We only deal with those aspects of the notice in relation to which we have comments.

### Overview of the Regulatory Framework

4. Our clients acknowledge that the Draft Declaration and the Draft PPP Regulations are a part of a broader regulatory system aimed at the improvement of ambient air quality and the reduction of greenhouse gas (GHG) emissions, in line with the National Environmental Management: Air Quality Act<sup>2</sup> (AQA), other national legislation, and South Africa’s international obligations.
5. The relevant regulatory framework also includes the Draft National Greenhouse Gas Emission Reporting Regulations (“Draft GHG Reporting Regulations”), which were published for comment on 5 June 2015, the National Climate Change Response White Paper (NCCRWP),<sup>3</sup> and South Africa’s Intended Nationally Determined Contribution (INDC), which outlines South Africa’s commitments in terms of the multilateral agreement under the United Nations Framework Convention on Climate Change (UNFCCC) adopted at the 21<sup>st</sup> session of the Conference of the Parties to the UNFCCC (COP21) (“the Paris Agreement”).<sup>4</sup>
6. It is submitted that it is important to understand the links to the broader regulatory framework, particularly on an international level, and how these complement each other, in order to ensure that there is proper alignment and that there are no inconsistencies between South Africa’s international commitments and the regulatory regime that is currently being put into place within South Africa to address climate change. It is also important to avoid any unnecessary duplication.
7. Section 29 of AQA provides as follows:

*“29. Pollution prevention plans*

*(1) The Minister or MEC may, by notice in the Gazette—*

*(a) declare any substance contributing to air pollution as a priority air pollutant; and*

*(b) require persons falling within a category specified in the notice to prepare, submit to the Minister or MEC for approval, and implement pollution prevention plans in respect of a substance declared as a priority air pollutant in terms of paragraph (a).*

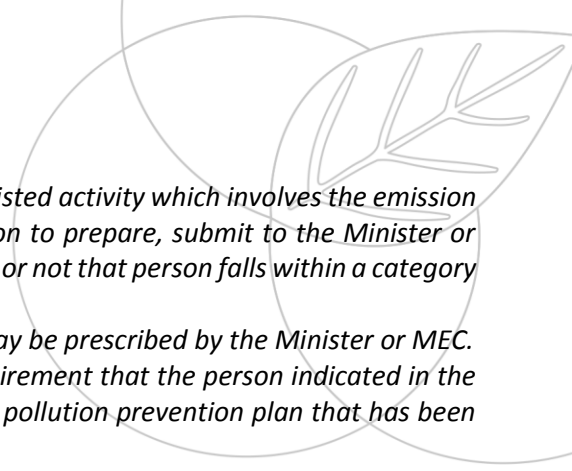
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<sup>2</sup> Act 39 of 2004.

<sup>3</sup> Dated 2011 and available at:

[https://www.environment.gov.za/sites/default/files/legislations/national\\_climatechange\\_response\\_whitepaper.pdf](https://www.environment.gov.za/sites/default/files/legislations/national_climatechange_response_whitepaper.pdf)

<sup>4</sup> The INDC is the commitment made by South Africa publicly outlining what post-2020 climate actions it intends to take under a new international agreement. South Africa’s INDC can be accessed here <http://www4.unfccc.int/submissions/INDC/Published%20Documents/South%20Africa/1/South%20Africa.pdf>. Countries across the globe committed to creating a new international climate agreement by the conclusion of the UNFCCC Conference of the Parties (COP21) in Paris in December 2015. The agreement negotiated with countries (196) that attended the conference, is referred to as the Paris Agreement. It is a global agreement on the reduction of climate change and it will become legally binding if joined by at least 55 countries which together represent at least 55 percent of global GHG emissions. These 55 parties are expected to sign the agreement in New York between 22 April 2016 (Earth Day) and 21 April 2017, and also adopt it within their own legal systems (through ratification, acceptance, approval, or accession). In preparation, countries had prepared, submitted and presented on their INDCs, on the post-2020 climate actions they intend to take under the international agreement. The INDCs were evaluated by independent scientists, and it has been established that the suggested commitments are estimated to limit global warming to 2.7 degrees Celsius by 2100. See <http://climateactiontracker.org/news/224/indcs-lower-projected-warming-to-2.7c-significant-progress-but-still-above-2c.html>.



- (2) *The Minister or MEC may, by written notice to a person conducting a listed activity which involves the emission of a substance declared as a priority air pollutant, require that person to prepare, submit to the Minister or MEC for approval and implement a pollution prevention plan, whether or not that person falls within a category specified in terms of subsection (1)(b).*
- (3) *Pollution prevention plans must comply with such requirements as may be prescribed by the Minister or MEC.*
- (4) *A notice contemplated in subsection (1)(b) or (2) must contain a requirement that the person indicated in the notice monitors, evaluates and reports on the implementation of the pollution prevention plan that has been approved in terms of subsection (1) or (2)."*

8. In terms of paragraph 3 of the Draft Declaration, the Draft PPP Regulations are applicable to a person conducting a production process which involves the direct emission of GHGs declared as priority air pollutants. Such person is then required, by regulation 5 of the Draft PPP Regulations, to submit a pollution prevention plan to the Minister within three months of the Draft Declaration coming into effect, and to submit progress reports (on the implementation of the plan) to the Minister by 31 March of each subsequent year. Pollution prevention plans are valid for five years after approval by the Minister and must be reviewed every five years.
9. In terms of section 21(1)(a) of AQA, the Minister must publish a list of activities which result in atmospheric emissions and which the Minister reasonably believes have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage. This list has been published.<sup>5</sup> In terms of section 22 of AQA, such "listed activities" cannot be conducted without an atmospheric emission licence (AEL). In terms of section 43(1)(l) of AQA, every AEL must contain GHG emission measurement and reporting requirements.
10. The Draft GHG Reporting Regulations are aimed at introducing a single national reporting system for the reporting of GHG emissions to the National Atmospheric Emission Inventory System (NAEIS) within 30 days of the commencement of these regulations. Although these have not yet come into operation, when they do, a category A data provider<sup>6</sup> will be required to submit to the NAEIS the total GHG emissions arising from their activities to the NAEIS by 31 March of each year.
11. Our clients have made submissions on the Draft GHG Reporting Regulations, in which they comment, *inter alia*, that in order for South Africa to meet its international obligations and conform to international best practice as described in the 2006 IPCC Guidelines for National Greenhouse Gas Inventories ("the IPCC Guidelines"),<sup>7</sup> it is essential that the Draft Regulations provide, *inter alia*, for:
  - clear and unambiguous identification of key categories of emitters which have a significant influence on South Africa's total GHG emissions inventory - and therefore are prioritised within the inventory system;
  - detailed and compulsory reporting of both relevant activity data and the GHG emissions of a data provider at facility level, including: information on the GHG emissions per facility, relevant facility layout and operations information, and monitoring and measuring methods;
  - a reporting system that provides a pragmatic means of building an inventory that is consistent, comparable, complete, accurate and transparent – and that this is maintained in a manner that improves inventory quality over time; and
  - public disclosure of the GHG emission data submitted in terms of the Draft GHG Reporting Regulations.

12. These comments, dated 4 August 2015, are attached hereto marked "1".

13. The Draft GHG Reporting Regulations will apply to a much broader spectrum of emitters and activities than those listed in the Draft Declaration and Draft PPP Regulations. Therefore only some entities required to report under

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<sup>5</sup> The current list has been published in GN 893 of GG 37054 dated 22 November 2013

A Category A data provider is any person conducting an activity listed in Annexure 1 to the Draft GHG Reporting Regulations. See Reg 4(1)(a) of the Draft GHG Reporting Regulations.

<sup>7</sup> 2006 IPCC Guidelines are available at <http://www.ipcc-nggip.iges.or.jp/public/2006gl> .

the Draft GHG Reporting Regulations will be required to prepare and submit pollution prevention plans under the Draft PPP Regulations.

14. With regard to national climate change policy, the NCCRWP has two objectives: (a) to effectively manage inevitable climate change impacts through interventions that build and sustain South Africa's social, economic and environmental resilience and emergency response capacity, and (b) to make a fair contribution to the global effort to stabilise GHG concentrations in the atmosphere at a level that avoids dangerous anthropogenic interference with the climate system within a timeframe that enables economic, social and environmental development to proceed in a sustainable manner.
15. South Africa committed to addressing climate change in its INDC. South Africa's mitigation component of its INDC moves from a "deviation from business-as-usual" form of commitment and takes the form of a peak, plateau and decline GHG emissions trajectory range. According to the INDC, *"South Africa's emissions by 2025 and 2030 will be in a range between 398 and 614 Mt CO<sub>2</sub>-eq, as defined in national policy. This is the benchmark against which the efficacy of mitigation actions will be measured."*<sup>8</sup> The INDC also commits to and states, *inter alia*, the following:
  - *"South Africa will use five-year periods of implementation at the national level, specifically, 2016-2020 focused on developing and demonstrating the above mix of policies and measures in order to meet South Africa's 7 Cancun pledge, and the periods 2021-2025 and 2026-2030 for this INDC. This level of effort will enable South Africa's greenhouse gas emissions to peak between 2020 and 2025, plateau for approximately a decade and decline in absolute terms thereafter";*
  - *"Increased disaggregation over time will be enabled through the introduction of mandatory GHG reporting domestically, no later than 2016, with regular reporting to the UNFCCC as multi-laterally agreed";*
  - *"Methodologies for Estimating Emissions: 2006 IPCC guidelines Metric applied: 100-year Global Warming Potential, as in the IPCC's 4th Assessment Report (AR4). Note that the current GHG inventory, consistent with the 2006 IPCC guideline reporting requirements, used GWPs from the Third Assessment Report (TAR) and indicated that future inventories will use GWP values from AR4."*<sup>9</sup>
16. The INDC was developed on the understanding that the Paris Agreement will be binding, fair, effective and incorporate a "no-backsliding" and a "progressive" approach to enhance climate change mitigation and adaptation implementation and ambition.<sup>10</sup>
17. The Paris Agreement aims to strengthen the global response to the threat of climate change by, *inter alia*, *"[h]olding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change"*.<sup>11</sup> The Paris Agreement places an obligation on each party to prepare, communicate and maintain successive nationally determined contributions that it intends to achieve and states that *"parties shall pursue domestic mitigation measures with the aim of achieving the objectives of such contributions."*<sup>12</sup> The Paris Agreement also states that *"Parties shall account for their nationally determined contributions. In accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting..."*<sup>13</sup>
18. Further, it provides for an enhanced transparency framework and places an obligation on each party to regularly provide: *"(a) A national inventory report of anthropogenic emissions by sources and removals by sinks of*

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<sup>8</sup> P6 SA INDC.

<sup>9</sup> P6 – 7 SA INDC.

<sup>10</sup> P1 SA INDC.

<sup>11</sup> Article 2(1)(a) Paris Agreement, 2015.

<sup>12</sup> Article 4(2) Paris Agreement, 2015.

<sup>13</sup> Article 4(13) Paris Agreement, 2015.

*greenhouse gases, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement; and (b) Information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4.*"<sup>14</sup>

19. It is therefore clear that South Africa's regulatory framework is aimed at the reduction of GHGs, not only within its territory, but also on an international level. The Draft Declaration, Draft PPP Regulations and Draft GHG Reporting Regulations should all refer to the commitments in terms of the NCCRWP and the INDC. There would be little sense in prescribing legislation which contradicts the NCCRWP or which would not allow South Africa to meet its obligations in its own INDC and under the Paris Agreement.
20. We note that South Africa's INDC has already been internationally criticised for being insufficient to meet the Paris Agreement goal of a temperature increase below 2 degrees.<sup>15</sup> Our clients also criticise the INDC, inter alia, for the lack of adequate public consultation, the inflated carbon budget allowed by the wide peak, plateau and decline range and because South Africa's energy plans will result in emissions exceeding even the upper limit of this range.<sup>16</sup> Yet South Africa notes in the INDC and NCCRWP that it, as a country, will be particularly severely impacted by the effects of climate change. The INDC states that "*South Africa is especially vulnerable to [climate change's] impacts, particularly in respect of water and food security, as well as impacts on health, human settlements, and infrastructure and ecosystem services. In this regard, South Africa is committed to cooperative efforts to adapt to the unavoidable adverse impacts of climate change. With regard to an ultimate solution to the global challenge of climate change, South Africa is firmly committed to working with others to ensure temperature increases are kept well below 2°C above pre-industrial levels*".<sup>17</sup> To enact legislation which does not demonstrate an intention to meet this objective would be fruitless and a breach of the State's duty to uphold the right to an environment not harmful to health or wellbeing and to protect the environment for the benefit of present and future generations.
21. Prior to making submissions on Draft Declaration and the Draft PPP Regulations, we outline below some general recommendations and comments for the regulatory regime.

### **General Recommendations for the Greenhouse Gas Emissions Regulatory Regime**

22. Firstly, there should be a unification of the data submitted to the NAEIS in terms of the Draft GHG Reporting Regulations and the data required to be submitted under the Draft PPP Regulations, as this will enhance transparency, consistency and enable verification of the data provided to both the NAEIS and the Minister under the Draft PPP Regulations. Our clients submit that the data submitted annually to the NAEIS in terms of regulation 7 of the Draft GHG Reporting Regulations should be submitted to the Minister with the pollution prevention plans, as well as annually with the annual progress reports in terms of regulation 6 of the Draft PPP Regulations.
23. Our clients are also of the view that the emission calculation and reporting methodologies should be consistent in the Draft Declaration, the Draft PPP Regulations and Draft GHG Reporting Regulations. In other words, these three pieces of legislation should prescribe the same methodologies for calculating emissions. For instance, the Draft GHG Reporting Regulations refer to the IPCC Guidelines for National Greenhouse Gas Inventories, and then to the Department's own Technical Guidelines for Monitoring, Reporting and Verification of Greenhouse Gas Emissions for tiers 2 and 3,<sup>18</sup> while the Draft PPP Regulations refer to the Draft GHG Reporting Regulations methodologies. This lack of clarity and consistency should be remedied.

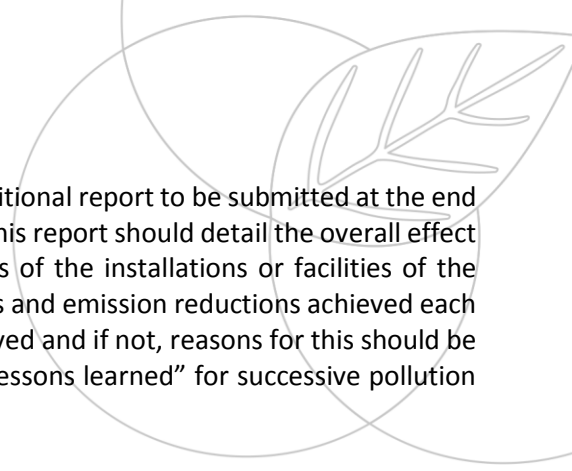
<sup>14</sup> Article 13(7) Paris Agreement, 2015

<sup>15</sup> Climate Action Tracker available at <http://climateactiontracker.org/indcs.html>

<sup>16</sup> See <http://www.dailymaverick.co.za/article/2015-09-23-climate-change-south-africa-readies-itself-for-cop-21/#.VrhF5f197IU>

<sup>17</sup> P1 SA INDC.

<sup>18</sup> These were supposed to have been on the DEA website, but they were not and CER reserved their rights to comment on these in the submissions on the Draft National Greenhouse Gas Emission Reporting Regulation dated 4 August 2015 (annexure 1 hereto).



24. Our clients recommend that the Draft PPP Regulations provide for an additional report to be submitted at the end of the five year period when the pollution prevention plan is reviewed. This report should detail the overall effect and impact of the pollution prevention plan in mitigating the emissions of the installations or facilities of the relevant person. It should include details such as the total GHG emissions and emission reductions achieved each year; whether the target of the pollution prevention plan has been achieved and if not, reasons for this should be stipulated in the report. It should also include recommendations and “lessons learned” for successive pollution prevention plans.

#### *Access to Information*

25. In order to exercise and protect their environmental rights, interested and affected parties will require public participation and public access to information on environmental pollution. Our clients recommend that the pollution prevention plans and annual progress reports be made publicly available on the NAEIS.

26. Section 24 of the Constitution of the Republic of South Africa provides that everyone has the right to an environment that is not harmful to their health or well-being; and 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; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

27. Section 32 of the Constitution recognises that all South Africans have the right of access to information held by the state, and any information that is held by another person and that is required for the exercise and protection of any rights. The Promotion of Access to Information Act, 2000 (PAIA) was enacted to give effect to this right.

28. Section 2(f) of the National Environmental Management Act, 1998 (NEMA) Principles recognises that:

*“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.”*

29. In that regard, our clients submit that the pollution prevention plans and progress reports submitted to the Minister should be made accessible to the public through the NAEIS platform. They and other members of the public are entitled to protect and exercise their constitutionally-guaranteed right of access to information and their environmental rights. This information will enable them to assess the impact of atmospheric emission activities on the environment, and to exercise a watchdog role in the preventative and rehabilitative measures taken to avoid further harm to the air they breathe. In this regard, we refer to the decision of the Supreme Court of Appeal in *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* [2015] 1 All SA 261 (SCA).

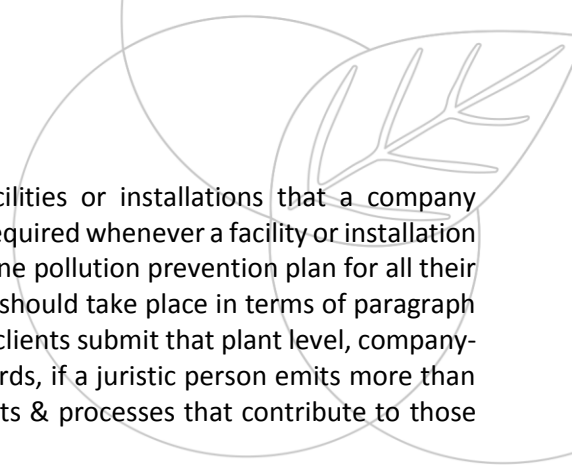
30. Next, we make specific submissions on the Draft Declaration and the Draft PPP Regulations.

#### **Declaration of Greenhouse Gases as Priority Pollutants**

31. Regulation 3(1) of the Draft Declaration provides that:

*“A person conducting a production process set out in Annexure A to this notice which involves the direct emission of greenhouse gases as priority pollutants, in paragraph 2 of this notice, in excess of 0.1 Megatonnes (Mt) annually measured as carbon dioxide equivalents (CO<sub>2</sub>-eq)”* is required to submit a pollution prevention plan.

32. The definition of “person”, includes a juristic person. It is assumed that the 0.1 megatonnes threshold referred to in this paragraph applies to the sum of GHGs emitted from each process, but it should be clarified whether the threshold applies to each process conducted by a person or whether it applies to the total processes conducted



by a person (i.e. to the sum total of GHGs emitted from all the facilities or installations that a company owns/operates). In other words, is a separate pollution prevention plan required whenever a facility or installation exceeds 0.1 megatonnes, or is it sufficient if the company only submits one pollution prevention plan for all their facilities? This should be clarified regarding the level at which reporting should take place in terms of paragraph 5 of the Draft Declaration. In this regard, as elaborated upon below, our clients submit that plant level, company-wide reporting and pollution prevention plans are required. In other words, if a juristic person emits more than 100,000 tonnes CO<sub>2</sub>e, they must report on and submit plans for all plants & processes that contribute to those emissions.

33. Regulation 5 provides that:

*“A person submitting pollution prevention plan (sic), that has been approved by the Minister, must in terms of 29(4) of the Act monitor, evaluate and report on the implementation of the pollution prevention plan.”*

34. We and our clients note that there is no guidance on how the monitoring and evaluation of the implementation of the pollution prevention plan should be done: it is not clear what methodology or criteria should be used. We suggest that the words “in accordance with the requirements contained in the regulations developed in terms of section 29(3) of this Act” be added to the end of that regulation to provide more clarity.

35. The amended regulation should read as follows:

*“A person submitting a pollution prevention plan, that has been approved by the Minister, must in terms of 29(4) of the Act monitor, evaluate and report on the implementation of the pollution prevention plan in accordance with the requirements contained in the regulations developed in terms of section 29(3) of this Act”.”*

### **The National Pollution Prevention Plans Regulations**

36. A “company” has been defined in Regulation 1 as any person to which a carbon budget is allocated and shall include:

- (a) its holding company or corporation or legal entity, registered in South Africa in accordance with the Laws of South Africa;*
- (b) all its subsidiaries and legally held operations, including joint ventures and partnerships where it has a conflicting interest, or is nominated as the responsible entity for the purpose of reporting under this Regulation; and*
- (c) all facilities generally over which it has control, which are not part of another company as provided for in this Regulation.*

37. Upfront, we point out that it is unclear as to why “company” has been defined at all. The word “company” is not used in the Draft PPP Regulations, except for in regulation 4(1)(a), which refers to a “company name”. Our clients recommend that the definition for “company” (amended as recommended below) instead be a definition for “juristic person”.

38. The definition indicates that it is applicable to a person to whom a carbon budget is allocated. This is problematic because there is currently no legislative framework for carbon budgets and it is not clear to whom a carbon budget applies. This will certainly create a loophole that could be taken advantage of by persons required to submit a pollution prevention plan, and provide an excuse for not complying with their obligations. This must be urgently remedied, both by speeding up the allocation of carbon budgets, and by inserting a definition for “carbon budget”. In this regard, carbon budgets must be less than the person is currently emitting and must decline annually.

39. Mitigation intervention has been defined as:

"mitigation intervention" is a technology (that is, a piece of equipment or a technique for performing a particular activity), process, or practice which, if employed, would reduce greenhouse gas emissions below anticipated future levels, when compared to the status quo or existing counterfactual techniques normally employed;

40. Our clients are of the opinion that this definition of "mitigation intervention" is too convoluted and difficult to understand – particularly the confusing reference to "existing counterfactual techniques". This definition should be clarified and simplified to remove any confusion and ambiguity as to what is actually intended.

41. Regulation 3 (1) provides that:

*"A person conducting a production process set out in Annexure A to this Notice which involves the direct emission of greenhouse gases in excess of 0.1 Megatonnes (Mt) annually measured as carbon dioxide equivalents (CO<sub>2</sub>-eq)" is required to submit a pollution prevention plan.*

42. We repeat the submissions made in paragraph 32 above in relation to regulation 3(1) of the Draft Declaration.

43. Regulation 4 provides for the requirements of pollution prevention plans, it states that:

*"(1) A pollution prevention plan must include —*

- (a) details of the person submitting the plan; including company name and registration number, name and contact details of person responsible for submitting the pollution prevention plan on behalf of the company;*
- (b) description of production processes listed in Annexure A to this Notice;*
- (c) type of greenhouse gas emissions generated from each production process or processes listed in Annexure A to this Notice;*
- (d) total greenhouse gas emissions from each production process measured as CO<sub>2</sub>-eq for the year, preceding the first calendar year of the pollution prevention plan;*
- (e) details of the methodology that is to be used by the person to monitor annual greenhouse gas emissions and evaluate progress towards meeting greenhouse gas emission reductions, which has been developed in accordance with the National Greenhouse Gas Emission Reporting Regulations.*
- (f) description of mitigation interventions that will be implemented to reduce greenhouse gas emissions over the five year period, and the projected emissions reductions that will be achieved."*

44. It is not clear whether the mitigation interventions to be implemented in regulation 4(1)(f) above will apply to a facility/installation or to a process. This should be amended to provide clarification. It is submitted that the mitigation interventions should be direct measures and should be as detailed as possible, addressing each process and each facility or installation. Such plans should not include offsetting.

45. We submit that, in addition to including "the projected emissions reductions that will be achieved" from the mitigation interventions that will be implemented in terms of the pollution prevention plan, a pollution prevention plan must include a target GHG emission reduction to be achieved at the completion of the five year period and on the termination of the pollution prevention plan. The Minister must ensure that this goal is aligned with South Africa's INDC, and any amendments thereto. Such a target should also be aligned with any carbon budget that has been allocated to the person preparing the pollution prevention plan, as soon as carbon budgets are incorporated into South Africa's regulatory regime to address climate change. Regulation 4(1)(f) should require that mitigation interventions result in compliance with the person's carbon budget (once such budgets are allocated). It is proposed that this regulation be amended to require that a pollution prevention plan also include:

*"(f) the target greenhouse gas emission reduction to be achieved over the five year period, together with a description of mitigation interventions that will be implemented to reduce greenhouse gas emissions over the*



*five year period, [and] the projected emissions reductions that will be achieved, and how these interventions will ensure compliance with carbon budgets, if any.*

46. Our clients are of the opinion that the data provided to the NAEIS under the Draft GHG Reporting Regulations should also be made available to the Minister when pollution prevention plans are submitted – so that these can be compared and checked for accuracy and completeness and so that the Minister has a record of the total GHG emissions of the relevant person during the preceding year. In other words, the data on the total GHG emissions as submitted to NAEIS should also be included in the pollution prevention plans. In this regard, it is submitted that there should be an additional requirement of the pollution prevention plans, so that subregulation 4(1) should include:

*“(g) the total greenhouse gas emissions arising from each of the activities as set out in the Annexures to the Greenhouse Gas Emission Reporting Regulations for the preceding year as submitted to the National Atmospheric Emission Inventory System in terms of the Greenhouse Gas Emission Reporting Regulations.”*

47. The Minister, in considering whether to approve or reject a pollution prevention plan, should in addition to considering whether the plan complies with regulation 4 of the Draft PPP Regulations, also be required to consider whether the pollution prevention plan is aligned with South Africa’s INDC and its international commitments.

48. As indicated above, regulation 6 requires a person that submits a pollution prevention plan to monitor and evaluate the implementation of the approved pollution prevention plan and submit a progress report to the Minister by 31 March each year for the preceding calendar year.

49. In order to ensure consistency of reporting in terms of the applicable regulations, our clients submit that provision should also be made for the annual progress reports to be submitted to the NAEIS. Therefore, regulation 6 (1) of the PPP Regulations should, our clients submit, be amended as follows:

*(1) A person required to submit a pollution prevention plan... and submit a progress report to the Minister submitting a progress report on their pollution prevention plans in terms of Regulation 6(1) must also submit such report to the Minister and to the National Atmospheric Emission Inventory System by 31 March each year for the preceding calendar year”.*

50. We have submitted above - in order to ensure accuracy and completeness of reporting - that the annual NAEIS report in terms of the Draft GHG Reporting Regulations should be included when the pollution prevention plan is submitted to the Minister. For the same reason, it is submitted that the annual NAEIS report must also be included with the annual progress reports submitted in terms of the Draft PPP Regulations. In this regard, it is submitted that an additional sub-regulation 6(2)(c) should be added, so that the progress report includes:

*“(c) the total greenhouse gas emissions arising from each of the activities as set out in the Annexures to the Greenhouse Gas Emission Reporting Regulations for the preceding year as submitted to the National Atmospheric Emissions Inventory System in terms of the Greenhouse Gas Emission Reporting Regulations.”*

51. Regulation 6(2) (b) states that a progress report must include:

*“(b) details of deviations from the approved pollution prevention plan, if any, and remedial action undertaken to address any deviations.”*

52. This provision should specifically require detailed explanations for deviations and other non-compliances from pollution prevention plans and should be amended to read as follows:

*“(b) details of and an explanation for any deviations from or non-compliance with the approved pollution prevention plan, [if any], and remedial action undertaken and proposed to address any deviations and non-compliances.”*

53. Draft regulation 12 of the Draft GHG Reporting Regulations provides as follows:

**Verification of information**

12. (1) If the competent authority reasonably believes that the information submitted to the NAEIS is incomplete or incorrect the competent authority, must instruct, in writing, a data provider to verify the information submitted.
- (2) A competent authority must, once every two years, conduct on-site verification of emission estimated using tier 2 and tier 3 methodologies by data providers listed in Annexure 3.
- (3) A data provider instructed to verify information in terms of subregulation (1) must verify the information within 30 days after receiving the written instruction from the competent authority.
- (4) If a competent authority reasonably believes the verified information submitted in terms of sub-regulation (1) to be incomplete or incorrect the competent authority must instruct such data provider, in writing, to submit supporting documentation prepared by an independent person with the competent expertise on the accuracy of the information that has been submitted to the NAEIS.
- (5) The supporting documentation requested must be submitted within 30 days after receipt of the instruction contemplated in sub-regulation (4).
- (6) A data provider is liable for all costs incurred in connection with compliance with an instruction from the competent authority in terms of sub-regulations (1) and (4).

54. In order to ensure that there is consistency in the information communicated to NAEIS and the competent authority in terms of the Draft GHG Reporting Regulations and to the Minister in terms of the Draft PPP Regulations, any data verified in terms of this provision by a data provider and/or by competent authority, should be provided to the Minister by the competent authority in terms of the Draft GHG Reporting Regulations - the National Inventory Unit based at the National Department of Environmental Affairs -<sup>19</sup> to enable the Minister to verify data provided to her in terms of the Draft PPP Regulations.

55. Our clients therefore suggest that an additional subregulation 6(2)(d) be added as follows:

A progress report must include —

*“(d) information that has been verified by a data provider and/or competent authority in terms of regulation 12 of the Greenhouse Gas Reporting Regulations.”*

56. It is submitted that the progress reports must focus on whether approved pollution prevention plans are achieving the intended outcome of reducing GHGs; and, if not, how this situation is being – and will be - urgently addressed. This regulation needs to emphasise that the purpose of submitting the reports is to ensure that there is considerable reduction of GHG emissions. It should be made clear that the Minister has the power and discretion to require that additional mitigation measures or steps be implemented, if it appears that a facility is not succeeding in mitigating its GHG emissions in accordance with the pollution prevention plan, or where additional measures are required to ensure compliance with South Africa’s international commitments.

57. As submitted above, if there are any non-compliances with any pollution prevention plans, these should be explained, as should the remedial action.

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<sup>19</sup> Regulation 1 of the Draft GHG Reporting Regulations.

58. In addition, inconsistencies between the total GHG data submitted to NAEIS and the data in the progress reports must be explained. Regulation 6(4), which provides that the Minister must, within 30 days, consider whether the content of the annual progress reports complies with subregulation (2), should be amended to include an additional sub-regulation requiring the Minister to consider whether the GHG data in the annual progress report is consistent with the data submitted to NAEIS.

59. In terms of regulation 6(4), *“(t)he Minister must, within 30 days, consider whether the content of the annual progress report complies with subregulation (2) and may —*

- (a) approve the annual progress report; or*
- (b) reject the annual progress report and direct the person to amend the report accordingly.*

60. In the circumstances, the following amendments are proposed to regulation 6(2):

"A progress report must include —

- (a) ....
- (b) details of and an explanation for any deviations from or non-compliance with the approved pollution prevention plan, [if any], and remedial action undertaken and proposed to address any deviations and non-compliances;
- (c) the total greenhouse gas emissions arising from each of the activities as set out in the Annexures to the Greenhouse Gas Emission Reporting Regulations, for the preceding year as submitted to the National Atmospheric Emission Inventory System in terms of the Greenhouse Gas Emission Reporting Regulations;
- (d) details of any information that has been verified by a data provider and/or competent authority in terms of regulation 12 of the Greenhouse Gas Emission Reporting Regulations; and
- (e) details on whether the facility is on schedule to complying with their greenhouse gas emission reduction target.

61. Regulation 6(5) goes on to provide that:

*“If an annual progress report is rejected in terms of subregulation (4)(b), the Minister must direct the person to amend the report within 30 days.”*

62. This provision should permit the Minister to recommend additional mitigation measures where there has been non-compliance and/or where a person has shown insufficient progress in achieving the requisite emission reductions. It is submitted that it should therefore be amended as follows:

*“If an annual progress report is rejected in terms of subregulation (4)(b), the Minister must:*  
*(a) direct the person to amend the report within 30 days; and*  
*(b) require additional mitigation interventions or other measures to promote compliance with the pollution prevention plan and with these Regulations”*

63. Additionally, our clients note with concern that verification in regulation 7 is to be done by a data provider only and there is no requirement for third party verification. Provision ought to be made for third party verification by a competent authority as proposed in the Draft GHG Reporting Regulations. This should be done annually, as recommended in our clients' comments on the Draft GHG Reporting Regulations (annexure 1).

64. Hence regulation 7 should be amended to include a subregulation 4 which provides that:

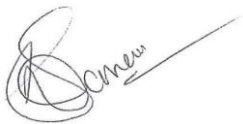
“(4) A competent authority must, annually, conduct on-site verification of information required to be submitted in the pollution prevention plans and annual progress reports.

65. In the circumstances we, on our clients’ behalf, strongly appeal for the Notice of Intention to Declare Greenhouse Gases as Priority Pollutants and the Draft National Pollution Prevention Plans Regulations to be amended as outlined above.
66. Should you require more information on any aspect of our submissions, please let us know. Kindly also keep us updated on the progress of these draft regulations.

Yours sincerely

**CENTRE FOR ENVIRONMENTAL RIGHTS**

per:

A handwritten signature in black ink, appearing to read 'S Kamanja', with a long horizontal stroke extending to the right.

**Sylvia Kamanja**

**Attorney**

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