



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Our ref: CER/RH
Date: 5 April 2016

Dear Sirs

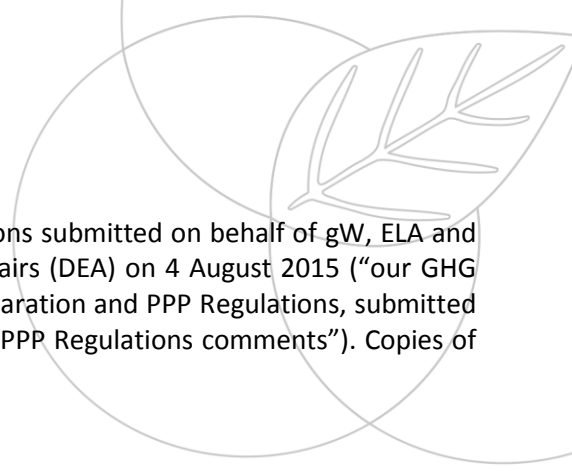
REQUEST FOR STRENGTHENING AND PUBLICATION OF THE NATIONAL GREENHOUSE GAS EMISSION REPORTING REGULATIONS, THE NOTICE OF INTENTION TO DECLARE GREENHOUSE GASES PRIORITY POLLUTANTS AND THE POLLUTION PREVENTION PLAN REGULATIONS

1. We address you on behalf of a group of non-government and community organisations concerned about industrial greenhouse gas (GHG) emissions and the need for South Africa to take steps to address the impacts of climate change. These organisations include:
 - 1.1. groundWork (gW);
 - 1.2. Earthlife Africa Johannesburg (ELA);
 - 1.3. the South Durban Community Environmental Alliance (SDCEA);
 - 1.4. the Highveld Environmental Justice Network (HEJN) – a network of community-based organisations;¹ and
 - 1.5. the Vaal Environmental Justice Alliance (VEJA) (“our clients”).
2. We refer to the National Environmental Management: Air Quality Act, 2004 (AQA): Draft National Greenhouse Gas Emission Reporting Regulations published in GN 541 (GG 38857) on 5 June 2015 (the “draft GHG Reporting Regulations”), the Notice of Intention to Declare GHGs Priority Pollutants (“the draft Declaration”), and the draft Pollution Prevention Plan Regulations (“the draft PPP Regulations”), which were published on 8 January 2016² in terms of s 29 of AQA (referred to collectively as “the draft regulations”).

¹ The organisations include: 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.

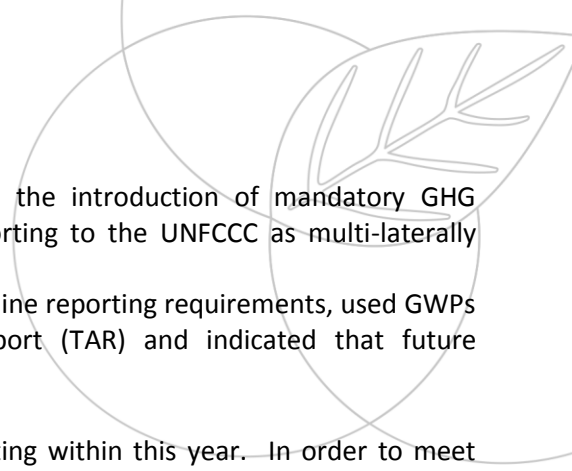
² GN 5 and 6 GG 39578 of 8 January 2016.

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3. We refer further to the comments on the draft GHG Reporting Regulations submitted on behalf of gW, ELA and SDCEA to the Director-General of the Department of Environmental Affairs (DEA) on 4 August 2015 (“our GHG reporting comments”). We refer also to our comments on the draft Declaration and PPP Regulations, submitted on behalf of our clients on 8 February 2016 (“our draft Declaration and PPP Regulations comments”). Copies of both comments are attached for your attention.
 4. We write this letter on behalf of our clients to:
 - 4.1. reiterate and emphasise the submissions and recommended changes to the draft regulations as set out in our comments; and
 - 4.2. to request that these regulations be published and come into force (as amended to address our clients’ concerns) without further delay. It has been almost one year since the publication of the draft GHG reporting regulations; since then, South Africa has made national and international commitments, as set out in detail below, which require a strict GHG reporting regime and strict regulation and monitoring of GHGs by emitters in South Africa.
 5. Our comments highlight South Africa’s commitments to address and mitigate climate change as set out in national policy - the National Climate Change Response White Paper (“the White Paper”) – as well as our international obligations, pointing out that GHG emissions are a matter of global, and not merely national, concern and that the regulation of GHG emissions in South Africa is therefore a matter of international interest.
 6. In general, our comments highlight the need for:
 - 6.1. coherence and alignment between the draft GHG Reporting Regulations and the draft Declaration and PPP Regulations, and alignment of these draft regulations and any future climate change legislation with national climate change policy and South Africa’s international commitments;
 - 6.2. GHG emission data to be publicly available through the NAEIS;
 - 6.3. detailed facility-level reporting by emitters; and
 - 6.4. detailed mechanisms and provisions for monitoring verification and enforcement of noncompliance by the relevant authorities.
 7. We submit that detailed and transparent reporting by emitters, and the publication of GHG emission data are crucial elements for the effective reduction and monitoring of GHG emissions, necessary to mitigate and address climate change.
 8. We note that, subsequent to the publication of the draft GHG Reporting Regulations and the submission of our GHG reporting comments, South Africa submitted its Intended Nationally Determined Contribution (INDC)³ and participated in the negotiations of the 21st annual Conference of the Parties (COP21) in Paris in December 2015, which culminated in the adoption of an international climate change agreement (“the Paris Agreement”).
 9. The INDC outlines South Africa’s international commitments in the context of the Paris Agreement and states, *inter alia*, that:
 - 9.1. South Africa’s INDC is premised on the adoption of a comprehensive, ambitious, fair, effective and binding multilateral rules-based agreement under the United Nations Framework Convention of Climate Change (UNFCCC) at the COP21 in Paris;⁴
 - 9.2. The timeframes communicated in South Africa’s INDC are 2025 to 2030, the INDC proposes that during this time South Africa’s emissions will be in a range between 398 and 614 Mt CO₂-eq, as defined in national policy. This is the benchmark against which the efficacy of mitigation actions will be measured;
 - 9.3. South Africa’s GHG emissions will peak between 2020 and 2025, plateau for approximately a decade, and decline in absolute terms thereafter;

³ Available at <http://www4.unfccc.int/submissions/INDC/Published%20Documents/South%20Africa/1/South%20Africa.pdf>.

⁴ At page 3 of the INDC.

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- 9.4. 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; and
 - 9.5. the current GHG inventory, consistent with the 2006 IPCC guideline reporting requirements, used GWPs (global warming potential) from the Third Assessment Report (TAR) and indicated that future inventories will use GWP values from Assessment Report 4.⁵
10. We note that the INDC proposes to introduce mandatory GHG reporting within this year. In order to meet these goals, and the other goals in the INDC, it is necessary that mechanisms be put into place soon to enable South Africa to effectively reduce, and regularly report on, its GHG emissions.
 11. South Africa, as a water-scarce country, will be particularly affected by the impacts of climate change – with the current ongoing drought being one example. The incentive and necessity to take steps to mitigate against climate change and reduce GHG emissions is therefore of particular relevance for South Africa. And although the INDC acknowledges that “*the adverse effects of climate change have been a stark reality for South Africa for many years*”,⁶ South Africa’s INDC proposal has been criticised as being inadequate to meet the overall objective of limiting global warming to 2°C.⁷ It is therefore necessary that South Africa set stricter GHG mitigation goals through its nationally determined contributions (NDC) to be submitted under the Paris Agreement. Indeed, as is set out below, this is what is required by the Paris Agreement.⁸
 12. Notably, the Paris Agreement places obligations on parties to:
 - 12.1. undertake and communicate (as NDCs) ambitious efforts with a view to achieving the purpose of the Paris Agreement;⁹
 - 12.2. every 5 years,¹⁰ prepare, communicate and maintain successive NDCs that each party intends to achieve. Parties shall pursue domestic mitigation measures with the aim of achieving the objectives of such contributions,¹¹ and each successive NDC will represent a progression beyond the party’s then current NDC and reflect its highest possible ambition;¹²
 - 12.3. in communicating their NDCs, provide the information necessary for clarity, transparency and understanding;¹³
 - 12.4. account for their NDCs. In accounting for anthropogenic emissions and removals corresponding to their NDCs, parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting;¹⁴
 - 12.5. regularly provide information such as a national inventory report of anthropogenic emissions by sources and removals by sinks of GHGs, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change (IPCC) and agreed upon by the COP serving as the meeting of the Parties to the Paris Agreement, and information necessary to track progress made in implementing and achieving their NDCs under Article 4;¹⁵ and
 - 12.6. the COP serving as the meeting of the Parties to the Paris Agreement shall periodically take stock of the implementation of the Paris Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the “global stocktake”). It shall do so in a

⁵ At page 7 of the INDC.

⁶ At page 3 of the INDC.

⁷ See <http://climateactiontracker.org/indcs.html>.

⁸ See article 4(3).

⁹ Article 3.

¹⁰ Article 4(9).

¹¹ Article 4(2).

¹² Article 4(3).

¹³ Article 4(8).

¹⁴ Article 4(13).

¹⁵ Article 13(7).

comprehensive and facilitative manner. The first global stocktake will be undertaken in 2023, with another every 5 years thereafter.¹⁶

13. In light of South Africa's commitments under its INDC and the Paris Agreement, the draft regulations must establish a GHG reporting system which:
 - 13.1. enables South Africa to meet its international obligations (as set out in the INDC and Paris Agreement¹⁷);
 - 13.2. enables South Africa to conform with international best practice as described in the 2006 IPCC Guidelines for National Greenhouse Gas Inventories ("the IPCC Guidelines");
 - 13.3. enables the identification of mitigation opportunities and actions;
 - 13.4. enables the tracking of South Africa's emissions trajectory;
 - 13.5. ensures that uncertainties are eradicated;¹⁸ and
 - 13.6. effectively establishes and maintains a national GHG inventory.
14. In this regard it is important that the draft regulations encompass the recommendations in our comments, in order to ensure detailed, effective reporting and transparency by emitters, which meets the above requirements, and complies with the requirements of our Constitutional rights to a healthy environment and of access to information.¹⁹
15. In particular, we highlight the importance of and need for the reporting of GHG emissions, and monitoring and reporting under the PPP Regulations, at individual facility level as opposed to company level (as the draft regulations currently provide) and the need for the GHG emission data to be publicly available.
16. We regard transparent and detailed reporting as particularly important for encouraging compliance and ensuring accurate verification of GHG emissions by emitters.
17. We submit that a mere record of total of company emissions will place the state in a weak position to report openly under the Paris Agreement and, more importantly, to track South Africa's own progress and take the required steps to address and mitigate GHG emissions by some of the largest GHG emitters in the country.
18. The need for firm and clear requirements is also illustrated by the worrying tendency of many emitters to disregard – or at least trivialize - the significant impacts of climate change and the necessity to take steps to reduce GHG emissions. As one recent example, we refer to a responding statement submitted by Colenso Power (Pty) Limited in the appeal by our client gW of the environmental authorisation granted for the proposed 1050MW Colenso independent power producer coal-fired power station. In response to gW's arguments that the environmental impact report and, consequently, the decision-maker, failed to take into account the impacts that the power station will have on climate change, the applicant argued *inter alia* that there is no legal requirement to assess the impacts of climate change. They also question the science behind climate change - in doing so, they quote a report from as far back as 1996 and state that "*from a scientific point of view it is worth noting that there is still considerable uncertainty around the science of climate change.*"²⁰ This is unacceptable and directly contradicts national policy and the state's clear position that "*the science is clear*"²¹ and that "*climate change is already a measurable reality, and is primarily as a result of the rising concentration due to human induced cumulative emissions...*"²²

¹⁶ Article 14(1) and (2).

¹⁷ In particular, we refer to the obligations in articles 4 and 13 of the Paris Agreement.

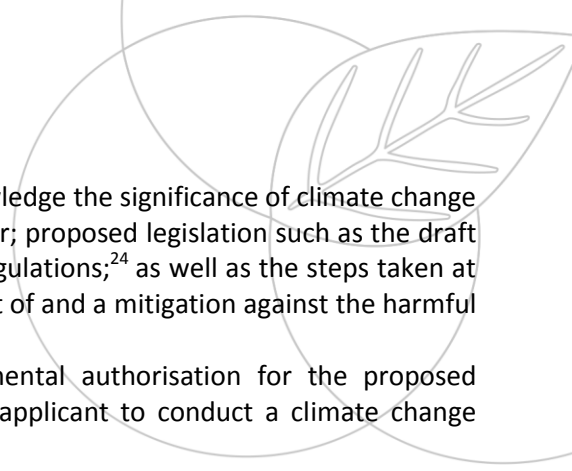
¹⁸ Page 11 of the INDC acknowledges uncertainties in respect of certain GHG emission data and states that "[u]ncertainties ... are to be bounded over time. In the on-going process of implementing the mitigation system, methodologies will be improved."

¹⁹ Sections 24 and 32 of the Constitution respectively.

²⁰ Please let us know if you would like a copy of the responding statement and/or our appeal.

²¹ Pages 8 and 9 of the White Paper.

²² Page 1 of the INDC.

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19. We support the steps being taken by government to address and acknowledge the significance of climate change and to seek to mitigate the impacts it will have through: the White Paper; proposed legislation such as the draft GHG Reporting regulations, the draft Declaration²³ and the draft PPP Regulations;²⁴ as well as the steps taken at an environmental impact assessment (EIA) level to ensure an assessment of and a mitigation against the harmful impacts of climate change. In this regard we refer in particular to:
- 19.1. the Minister's decision on the appeal against the environmental authorisation for the proposed Thabametsi coal-fired power station, which has required the applicant to conduct a climate change impact assessment within 6 months of the decision; and
 - 19.2. the refusal of an environmental authorisation by the Limpopo Economic Development Environment and Tourism Department (LEDET) for a proposed mine in Limpopo, with one of the grounds for refusal being that the area where the mine is proposed is important for South Africa's climate change resilience and granting the authorisation would be contrary to South Africa's national climate change response policy.²⁵
20. In light of the above, we ask that serious consideration be given to our comments and to the commitments under South Africa's INDC and the Paris Agreement, in finalising the draft regulations.
21. We submit that a failure to remedy the draft regulations in light with our comments and South Africa's commitments could render the final regulations unconstitutional and subject to legal challenge.
22. We ask that the draft regulations, as amended in accordance with our comments, be published in final form without further delay.
23. Please advise if you would like to meet with us to discuss the issues highlighted in this letter.
24. If you have any questions, please feel free to contact us.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

Robyn Hugo
Attorney and Programme Head: Pollution and Climate Change
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²³ GN 6, GG 39578 of 8 January 2016.

²⁴ GN 5, GG 39578 of 8 January 2016.

²⁵ See <http://cer.org.za/news/newsflash-authorisation-for-limpopo-mine-refused-because-of-detrimental-impacts-on-climate-change-resilience> for further information on this, and please let us know if you would like a copy of the LEDET decision.