



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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16 April 2013

Dear Mr Munyai

SUBMISSIONS REGARDING THE REVIEW OF THE 2012 NATIONAL FRAMEWORK FOR AIR QUALITY MANAGEMENT IN THE REPUBLIC OF SOUTH AFRICA

1. We address you at the instance of our clients, groundWork, the South Durban Community Environmental Alliance (“SDCEA”) and the Vaal Environmental Justice Alliance (“VEJA”).¹ These submissions on the review of the latest draft 2012 National Framework for Air Quality Management, published for comment on 15 February 2013 (“the draft 2012 Framework”), also incorporate inputs from and are supported by Prof Eugene Cairncross, who has provided expert advice to the Centre for the purpose of these comments. In addition, they are supported by the following organisations:

1. 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. 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 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. Among other things, it aims to promote a culture of environmental awareness and sustainable development.

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- 1.1. Middelburg Environmental Justice Network;
 - 1.2. Greater Middelburg Residents' Association;
 - 1.3. Guqa Community Service Centre;
 - 1.4. Southern Africa Green Revolutionary Council;
 - 1.5. Greater Delmas Civic Movement; and
 - 1.6. Schoongesicht Community Movement.
2. We refer also to the submissions made on 22 August 2012 on behalf of the same clients in relation to an earlier draft of amendments to the Framework ("the August 2012 submissions"), a copy of which is attached hereto. We note that certain of these comments have not been addressed in the draft 2012 Framework, and we request that the August 2012 submissions be read together with these submissions. In particular, we reiterate the contents of paragraphs 4-27; 31-51; 61-64; 66; 69-73; 75-89.
 3. As is elaborated on below, the Framework has the status of legislation. Our clients are extremely concerned that several of the legislative obligations in the 2007 Framework remain unfulfilled. This is exacerbated by the fact that the draft 2012 Framework extends many of the target dates for implementation.
 4. It is also highly problematic that the Department of Environmental Affairs (DEA) has failed to follow the prescribed process for reviewing the Framework.
 5. Below, we comment on the draft 2012 Framework. Upfront, we set out the legislative framework and make some general comments about what should be included in a second-generation Framework. We then address some of our client's concerns regarding the process adopted in preparing the draft 2012 Framework. Thereafter, we comment on certain specific provisions in the draft.

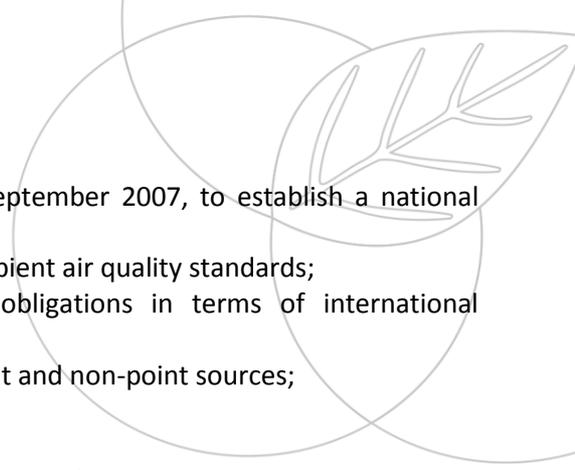
The legislative framework

6. Section 24 of the Constitution of the Republic of South Africa, 1996 (Constitution) guarantees everyone the rights 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 and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.
7. The National Environmental Management: Air Quality Act, 2004 (AQA) is one of those reasonable legislative measures required by the Constitution. Its objects are:
 - 7.1. to protect the environment by providing reasonable measures for—
 - 7.1.1. the protection and enhancement of the quality of air in the Republic;
 - 7.1.2. the prevention of air pollution and ecological degradation; and
 - 7.1.3. securing ecologically sustainable development while promoting justifiable economic and social development; and
 - 7.2. generally to give effect to section 24(b) 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.²
8. The State must seek to protect and enhance the quality of air in South Africa.³ Although AQA provides that it should be applied so as to achieve the progressive realisation of rights,⁴ section 24 of the Constitution (to which AQA aims to give effect) does not provide for "progressive realisation". The environmental rights are immediately applicable. In any event, as is explained below, the State is, in many respects, not even on track to achieve such progressive realisation.

² s.2.

³ S.3(a).

⁴ s.3(b).

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9. In terms of section 7(1) of the AQA, the Minister was required, by September 2007, to establish a national framework for achieving the object of the AQA Act, which had to include:
 - 9.1. mechanisms, systems and procedures to attain compliance with ambient air quality standards;
 - 9.2. mechanisms, systems and procedures to give effect to SA's obligations in terms of international agreements;
 - 9.3. national norms and standards for the control of emissions from point and non-point sources;
 - 9.4. national norms and standards for air quality monitoring;
 - 9.5. national norms and standards for air quality management planning;
 - 9.6. national norms and standards for air quality information management; and
 - 9.7. any other matter which the Minister considered necessary for achieving the object of the AQA.
 10. The current Framework was established on 11 September 2007. Its purpose is to achieve the objectives of AQA, and it sets out the means by which to implement this purpose.⁵
 11. The Framework binds all organs of state in all government spheres,⁶ and an organ of state must give effect to the Framework when exercising a power or performing a duty in terms of AQA or any other legislation regulating air quality management.⁷ It falls with the AQA's definition of "this Act"⁸ and contains legislative obligations.
 12. The 2007 Framework should have been reviewed within five years.⁹ We address our clients' concerns regarding the review and public participation processes from paragraph 18 below.

What a second-generation Framework should and should not contain

13. In the Foreword to the draft 2012 Framework, the Minister of Water and Environmental Affairs indicates that, "during the five year period of the implementation of the 2007 National Framework, there have been major achievements in air quality management". The Minister then mentions: the setting of ambient air quality standards; the establishment of three priority areas and plans to improve air quality in these areas; that South African Air Quality Information System (SAAQIS) "continues to provide access to air quality information"; the Atmospheric Pollution Prevention Act, 1965 was repealed and AQA came into full effect on 1 April 2010; and, as a result, provinces and municipalities became the atmospheric emission licensing authorities. But none of these "major achievements" is an improvement in air quality – which is the objective of AQA.
14. Instead of setting new milestones for the second five-year period of the Framework, the draft Framework reveals that various important elements of the 2007 Framework remain unachieved (more details are set out below). In addition, the draft Framework proposes that certain deadlines – in SAAQIS, for example – simply be extended so that missed milestones can now be reached. No proper explanation has been provided for this non-compliance with the legislative provisions of the 2007 Framework. This is of serious concern, given the numerous air quality-related challenges and serious air pollution in many areas of the country.
15. Our clients are concerned and disappointed that the DEA is neither complying with its obligations, nor providing any reasonable explanation for this failure. There is not an attempt to identify constraints or other factors that may have resulted in the failure to meet relevant milestones. These circumstances lead our clients to believe that these obligations – several of which have important implications for Constitutional rights – are not being taken seriously.

⁵ 2007 Framework section 1.3.

⁶ s7(3)(a).

⁷ s7(4).

⁸ s(1).

⁹ s7(5)(d).

16. It is submitted that a second-generation Framework should also contain more detail as to how key goals are to be reached. As an example, we address the need for support to local government below.

17. Support to local government

- 17.1. Crucially, the draft 2012 Framework must explain how other spheres assist the municipalities in meeting their air quality-related obligations, and how this will be improved.
- 17.2. The Constitution provides that municipalities have executive authority for, and the right to administer “air pollution”.¹⁰ Section 155(7) provides that the national government and provincial governments have legislative and executive authority to ensure the effective performance by municipalities of their functions, by regulating the exercise of municipalities’ executive functions. Section 8(b) of AQA provides that the Framework must establish national standards for provinces to monitor the municipalities’ performance in implementing the AQA.
- 17.3. It is submitted that the draft 2012 Framework should contain a clearer strategy, including specific and detailed interventions by the provincial and national spheres of government in order to assist municipalities in complying with their important air quality-related functions. For instance, section 4.2.7 of the draft 2012 Framework indicates that the DEA “*assumes a leadership and support role in the atmospheric emission licensing function*”, but no indication is provided as to what this role entails; how successful it has been; and what will be done to improve this support. One way to measure progress and plan intervention is through the introduction of adequate benchmarks, such as benchmarks for monitoring, reporting, and performance.
- 17.4. The roles of the National Air Quality Officer (AQO) and provincial air quality officers (AQOs) must be explicitly set out in the Framework, as must national and provincial air quality functions. This is necessary for there to be clarity regarding obligations and no confusion as to who is responsible for failing municipal air quality functions, especially in the priority areas.
- 17.5. Section 5.2 of the draft 2012 Framework refers to the development of SAAQIS, as well as to the development of “*guidance manuals and publications to provide support to [Air Quality Officers]*”. Section 5.4.5.2 refers to a national support programme “*to ensure that the DEA provide effective and efficient support to [Air Quality Management Plan] development country wide*”.
- 17.6. It is, however, clear that such mechanisms as have been adopted are insufficient. Our instructions are that local government, in general, lacks the human and financial resources, as well as relevant expertise to comply with its obligations. To give just one example, it is clear from eThekweni’s website¹¹ that their analysers have been down on numerous occasions over the last two years. If the weekly reports from July 2012¹² are considered, it is clear from the discussion section on page 12 that there are serious problems with their equipment and data non-availability. Such information as is available, generally shows non-compliance with ambient air quality standards. Since the September 2012 weekly report, there simply is no other data. Our clients have also been advised by eThekweni air quality employees that the severe shortage of resources and staff makes it impossible even to maintain their equipment.
- 17.7. In the absence of significantly ramped-up specific interventions, training and assistance from the other spheres, this dire situation in eThekweni - and numerous other municipalities – will not improve. It is crucial that the Framework indicate how this will be addressed. In the event of future failing municipal

¹⁰ Schedule 4, Part B.

¹¹ Available at: <http://www2.nilu.no/airquality/index.cfm?fa=city.viewstationgraph×erieID=%7b2c508af9-14d1-14a8-8884473d4226d2e2%7d&cityID=25&stationID=%7b63b8e347-5f87-745b-bf90-0e55c45bad81%7d&type=30d>

¹² Available at: <http://www2.nilu.no/AirQuality/data/reports/%7bAB304150-FE6B-E3F2-0C80-EF1274114664%7D.pdf>

systems, provinces must have in place adequate systems to alert them to this and adequate systems to remedy the situation.

- 17.8. Although not without its problems, it is proposed that consideration should be given to a system similar to the Blue Drop Certification Programme for Drinking Water Quality Management Regulation. Like the Blue Drop Programme, an air quality certification programme would measure and compare the results of the performance of municipalities (according to defined requirements), and then reward (or penalise) the municipality accordingly. For instance, targets could be: benchmarks for availability of air quality information, meeting of air quality objectives, well-maintained and fully functioning monitoring equipment, and responses to public complaints. Awareness of this performance would be obtained by routine reporting benchmarks, pressure through members of the public, the media, political classes, and NGOs. Under-performing municipalities would be required to correct the identified shortcomings, and municipalities would be incentivised to perform well to obtain the equivalent of a Blue Drop. However, for the reasons set out above, it is clear that other spheres would need to assist and support certain municipalities to meet their obligations.

Public participation and the Independent Review

18. There has not been compliance with the Framework's provisions regarding public participation and review of the Framework.
19. The AQA requires that norms and standards established in terms of the Framework are aimed at ensuring, *inter alia*, opportunities for public participation in the protection and enhancement of air quality.¹³ There is provision for public participation in relation to various sections of AQA (such as licensing;¹⁴ transfer of licences;¹⁵ and variation of licences;¹⁶). In general, the Minister or MEC must give due consideration to all representations or objections received from or presented by the public before exercising various powers.¹⁷
20. The 2007 Framework and the draft 2012 Framework make extensive references to the importance of public participation in air quality processes. Section 3.5 of both documents notes the direct impact on the public of air pollution, and their important watchdog role.
21. Sections 5.9.1.1 of both documents provides that *"(a)ctive participation and contributions from individual citizens and citizen groups is of utmost importance in developing, implementing and enforcing air quality management decisions within the context of the AQA. The potential benefits of public participation are numerous. If well-planned and managed, public participation can bring new and important knowledge to the table, mediate between conflicting perspectives early in the process and facilitate more efficient air quality governance. Equally important, public participation in air quality management plays a vital role in strengthening and deepening democracy in South Africa and in giving effect to the constitutional right to an environment which is conducive to health and well-being."*
22. According to sections 5.9.1.3 of both documents: *"(t)o keep stakeholders informed about on-going and planned air quality management projects and decision-processes (and related public participation opportunities), all three spheres of government must make relevant information available in a timely manner through, for example, dedicated air quality management websites and other suitable means, such as actively notifying known stakeholders."*

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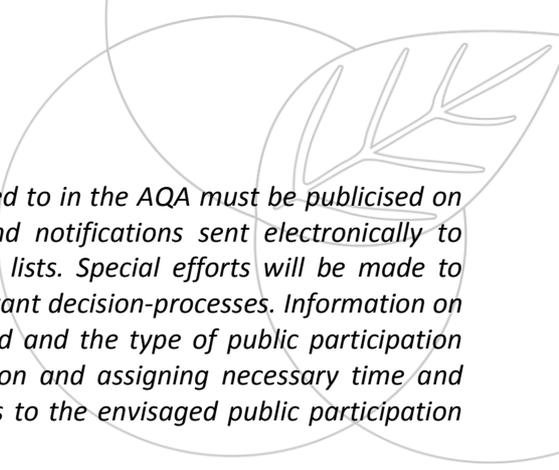
¹³ s7(2)(a).

¹⁴ s38(3).

¹⁵ s44(4).

¹⁶ S46(3) and (4).

¹⁷ s57.



Public participation opportunities for air quality decision-processes referred to in the AQA must be publicised on the national department websites and in other appropriate media and notifications sent electronically to stakeholders directly using up-to-date databases and electronic mailing lists. Special efforts will be made to ensure that vulnerable and affected communities are informed about relevant decision-processes. Information on the stage in the decision-process at which public participation is planned and the type of public participation activities envisaged will assist stakeholders in planning their participation and assigning necessary time and resources. It will also allow stakeholders to suggest possible adjustments to the envisaged public participation process early in the decision-process.

....

Public participation must take place early in the process, when key options are still open. This will ensure that all perspectives are captured and can be properly assessed at the outset. It will also ensure that all stakeholder groups have equal opportunities to convey their views. For major decision-processes, consideration must be given to the organisation of stakeholder workshops and other participatory tools that facilitate in-depth interaction and deliberation at early stages, and which promote face-to-face dialogue.

....

Providing feedback and acknowledging written contributions from stakeholders is considered essential to participatory processes and will strengthen the relationship and build trust between government and the public. To address related stakeholder expectations in a practical manner, government must prepare concise response documents that explain the rationale for final decisions or outcomes. Government must also provide explanation on why important comments may not have been addressed. The response document must be made available to the public on request.

....

Vulnerable groups and communities have specific needs in order to effectively participate in air quality decision-making. Capacity constraints include lack of technical and human resources as well as lack of financial resources to attend meetings. Government must take cognisance of these constraints when organising meeting locations and times and when setting timelines for public comment.”

23. Sadly, the process for the review of the Framework fell woefully short of these requirements. Our understanding is that all that was done in relation to public participation for the review of the Framework was that, in early July 2012, an advert was placed in the *Sunday Times* for three public workshops (in different provinces). At these workshops, the draft review was presented and discussed. As none of our clients saw the advert and no other attempts were apparently made to communicate with well-established stakeholders like our clients, they were unable to attend the workshops. In the evening of 24 July 2012, Ms Masekoameng circulated proposed amendments to the Framework, advising that two weeks were permitted for comment. The Centre requested – and was granted – the opportunity to make submissions by 22 August 2012. This process was made significantly more difficult because the amendments to the Framework were not marked up (with changes “tracked”, as is customary in the amendment of even subordinate legislation). The proposed amendments to the 2012 draft Framework have also not been marked up (and our requests for such marked-up versions refused).
24. In relation to the particular procedure prescribed in the 2007 Framework for its review, section 7.3 requires that a mid-term review must take place in 2010 and its results incorporated in the National Air Quality Officer’s 2010 Annual Report. The mid-term review was to have incorporated a “questionnaire survey of the primary air quality professionals involved in the National Framework process”. Following analysis of the questionnaires, a series of recommendations was to be developed regarding potential modifications to existing practices and the DEA was to provide commentary on these. Thereafter, the conclusions and recommendations of the mid-term review would be reviewed by stakeholders in a workshop (potentially the 2010 Lekgotla). “In addition, the workshop group can be used for a Horizon Scanning exercise to further identify any information gaps and future issues for consideration”.

25. There is no longer provision in the draft 2012 Framework for the mid-term review of envisaged in section 7.3 of the 2007 Framework. The explanation for this is set out in section 6.1:

“The 2007 National Framework provided a timetable for the review of the framework (refer to figure 10 of the 2007 National Framework). According to the said timetable, the 2nd generation of the National Framework was supposed to be generated in 2008 following the incorporation of the public comments received in 2008. However, this 2nd generation NF was never generated since it was too soon after the publication of the 2007 National Framework. The 2007 comments were therefore incorporated during 2012 along with new comments received during the 2012 public participation. Thus the 2012 National Framework serves as the 2nd generation National Framework. The amended timetable for the review of the National Framework is therefore suggested in the Figure 11 below. The NAQO report and recommendations from AQOs and stakeholders will inform the review process. The mid-term review, suggested in the 2007 National Framework will no longer form part of the review process based on the recommendations made and agreed during the public participation process.”

26. It is not clear what the 2008 public participation process entailed, nor how it was agreed not to conduct the mid-term review required by the 2007 Framework. No explanation is provided in this regard.

27. The 2007 Framework, in section 7.4, makes provision for an Independent Review of the National Framework to be completed by March 2012. This process is to be undertaken by an external contractor to the DEA to ensure a neutral and objective assessment of the implementation of the process. This review is apparently envisaged to incorporate *“extensive questionnaire surveys of various stakeholders including, but not limited to, members of the National-Provincial AQO Forum, the Provincial-Municipal AQO forum and the National Reference Group (once established), air quality practitioners and other interested parties including representatives of industry, NGOs and civil society groups”*.

28. Section 7.4 further indicates that, *“following the questionnaire surveys and analyses, a number of cases will be identified and case studies (including interviews) will be undertaken in order to provide a complete assessment of the key drivers, barriers, opportunities and information gaps in the management and implementation of the National Framework process. A final Independent Review report will be completed and submitted to the national department for comment in time for any potential redrafting of the 2012 National Framework. The review of the National Framework in 2012 will incorporate:*

28.1. all of the beneficial aspects and lessons learned in the current National Framework development and consultation phases;

28.2. all recommendations generated over the previous 5 years in the National Framework Indicator Assessment Reports (in the NAQO report), and the Independent Review;

28.3. an assessment of the review process itself.”

29. The consultative stage will include a *“Horizon Scanning exercise to further identify any information gaps and future issues for consideration”*. Section 7.5.1 indicates that the *“consultation workshops”* of the Independent Review stage will include *Horizon Scanning by relevant stakeholders, including air quality practitioners and other stakeholders such as industry and the general public”*.

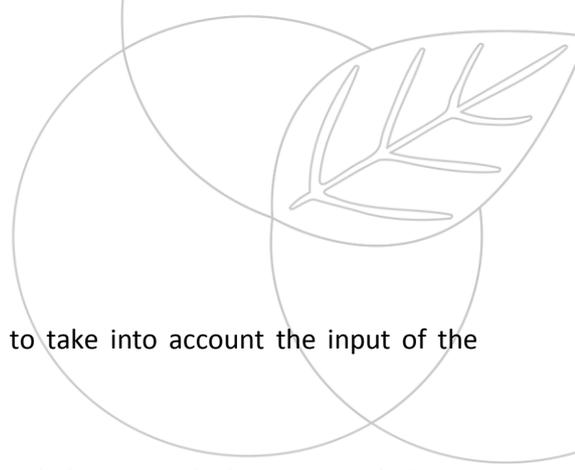
30. Section 6.3 of the 2012 draft Framework deals with the *“Independent Review of the National Framework”* and is almost identical to section 7.4 of the 2007 Framework.

31. In our comments on the previous draft Framework, we asked: when this independent review would take place; for our clients to have an opportunity to participate in the review; and to receive a copy of the review.

32. Having heard nothing further about this process, on 11 March 2013, we addressed another letter to the DEA, asking the following questions:

32.1. Who is the external contractor conducting the Independent Review?

32.2. What is the current stage of the Independent Review process?



- 32.3. When will stakeholders be invited to complete the questionnaires?
- 32.4. When and where will the consultation workshops be held?
- 32.5. When will the case studies be undertaken?
- 32.6. When will the final report be available?
- 32.7. Will the current draft of the 2012 Framework then be redrafted to take into account the input of the Independent Review report – as envisaged by section 6.3?

33. On 12 March 2013, the DEA advised us that:

- 33.1. uMoya NILU has been appointed as the independent reviewer and the 2012 draft Framework *“is an outcome of an independent review”*;
- 33.2. it had held 3 public workshops in July 2012 as part of the review process and no more public meetings were envisaged; and
- 33.3. *“we already held 3 public workshops last year in July as part of the review process. Unfortunately there will no longer be any public meeting. All meetings were advertised on the Sunday Times and various organisations registered as interested parties. Instead of having questionnaires, we only asked participants to provide us with inputs on how to improve the framework and what the limitations are. Following the 3 public meetings, participants were given a month to answer/provide inputs to sections of the framework where there are still grey areas and to the proposed amendments.”*

34. We have requested a copy of the report of the review, but this has not yet been forthcoming.

35. It is submitted that the process followed in reviewing the Framework has failed to comply with the public participation processes set out above. It has also failed to comply with the prescribed procedure for the review of the Framework. This means that, despite express commitment to public participation in the AQA and the 2007 Framework, public input and independent expert review played a negligible role in developing the next generation Framework.

36. As set out above, the Framework has the status of legislation. Given the important role of the Framework - which is required to set out how to achieve the objects of the AQA – this non-compliance is serious and has potentially far-reaching consequences for the legitimacy of the review process, particularly with the many communities affected by poor air quality across the country.

37. Below, we make submissions on particular sections of the draft 2012 Framework.

Section 2.2.3: AQA

38. The draft 2012 Framework should make clear which organs of state have failed to appoint air quality officers (AQOs) as required by section 14 of the AQA. It should also indicate the reasons for this failure and what will be done to address it. The draft 2012 Framework needs to make clear that the appointment of AQOs is obligatory.

Section 2.2.4: Other related national legislation

39. The legislation should be inserted into table 1 in the correct chronological order.

40. We note that the “Mineral and Petroleum Resources Development Act Amendment (2008)”, which was never brought into operation by the Minister of Mineral Resources, is included in table 1. The Mineral and Petroleum Resources Development Amendment Bill, 2012, was published for comment on 27 December 2012. The intention of the Department of Mineral Resources is that, when the new Amendment Act is promulgated and enacted, it will effectively enact Act 49 of 2008 and simultaneously amend it. The table should be amended to reflect the correct position.

Section 2.4.3.2: International concerns around Mercury, Lead and Cadmium

41. In addition to the reiteration of paragraphs 31-35 of the August 2012 submissions, the draft 2012 Framework should be updated to reflect that the mercury treaty was signed in January 2013.

Section 3.2.1: The National Department of Environmental Affairs (DEA)

42. The draft 2012 Framework should indicate what steps that DEA has taken and will take to meet the following objectives:

- 42.1. execution of the overarching auditing function to ensure that adequate ambient and compliance monitoring occurs and is audited against international benchmarks for data quality assurance and availability nationally;
- 42.2. enforcing compliance with the AQA, the National Framework and other relevant legislation; and
- 42.3. ensuring that air quality information is accessible to all stakeholders.

43. I address the DEA's Baseline Survey on Government-owned Air Quality Monitoring Networks dated August 2011 from paragraph 83 below.

Section 3.2.2: Provincial environmental departments

Section 3.2.3: Municipalities

Section 3.2.4: Other national departments

Section 5.4.5: Air Quality Management Plans

Section 5.4.5.3: The National Air Quality Management Plan

Section 5.4.5.4: Air Quality Management Plans for other National Government Departments

44. The draft 2012 Framework should indicate which provinces, municipalities and other national departments have failed to produce air quality management plans (AQMPs), as required, and also indicate the reasons for this failure, and what will be done to address it. The draft 2012 Framework must make clear that it is mandatory to produce these AQMPs.

45. In this regard, we note from the November 2011 DEA report entitled "An Assessment of the National Air Quality Management Planning Status Quo Report" ("Status Quo Report") that, as at the date of the report:

- 45.1. *"Even though AQMPs are required by law within these various spheres of government, many authorities have still not developed an AQMP" (p1);*
- 45.2. No national department that was required to do so had produced an AQMP (p4 and p33); and
- 45.3. *"Twenty four (24) AQMPs have been completed in South Africa with six (6) AQMPs in progress. A total of thirty one (31) district municipalities, four provinces and one metropolitan have not yet embarked on the process" (p4)*

46. We note that the Framework serves as the DEA's AQMP. It is submitted that the Framework fails to meet the requirements for an AQMP set out in section 16 of the AQA.

47. Similarly, the Framework should make clear which national and provincial departments have failed to prepare their environmental implementation and/or management plans, containing their AQMP, every four years as required by section 15(1) of AQA. It should also indicate which municipalities have failed to include their AQMP in their Integrated Development Plan ("IDP"), as required by section 15(2) of the AQA. The Framework should also disclose the reasons for these failures, and what will be done to address them. Again, the Framework should stress that these are mandatory requirements.

48. The Status Quo Report indicates that *"67% of authorities had included their AQMP into the IDP/[Environmental Management Plan]/[Environmental Implementation Plan]"*. Our understanding is that this means that this

percentage had included certain air quality-related information in their relevant plan; rather than that they had included the AQMP itself (with the contents required by section 16).

49. In this regard, the most recent DEA environmental implementation and management plan (EIMP) is dated 2008, and there is no AQMP included in it. We understand that the DEA's EIMP development will commence in the 2013/2014 financial year and the AQMP will be included. It is not clear what is meant by this – will the EIMP incorporate the Framework?
50. The draft 2012 Framework should also indicate which organs of state have failed to report annually to the Director-General on the implementation of their adopted environmental management plans and/or environmental implementation plans to the Director-General, as required by s16(1)(b) of the National Environmental Management Act, 1998. The reasons for this failure should be made public, as well as the steps that will be taken to address it. Again, the draft 2012 Framework must make clear that these reports are obligatory.
51. The Status Quo report indicates that: *“section 17 of the AQA notes that annual reporting on the implementation of the AQMP should be made. In some instances this is not being undertaken and should be viewed as a level of non-compliance of the Act.”*
52. In addition, the information in the DEA's Annual Report 2011/12 is extremely sparse and does not meet the requirements of s17 of the AQA.
53. For the reasons set out above, it is submitted that the DEA has failed to comply both with s15 of the AQA – in that its EIMP does not contain an AQMP – and with s17 of the AQA – in that its annual report to the Director-General on its EIMP does not contain information on the AQMP's implementation

Section 3.3: Industry

Section 5.5.4: Atmospheric Impact Reports

54. As set out above, we reiterate paragraphs 37 and 38 of the August 2012 submissions.
55. Kindly advise: on how many occasions an atmospheric impact report has been required; from whom; whether it has been produced; and what action has been taken in the event of a failure to produce this report.
56. In relation to Table 23 of the draft 2012 Framework, Draft Regulations prescribing the Format of the Atmospheric Impact Report were published for comment on 23 November 2012

Section 4.2.8; section 5.2.1.4; section 5.7: Compliance monitoring

Section 4.2.9; section 5.8: Enforcement

57. In addition to reiterating the contents of paragraphs 42-47 of the August 2012 submissions, the draft 2012 Framework must contain detail as to the systems and structures that are in place to monitor compliance with all aspects of the AQA, and how non-compliance is being addressed.
58. The provisions in the draft 2012 Framework are very sparse in this regard.

Section 4.4.3: The Committee for Environmental Coordination (CEC)

59. The CEC no longer exists. The draft 2012 Framework should delete this section.

Section 5.2: Air quality information management

Section 5.2.1: The South African Air Quality Information System (SAAQIS)

Section 5.2.1.1: Ambient air quality information

60. The AQA requires that national norms and standards established in terms of the Framework be aimed at ensuring, *inter alia*, public access to air quality information.¹⁸ In terms of section 8 of AQA, the Framework must establish various national standards for, *inter alia*, the collection and management of data necessary to assess access to information by the public.¹⁹

61. We note that, notwithstanding the extensive reference to the gathering of air quality information in the Framework, and the explicit obligations in the AQA and the Framework to make air quality information publicly available, there is a marked paucity of air quality-related environmental information. In addition, such environmental information as is available is generally incomplete and/or out of date and it is difficult, or practically impossible for the public to access this environmental information.

62. Numerous norms and standards required by the AQA have not yet been established. Among others, the following national standards have not been established:

62.1. air quality monitoring;²⁰

62.2. air quality information management;²¹ and

62.3. the collection and management of data necessary to assess access to information by the public.²²

63. The plans and milestones for the establishment of these standards should be addressed in the review.

64. The SAAQIS website indicates that its objective is the following:

“By 2010 and beyond, a national air quality information system is in place that provides accurate, current, relevant, complete and accessible information for informed decision-making that goes beyond compliance with national and international information management requirements and commitments.”

65. This objective is a very long way from being met.

66. In addition to reiterating the contents of paragraphs 49-51 of our August 2012 submissions, we make the additional submissions below.

67. The 2007 Framework indicated (in section 5.2.1.1) that Phase 1 of the SAAQIS project was an 18 month project with the following objectives:

67.1. The Description and Plan Objective: *“by project completion, the SAAQIS, informed by local requirements and needs and international experience, is fully described and detailed and its development articulated in a phased and costed implementation plan”;*

67.2. The Phase 1 Implementation Objective: *“by project completion, the SAAQIS framework, central database and core functions that are required for reporting ambient air quality monitoring data and status/management reports by all spheres of government by all spheres of government are established, tested and fully operationalized for pilot areas”;* and

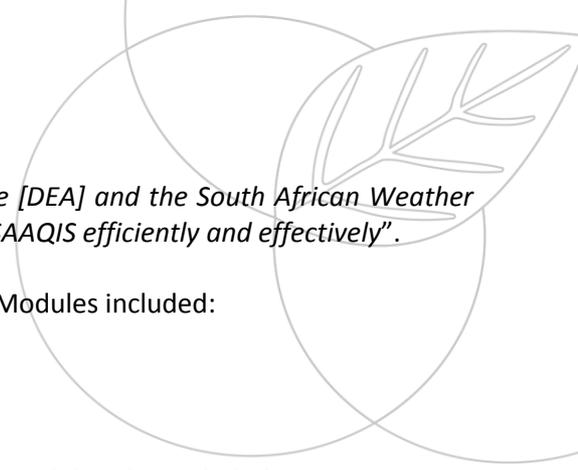
¹⁸ s7(2)(b).

¹⁹ s8(c)(vi).

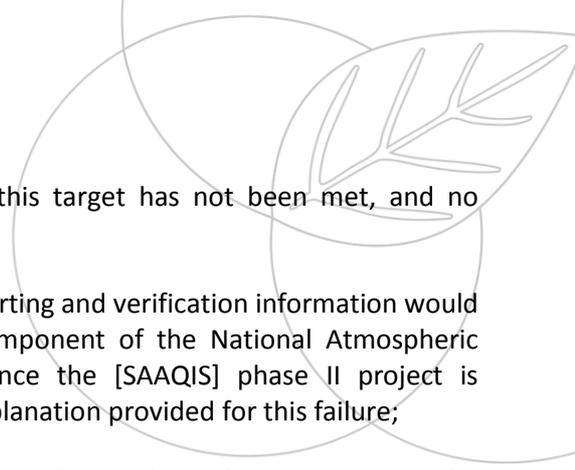
²⁰ s7(1)(d).

²¹ s7(1)(f).

²² s8(c)(vi).

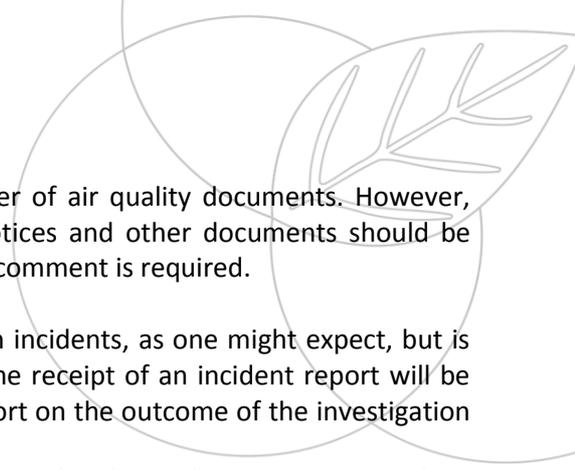


- 67.3. The Capacity Building Objective: “by project completion, both the [DEA] and the South African Weather Service are fully capacitated to manage and operate the Phase 1 SAAQIS efficiently and effectively”.
68. Table 10 of section 5.2.1.2 of the 2007 Framework provides that Phase I Modules included:
- 68.1. ambient data report/view generating module; and
 - 68.2. ambient monitoring station description,
- both of which were to be completed by 2009/10.
69. Table 15 of section 5.2.1.4 of the 2007 Framework provides that Phase 1 Modules also included:
- 69.1. municipal emission inventories; and
 - 69.2. Greenhouse Gas (GHG) Inventory,
- both of which were to be completed by 2009/10.
70. Table 19 of section 5.2.1.8 of the 2007 Framework provides that, by 2009/10, norms and standards for air quality information management – which will be continuously updated – will be developed.
71. Table 20 of section 5.2.1.9 of the 2007 Framework provides that, by 2009/10, all current available AQMPs will be included in SAAQIS – and continuously updated.
72. These Phase I targets have largely not been met, and no explanation provided for this failure. In the majority of cases, only the description of the monitoring stations has been done. The ambient data report generator is not properly functional and does not yield any ambient data. Table 10 of the 2012 draft Framework indicates that SAAQIS Phase I is undergoing an upgrade, which is expected to be completed by 2014.
73. In relation to Phase II, there is no evidence that targets have been met. There is also no explanation for this. It stands to reason that targets for other phases will also not be met.
74. Table 10 of the 2007 Framework indicates that the following modules would be completed by 2011/12, as part of Phase II:
- 74.1. ambient raw data import module;
 - 74.2. ambient data validation module;
 - 74.3. ambient data assessment; and
 - 74.4. ambient data export module.
75. Table 16 of section 5.2.1.5 of the 2007 Framework provides that a database of listed activities should, as part of phase II, have been available by 2008/9. It is also provided in section 5.2.1.5 of the 2007 Framework that norms and standards for the production of information from operators of listed activities would be provided through the SAAQIS.
76. Table 21 of section of the 2007 Framework indicates that the module on national air quality status reporting would be completed by 2011/12.
77. Table 10 of the draft 2012 Framework indicates that the timeframe for “reporting of all government-owned air quality monitoring stations into SAAQIS” is as per Outcome 10’s Delivery Agreement. The Delivery Agreement provides that, by March 2014, 80% of government monitoring stations should be reporting into SAAQIS. It appears that that by 2015/16, at least 30% of stations will provide real-time data to the SAAQIS (if that is what is meant by “live reporting”). In relation to these targets, we reiterate the contents of paragraph 57 of our August 2012 submissions.
78. The Delivery Agreement also provides, *inter alia*, that:

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- 78.1. SAAQIS Phase II will be completed by mid-2012 (Appendix A): this target has not been met, and no explanation provided for this failure;
- 78.2. detailed greenhouse gas emission (GHG) emission monitoring, reporting and verification information would be available by mid-2012 when the national GHG inventory component of the National Atmospheric Emissions Inventory Project becomes fully operational “(i.e. once the [SAAQIS] phase II project is completed)” (Appendix A): this target has not been met, and no explanation provided for this failure;
- 78.3. provinces must report all ambient air quality data to SAAQIS (Appendix C): there does not seem to be compliance with this requirement; and
- 78.4. provinces must report annually on the SAAQIS system (Appendix C): there does not seem to be compliance with this requirement.
79. In relation to the GHG Inventory, SA has obligations in terms of Article 4, paragraph 1 of the United National Framework Convention on Climate Change,²³ including the preparation of the National Communication, which incorporates an inventory of GHGs not covered by the Montreal Protocol. However, the GHG Inventory has not been published.
80. Table 10 also provides that a National Ambient Air Quality Monitoring Strategy will only be developed in 2013/14.
81. In relation to the SAAQIS site, we make the following additional submissions:
- 81.1. On SAAQIS’s homepage menu, there is a link to “login”; however, there is no procedure or facility provided to register for the site.
- 81.2. The process of having to request information from the South African Weather Service (SAWS) is cumbersome and delays access to information. It is submitted that, as soon as a data set has been “cleaned”, it should be accessible for download on the SAAQIS site.
- 81.3. It is crucial for all permits, certificates and licences that relate to air quality and emissions be made accessible on the SAAQIS website on an urgent basis. These basic documents are essential to make the monitoring data meaningful. Ideally, all monitoring by licence-holders in terms of their licence should also be publicly accessible.
- 81.4. The “interactive map” link on the homepage does not provide access to any useful air quality graphs. It is also very user-unfriendly.
- 81.5. The “air quality graphs” feature²⁴ does not appear to work at all; alternatively, it may only work intermittently. A test of the availability of data for any of the stations (listed as SANAS-accredited or otherwise) reporting to SAAQIS reveals that the data are not available. This function of making monitoring data available to the public via the SAAQIS website is critically important.
- 81.6. The “air quality graphs” section must allow the users to be able to generate data in line with the South African ambient air quality standards. For instance, if PM₁₀ data from a particular monitoring station is requested, the user should be able to request 24 hour data as well as annual data – at the moment the choice is restricted to 10 minute, 8 hour, 24 hour, and monthly data. The effect of this is that PM₁₀ air quality data cannot be compared to the SA annual standard.

²³ s.2.4.1.1 of the draft 2012 Framework.

²⁴ Available at: <http://www.saaqis.org.za/AQLineGraph.aspx>

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- 81.7. The “air quality documents” section is a repository for a number of air quality documents. However, these are poorly organised and structured. Draft legislation, notices and other documents should be listed under a separate heading, together with the date by which comment is required.
- 81.8. The “Incidents” page does not lead to a database of air pollution incidents, as one might expect, but is mechanism for reporting incidents. The website promises that the receipt of an incident report will be acknowledged, but not that it will be investigated, nor that a report on the outcome of the investigation issued.
- 81.9. A dedicated web-link to all the reporting documents required by each sphere of government– such as AQO reports and AQMPs – would be very helpful.
- 81.10. The format in which data are stored on the SAAQIS site has proven to be problematic – they cannot be manipulated to generate graphs, as the data were not whole numbers rounded off. This complicates data analysis. Data must be available in such a format as to ensure easy use.
- 81.11. Municipalities do not appear to be using SAAQIS data – either appropriately, or at all. It is submitted that basic data manipulation training and SAAQIS training is essential for all municipalities; and, most urgently, for those that fall within the priority areas. This will assist them in monitoring ambient air quality and emissions, and place them in a better position meaningfully to investigate exceedences of ambient air quality standards.
- 81.12. Searching the “documents” section seems a little constrained – ideally one should be able to search these documents using just a key word – such as “lead “or “benzene”.
- 81.13. The “recent news” section was last updated on 27 February 2012. This should be keep updated.
- 81.14. Outdated information – such as the draft PM_{2.5} ambient air quality standard should be removed.
- 81.15. A web-link to upcoming events and meetings (with a notification function) would also be very helpful, especially for planning.
- 81.16. Where is the “South African air quality research reference database” available?
- 81.17. In relation to “contact information”, no officials within the DEA’s Air Quality Management section are listed. Although it is understood that the South African Weather Services is intended by the DEA to be the custodian of SAAQIS, our clients are concerned that the DEA has abrogated its responsibilities in this regard.

Section 5.2.1.2: Ambient air quality monitoring

82. In addition to reiterating paragraphs 61 and 62 of our August 2012 submissions, we note that national norms and standards for air quality monitoring will only be available in 2014. Given the importance of these norms, their development should be fast-tracked.
83. It is not clear why the draft 2012 Framework does not deal with the DEA’s August 2011 Baseline Survey on Government-owned Air Quality Monitoring Networks dated August 2011.
84. According to its Executive Summary, the main purpose of the baseline assessment was *“to assess the current status of all the government owned air quality monitoring networks, currently being operated by National, Provincial and Local Government Departments across the country in order to provide air quality data to [SAAQIS]. The survey consisted of the physical assessment of all the government owned air quality monitoring networks.....Furthermore, the baseline audit assessed the number of networks providing air quality data to*

[SAAQIS] and also those that are in the process. At that time, current status of infrastructure at the stations was assessed and whether the monitoring equipment complies with either US Environmental Protection Agency (EPA) or other International recognised standards”.

85. According to the survey,²⁵ “the main areas of concern encountered during the survey was that most of the networks are being operated by Environmental Health Practitioners (EHP) who lack sufficient formal training in the field of air quality monitoring particularly at municipal level. The other major problem encountered was lack of funding to manage the stations in some of the networks, the stations were either stranded due to lack of funds to purchase the basic spares (such as filters, UV Lamps and pumps etc) for the routine maintenance of the stations.

Some of the EHP’s indicated that they are no longer motivated to undertake the air quality monitoring functions due to lack of support and encouragement from their superiors. The other challenging factor in both Provincial and Local government levels was the supply chain management prolonged procurement procedures which always interfered with the running of the stations, in some cases the stations had to be switched off because some of the officials at supply chain’s procurement do not approve orders within the set timeframes to procure spares or even to conduct repairs.

Furthermore, it was also noted that in networks where internal capacity is in place to run the stations, there were no fixed procedures on how the daily data checks should be done and there was no records to substantiate that the daily checks were indeed undertaken. Also there was no record of what changes had been made to the data, for example, if the station operator had made an adjustment for zero drift, there was no record of why this was done.

It was also noted that not all of the government-owned air quality monitoring networks are reporting to SAAQIS. Some of the networks that are currently reporting to SAAQIS are not frequently transmitting the data into the system.”

86. Appendix 3 of this assessment lists six of 39 monitoring stations as being SANAS-accredited. This number (6) is contradicted by the statement²⁶ that “of the ninety four (94) government-owned stations, only one (1) belonging to City of Cape Town was SANAS Accredited in terms of ISO 17025”. Also, no explanation is given for not listing and reporting on all 94 stations.

87. Therefore, although the requisite air quality monitoring equipment may be in place at 94 monitoring sites, the majority of the systems are not operational to an acceptable standard, and, as set out above, the provision of air quality monitoring data via SAAQIS is not functional.

Emissions monitoring

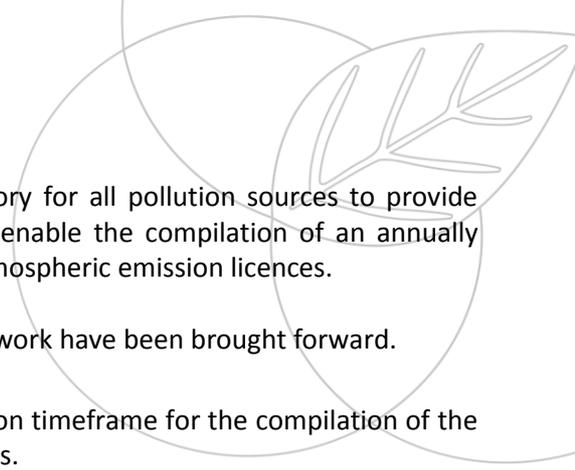
88. We note that the section 5.2.1.4 in the previous draft of the Framework (on which we provided comment by means of the August 2012 submissions), which provided for “emissions monitoring” has been deleted from the draft 2012 Framework. It is submitted that the inclusion of this section was an important initiative and should be included in the current draft 2012 Framework. We reiterate paragraphs 63 and 64 of our August 2012 submissions in this regard.

Section 5.2.1.4: Emissions inventory

89. We note that the draft 2012 Framework provides that the DEA is responsible for the establishment of an internet-based National Atmospheric Emission Inventory as a component of SAAQIS.

²⁵ s.4.

²⁶ In the Executive Summary.



90. It is submitted that the draft 2012 Framework must make it compulsory for all pollution sources to provide relevant information (such as emission rates), on an annual basis, to enable the compilation of an annually updated emission inventory. The inventory should be integrated with atmospheric emission licences.

91. We are pleased to note that certain of the dates in the draft 2012 Framework have been brought forward.

92. It is also crucial that the draft 2012 Framework include an implementation timeframe for the compilation of the Inventory. We reiterate paragraphs 69-71 of our August 2012 submissions.

Section 5.2.1.4: Listed activities and compliance monitoring

93. In addition to reiterating paragraph 73 of our August 2012 submissions, we note that the timeframe for the database of listed activities has been extended by 6 years from the 2007 Framework target date.

Section 5.2.3.1: Atmospheric impact reports

94. On how many occasions has an Atmospheric Impact Report been required in terms of section 30(a) of the AQA?

Section 5.2.3.2: State of air reporting

95. Despite the requirement for the state of the air report to be reviewed every 5 years, the last State of the Environment report was in 2005. We understand that a stakeholder workshop will be held in April 2013 in relation to the current draft of the State of the Environment Report.

Section 5.2.3.3: AQOs' annual reports

96. The Framework must indicate which AQOs have failed to submit annual reports, as well as indicating the reasons for this failure and how it will be addressed.

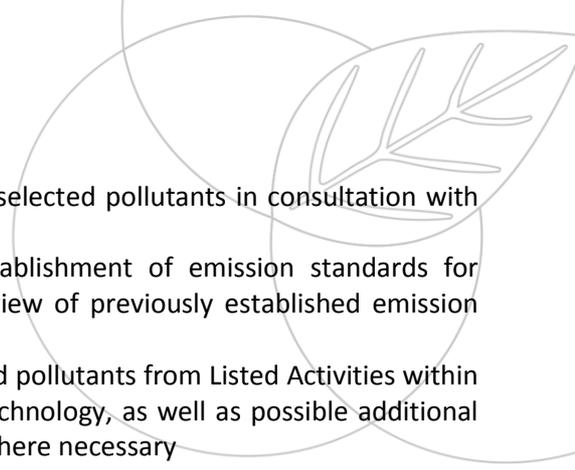
Section 5.4.3: Standard setting

97. In addition to reiterating what was set out in paragraphs 85-98 of our August 2012 submissions, we made the following additional submissions below.

98. The contents of the section under the sub-heading "phase-in and transitional arrangement" in section 5.4.3.3 should be amended to take account of the fact that the initial list of activities is no longer applicable.

99. Section 5.4.3.3 of the draft 2012 Framework deals with listed activities and related emission standards. It provides that the approach for establishing emissions standards for listed activities will follow the generic section 5.4.3.1 approach. Section 5.4.3.1 refers to the establishment of an independent technical committee to review standards, and provides that its role is "to undertake an independent review of the standard proposed by an organ of state based on the latest scientific information". Section 5.4.3.5 of the 2007 Framework addresses listed activities and also refers to the generic section 5.4.3.1. However, in addition, section 5.4.3.5 of the 2007 Framework sets out the responsibilities of the technical committee as follows:

- 99.1. identification of key pollutants for Listed Activities within the sector for which emission standards are to be set;
- 99.2. the collation of sector guidance documents comprising information on Best Available Technology/Technique (BAT) including associated emission standards and monitoring requirements, using international BAT documentation and industry-specific information;
- 99.3. consultation/communication with stakeholders such as industry, trade bodies and civil society;

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- 99.4. drafting emission standards for the selected industry types and selected pollutants in consultation with stakeholders;
 - 99.5. continuing to update information on BAT for use in the establishment of emission standards for additional industry types and additional pollutants, and the review of previously established emission standards; and
 - 99.6. undertaking a five-year review of emission standards for identified pollutants from Listed Activities within each sector, with the purpose of identifying improvements in technology, as well as possible additional industry types and possible additional pollutants to be included where necessary

100. These are important responsibilities of the technical committee and they should remain in the draft 2012 Framework to provide guidance as to the role of the technical committee.

Section 5.4.3.4: Controlled emitters

101. The draft 2012 Framework refer to the draft notice dated 23 November 2012 in terms of which comments was sought regarding the draft declaration of small boilers as controlled emitters.

Section 5.4.3.7: Dust

102. The draft 2012 Framework should refer to the latest draft of these regulations. The last draft made available was dated 7 December 2012.

Section 5.4.4: Regulations

103. Table 21 of the draft 2012 Framework must be updated to reflect the latest information. For instance:

- 103.1. there is a later draft of the Dust Control Regulations;
- 103.2. the PM_{2.5} standard has been promulgated and is no longer in draft format;
- 103.3. the Waterberg Priority Area has been declared;
- 103.4. Draft amendments to the section 21 of the AQA list of activities were published for comment on 23 November 2012
- 103.5. Draft Regulations prescribing the Format of the Atmospheric Impact Report were published for comment on 23 November 2012; and
- 103.6. Draft Regulations regarding Air Dispersion Modelling were published for comment on 14 December 2012.

Section 6.4.2: Potential issues for future development

104. South Africa ratified the Stockholm Convention on Persistent Organic Pollutants (POPs) in 2002, and it came into force on 2004. An implementation plan for the Convention is apparently under development.²⁷ As a result, it is incorrect for the “development of strategies to deal with ambient concentrations of heavy metals and POPs, their impact and the establishment of suitable objectives” as one of the “potential issues for future development”. Given South Africa’s internal obligations, this should be addressed as an activity for implementation in the draft 2012 Framework.

105. We thank the Department for the opportunity to comment on the review, and hope that our concerns can be addressed. Kindly contact us should you have any questions about our submissions.

106. Please keep us informed regarding progress on the review.

²⁷ Section 2.4.3.1 of the draft 2012 Framework.

Yours sincerely
Centre for Environmental Rights
per:



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