



# Centre for Environmental Rights

Advancing Environmental Rights in South Africa

**Deborah Ramalope**  
**Chief Director: Climate Change Mitigation**  
Department of Environmental Affairs  
By email: [dramalope@environment.gov.za](mailto:dramalope@environment.gov.za)

**Tlou Ramaru**  
**Chief Directorate: Climate Change Adaptation**  
Department of Environmental Affairs  
By email: [tramaru@environment.gov.za](mailto:tramaru@environment.gov.za)

Copied to:

**Mashudu Mundalamo**  
Department of Environmental Affairs  
By email: [MMundalamo@environment.gov.za](mailto:MMundalamo@environment.gov.za)

**Mactavish Makwarela**  
Department of Environmental Affairs  
By email: [MAMakwarela@environment.gov.za](mailto:MAMakwarela@environment.gov.za)

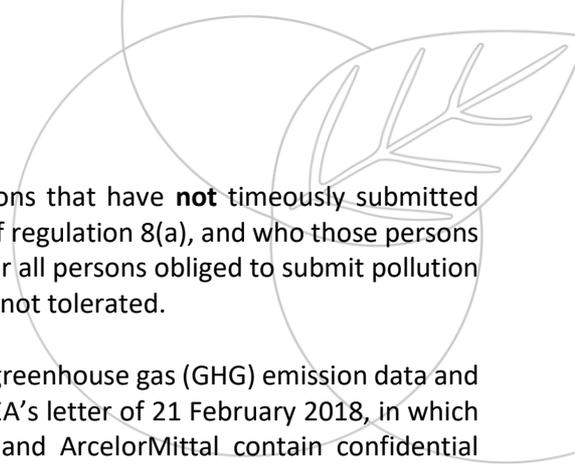
Our ref: RH/NL  
25 June 2018

Dear Sirs

## REQUEST FOR ACCESS TO POLLUTION PREVENTION PLANS & GREENHOUSE GAS REPORTING RECORDS

1. We refer to the National Pollution Prevention Plan Regulations, 2017 (“the Regulations”), as well as the 22 May 2018 Amendment of the Regulations (GN 513, GG 41642), which extends the deadline for the submission of pollution prevention plans to 21 June 2018.
2. We refer also to our letter of 15 June 2018, in which we provided submissions on “the operationalisation of the post 2020 mitigation system”; a copy of which is attached for your ease of reference. In that letter, we noted the extension for the submission of pollution prevention plans under the amendment to the Regulations, to 21 June 2018, and we asked that the Department of Environmental Affairs (DEA), as soon as possible after 21 June and **by no later than 2 July 2018**:
  - 2.1. advise **how many entities have submitted pollution prevention plans**; and
  - 2.2. provide us with a **list of the names of the entities that have submitted pollution prevention plans** by the stipulated deadline.
3. As the 21 June 2018 deadline has now expired, we remind you of our request of 15 June for the list of entities that have submitted pollution prevention plans, and we continue to await your response.

Cape Town: 2<sup>nd</sup> Floor, Springtime Studios, 1 Scott Road, Observatory, 7925, South Africa  
Johannesburg: 9th Floor, Southpoint CNR, 87 De Korte Street, Braamfontein, 2001, South Africa  
Tel 021 447 1647 (Cape Town) | Tel 010 442 6830 (Johannesburg)  
Fax 086 730 9098  
Email [info@cer.org.za](mailto:info@cer.org.za), [www.cer.org.za](http://www.cer.org.za)

- 
4. Kindly also advise what steps will be taken by DEA against those persons that have **not** timeously submitted pollution prevention plans, given that this is a criminal offence in terms of regulation 8(a), and who those persons are. It is important that a clear and firm precedent be set at the outset for all persons obliged to submit pollution prevention plans and that non-compliance with these legal obligations is not tolerated.
  5. In our letter of 15 June, we emphasised the necessity of public access to greenhouse gas (GHG) emission data and pollution prevention plans. We again record our serious concern over DEA's letter of 21 February 2018, in which it was claimed that the pollution prevention plans of Sasol, Eskom, and ArcelorMittal contain confidential information and therefore cannot be shared. We dispute the contention that these records contain confidential information. If DEA persists in this contention, **we call on DEA to explain which information - in particular - in the pollution prevention plans is alleged to be confidential and why this claim is made.** Refusing to make this information publicly available severely prejudices the constitutional rights of stakeholders to gain access to crucial information, which is in the public interest. If the implementation of GHG mitigation measures is not transparent and open, the entire mitigation system will be severely undermined and compromised.
  6. In relation to GHG reporting data, the DEA letter of 21 February 2018 stated that *"thus far 140 data providers have submitted their registrations in line with Annexure 2 of the regulations with a total of 595 facilities. Disclosure of this information shall be made in accordance with the provisions of existing laws ..."* The National GHG Reporting Regulations, 2017 ("GHG Reporting Regulations") provide that *"The competent authority may only place data and information reported in terms of these Regulations in the public domain if it does not – (a) promote unfair competition in terms of the Competition legislation; (b) contravene section 36 of the Promotion of Access to Information Act, 2000 (PAIA); or (c) contravene section 17 of the Statistics Act, 1999."*<sup>1</sup> We submit that **making GHG reporting data publicly available would not promote unfair competition or contravene PAIA or the Statistics Act. This information also cannot be regarded as confidential;** as such, the provisions of regulation 12 of the GHG Reporting Regulations, which deals with disclosure of information that is confidential, do not apply.
  7. We therefore request that you provide us with:
    - 7.1. the names of the category A data providers that have registered in terms of regulation 5 of the GHG Reporting Regulations;
    - 7.2. the names of the category A data providers that have reported on their GHG emissions in accordance with regulation 7 of the GHG Reporting Regulations;
    - 7.3. access to the GHG emissions and activity data reports submitted in accordance with regulation 7 of the GHG Reporting Regulations by 31 March 2018; and
    - 7.4. details of enforcement steps (including whether any fines, pre-compliance, or compliance notices have been issued, how many, and to whom, and what the status of such steps are) taken against those data providers that have not registered in accordance with regulation 5 or reported in accordance with regulation 7. We record that this failure to register constitutes an offence in terms of regulation 16 of the GHG Reporting Regulations and that the DEA advised in its February 2018 letter that *"[e]nforcement will be dealt with in line with the regulations and following consultations with DEA legal and law enforcement"*.
  8. In our 15 June 2018, letter we referred to other jurisdictions where GHG reporting data are made publicly available by default. We reiterate, that, **if such information can be made available in other jurisdictions, there is no reason why it should be regarded as confidential and prohibited from public disclosure in South Africa**, especially where our Constitution and other relevant laws support access to information, and in light of the environmental right in section 24 of the Constitution. Companies such as Sasol also operate within the USA, and therefore are obliged to make their emissions data publicly available per the USA legal requirements. There is no basis for them to refuse to do so in South Africa.

---

<sup>1</sup> Reg 14.

9. We also referred to case law that confirms the importance of public access to environmental information for the protection of rights:

9.1. In the Supreme Court of Appeal (SCA) judgment in the case of *Company Secretary, ArcelorMittal South Africa (AMSA) v Vaal Environmental Justice Alliance (VEJA)*,<sup>2</sup> which entailed an application by VEJA to compel the disclosure of information requested in terms of PAIA from AMSA. The SCA upheld the decision of the South Gauteng High Court, granting judgment in VEJA's favour. The SCA held that, "[i]t is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative governance in relation to the environment",<sup>3</sup> and that "[c]orporations operating within our borders ... must be left in **no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced**" (emphasis added).<sup>4</sup>

9.2. In a 2013 European Court case, it was held that that there is a strong public interest – that overrides commercial interests - in access to information about emissions into the environment. The Court declared that an agency must disclose a document "where the information requested relates to emissions into the environment, **even if such disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person, including that person's intellectual property, within the meaning of Article 4(2) of the Environmental Information Directive**" (emphasis added).<sup>5</sup>

10. We look forward to receiving your response – providing us with the list of entities that have submitted pollution prevention plans by no later than **2 July 2018**, and the information requested in paragraph 7 above by no later than **16 July 2018**.

Yours faithfully

**CENTRE FOR ENVIRONMENTAL RIGHTS**



per:

**Nicole Loser**  
**Attorney**

Direct email: [nloser@cer.org.za](mailto:nloser@cer.org.za)

---

<sup>2</sup> *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA), 26 November 2014.

<sup>3</sup> Paragraph 71.

<sup>4</sup> Paragraph 82.

<sup>5</sup> *Stichting Greenpeace Nederland and Pesticide Action Network Europe v Commission*, Case T-545/11, para. 38, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=142701&pageIndex=0&doclang=EN&mode=lst&dir=&occ=fir&st&part=1&cid=223010>.