

# ENVIRONMENTAL ALERT

23 October 2013

## THE NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT, NO 39 OF 2004 (AQA): SIGNIFICANT PENALTY INCREASES AND WELCOMED PROPOSED STREAMLINING OF ENVIRONMENTAL CONSENT APPLICATIONS

The National Environmental Management Laws Amendment Act, No 14 of 2013 (NEMLAA) has increased penalties for non-compliance with AQA. Amendments have also been proposed in the National Environmental Management: Air Quality Amendment Bill, No 27 of 2013 (Bill) in July 2013, which will *inter alia* promote the streamlining of environmental applications required under the various sectoral environmental laws.

Previously, the penalty for contravention of AQA was imprisonment for a period less than five years, a fine of R200,000 or both. This has now significantly increased to a maximum fine and imprisonment of R5 million and/or five years for a first offence (or both) and R10 million and/or ten years (or both) for a second or subsequent offence.

A welcomed streamlining of environmental applications is proposed in the Bill. South Africa is often criticised as being overregulated due to the number of environmental approvals required from different governmental authorities.

At present, metropolitan and district municipalities are the competent authorities to issue atmospheric emission licences (AELs) for atmospheric emission activities listed under the AQA. The Minister of Environmental Affairs (Minister) or the Provincial Environmental Departments' authorised officials are empowered to issue waste management licences (WMLs) for waste management activities listed under National Environmental Management: Waste Act, No 59 of 2008 (Waste Act) and environmental authorisations (EAs) for activities listed (Listed EA Activities) under the National Environmental Management Act, No 107 of 1998 (NEMA). Under these Acts, the Minister is the competent authority if the Listed EA Activity or waste

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management activity require a full environmental impact assessment (EIA) and the Provincial Departments if only a basic assessment process, and not a full EIA, is required.

Several approvals may therefore be required for an operation from various government authorities.

The Bill proposes that the Minister will be the licensing authority to issue AELs if *inter alia* the Minister is also the competent authority to issue EAs and WMLs under NEMA and the Waste Act respectively.

It also proposes that where an air emission activity is also a Listed EA Activity and a waste management activity under the Waste Act, the Minister and Provincial Environmental Departments empowered to consider applications for EAs and waste management licences may exercise their respective powers jointly by issuing integrated EAs. Similar amendments have been effected to NEMA in relation to integrated licensing.

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In line with the notion of ensuring integrated environmental management, the Bill provides that an integrated EA may only be issued if the relevant provisions of NEMA, the AQA and Waste Act have been complied with.

However, importantly for parties required to apply for an AEL under AQA, the Bill proposes that the Minister and the relevant municipality may agree that any AEL application may be dealt with either by the Minister or by the relevant municipality. It is therefore important for parties applying for an AEL to ensure that they apply to the correct authority.

The Bill also proposes amendments to give further clarity as to the interaction between applications for EAs under NEMA and granting of AELs under AQA. Streamlining of these applications is important to ensure that all environmental impacts are considered before an AEL is granted and an AEL application is not assessed in isolation. AQA presently only states that when considering an AEL application the licensing authority must take into account all relevant matters, including section 24 of NEMA (which relates to the requirements for EAs) and "any applicable notice issued" or regulation made pursuant to those sections. The proposed amendments

provide that the decision maker must take cognisance when considering whether to grant an AEL specifically of any applicable EIA conducted and the decision taken on the application for an EA under NEMA.

Clarity has also been given on the validity period of provisional AELs and limits the authorities' present unfettered discretion as to such period. The Bill proposes that provisional AELs shall remain valid for 1 year from the date of commissioning a listed air emission activity under the AQA.

A specific offence for contravention of the AQA's provisions relating to the use and prohibition of controlled fuels has also been proposed by the Bill.

The Bill arguably ensures the long-awaited streamlining of competencies between various state organs and stands to introduce a range of benefits, including a less arduous bureaucratic system applicable to environmental approvals under South Africa's environmental law.

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## DEVELOPMENTS IN PROPOSED ENVIRONMENTAL REGULATION OF FRACKING

Two new proposed laws have been published regarding the environmental regulation of fracking, which indicates commencement of such operations is likely to be imminent. These proposed laws come approximately a year after the moratorium on fracking was lifted.

The Minister of Water Affairs issued a notice on 13 August 2013 of her intention to declare the exploration for and/or production of onshore unconventional oil or gas resources and any activities incidental thereto, including but not limited to, hydraulic fracturing a 'controlled activity' under the National Water Act, No 36 of 1998 (NWA) (referred to as the 'Declaration').

This means the Department of Water Affairs (DWA) may proclaim fracking as an activity which specifically requires a water use licence (WUL) before it can lawfully commence. The intention of the Declaration is clearly to allow for greater control and oversight of fracking operations by the DWA.

Companies who wish to undertake fracking will be required to timeously apply to the DWA for a WUL before they can commence their operations.

In addition, on 15 October 2013 the Minister of Mineral Resources (Minister) gave notice of her intention to promulgate the Technical Regulations for Petroleum Exploration and Exploitation under the Mineral and Petroleum Resources Development Act, No 28 of 2002 ('Draft Technical Regulations').

The Department of Mineral Resources (DMR's) Director-General, Thibedi Ramontja, has stated that the final regulations would be published soon after the comment period has expired, although no definite time frame was given. He said the actual physical exploration of shale gas in the Karoo could start soon after the final regulations were published.

The Minister has stated the Draft Technical Regulations aim to augment gaps in the regulatory framework governing onshore and, where relevant, offshore exploration and exploitation of petroleum resources. She has conveyed this will ensure precautions are taken so that fracking operation's possible impacts on biodiversity and water resources are "carefully managed and minimised" and "fracking is undertaken in a safe and socially and environmentally balance manner." The polluter pays principle has been included, the Minister said, to ensure the environment is rehabilitated after exploration and exploitation activities have been conducted.

The Draft Technical Regulations have apparently been based on a comprehensive international benchmarking exercise of well-developed jurisdictions that have begun shale gas exploitation, in particular the American Petroleum Institute's standards.

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It proposes certain studies that must be undertaken to assess exploration and production activities' potential environmental impacts (Impact Prediction Study). An Impact Prediction Study must be conducted as part of an environmental impact assessment (EIA) prior to the approval of an exploration or production right. Onerous requirements of what must be included in an Impact Prediction Study are proposed, including *inter alia*:

- characterisation and knowledge of the operation's sources which may result in an impact, including environmental pathways along which such impacts could migrate and receptors that could experience impacts;
- an assessment of capabilities and limitations of the various approaches and tools that can be used for impact predictions and responses to issues that are agreed with relevant government departments, such as the DMR, to be key questions that must be addressed;
- risks and uncertainties inherent in the assessment procedure;
- a conceptual model, describing interactions between sources, pathways and receptors;
- the appointment of suitably-qualified persons who have access to various appropriate tools and are properly experienced in selecting such tools for any assessments undertaken;
- an independent review of the prediction methodology and results;
- the design and implementation of an appropriate post-prediction monitoring programme;
- a recommendation on the most appropriate management action; and
- comprehensive details on the fracking fluids or chemicals that will be utilised and confirmation whether they should be classified and treated as hazardous substances.

During an Impact Assessment Study, the applicant must interact with the authorities at appropriate stages and reach agreement on the (a) identity of critical receptors; (b) initial and final conceptual models and their underlying assumptions; (c) tools to be used to undertake the impact prediction; and (d) appropriate alternative options to manage any unacceptable impacts.

There are a range of requirements aimed at environmental pollution, covering various phases from site assessment and design to post-operation monitoring, including:

- onerous reporting duties to the DMR during the pre-commissioning, commissioning, operational, decommissioning and remediation phases;
- assessing below-ground conditions, including the affected area's geology and geo-hydrology and preparation of a geological overview report;
- conducting an in-depth water resource assessment, with a hydro census, baseline and subsequent water quality assessments, and identifying priority water source areas and domestic aquifer supplies. The Council of Geoscience is also required to undertake its own independent water investigations;
- assessing potential fracking related seismicity risks and compiling a report with proposed mitigation measures for preventing fracking fluids or chemicals from entering any stressed faults, which must be approved by the Council of Geoscience. On-going micro-seismic monitoring is also required;
- a fracture containment risk assessment;
- protection of radio and optical astronomy advantage areas for the South African Large Telescope and Square Kilometre Array stations, under the Astronomy Geographic Advantage Act, No 21 of 2007, through assessing the operation's potential impacts; consultations with the Ministers of Science and Technology and Mineral Resources; and proclaiming distances from such areas where no fracking operations can occur;
- well(s) design, construction, equipment, commissioning, operation, potential modifications, maintenance, examination, suspension and abandonment, to ensure prevention of (a) petroleum and other fluids migrating into any other formation except the targeted formation; (b) pollution of useable groundwater; and (c) risks to health and safety of persons from it;
- ensuring compliance with various casing standards;
- criteria for cementation by requiring specified compressive, casing string and formation pressure integrity tests be conducted;
- blowout prevention equipment; and
- on-going mechanical integrity tests and monitoring for equipment under approved plans.

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The Draft Technical Regulations stipulate that the holder of an exploration or production right (holder) may not commence with fracking operations before obtaining all necessary authorisations and permits for any activities associated with fracking, including confirmation that (a) a WUL under the NWA has been obtained; (b) the Regulations have been complied with; and (c) the required plans approved. Some of the additional plans that must be submitted to the DWA and 'designated agency' in the DMR include a:

- plan for handling, storage, transportation, and disposal of fracking fluids and chemicals, as well as fracking flowback;
- waste management plan;
- a risk assessment;
- well engineering design; and
- fracking programme and procedures.

On-going obligations are included relating to water resources protection and management; and management of storm water,

waste, spillage, air quality and noise levels. If any of these requirements are not adhered to; or the mechanical integrity of the well is compromised and continued fracking operations pose environmental risks, the holder must comply with the provisions relating to well suspension. This includes immediately notifying the designated agency at the DMR and suspending hydraulic fracturing operations until remedial action has been completed.

A post-fracking report is also required for review by the designated agency.

Members of the public and interested and affected parties are invited to submit written comments to the Minister by no later than 16 November 2013.

The Treasure Karoo Action Group has stated that a court battle over the implementation of the Draft Regulations is inevitable.

For further information regarding any aspect of this article, please feel free to contact us.

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## CHANGES TO THE REGIME FOR THE CLASSIFICATION AND MANAGEMENT OF WASTE

On 23 August 2013 Waste Classification and Management Regulations (regulations) were published under the National Environmental Management Waste Act, No 59 of 2008 (Waste Act).

Two sets of national Norms and Standards were published at the same time – the National Norms and Standards for the Assessment of Waste for Landfill Disposal (Assessment Norms and Standards) and the National Norms and Standards for Disposal of Waste to Landfill (Disposal Norms and Standards).

The regulations and Norms and Standards mark a significant shift in the waste classification and associated management regime which came before it, under which wastes were classified and regulated with reference to the Minimum Requirements for Handling, Classification and Disposal of Hazardous Waste and for Waste Disposal by Landfill, published by the erstwhile Department of Water Affairs and Forestry. Transitional provisions of the regulations have the purpose of bridging the regimes.

### The regulations

The regulations were published under s69(1) of the Waste Act and:

- regulate classification and management of waste;

- establish a mechanism and procedure for the listing of waste management activities that do not require a waste management licence under the Waste Act;
- prescribe requirements for disposal of waste to landfill;
- set requirements and timeframes for the management of specified waste; and
- prescribe the general duties of waste generators, transporters and managers.

'Waste generators', 'waste managers' and 'waste transporters' are defined. The regulations impose duties on them and stipulate when and how waste may be treated.

Waste is required to be classified in accordance with SANS 10234 and re-classified, within the timeframes specified in the regulations. Importantly, waste must be kept separately for the purposes of classification and must not be mixed prior to classification. Waste may only be mixed or blended if it can be shown to enhance the potential for re-use, recycling, recovery or treatment or to reduce environmental risks of the waste.

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Where the regulations conflict with existing waste management licence conditions imposed prior to the coming into effect of the regulations, licence holders may need to apply for exemptions from the requirements of the regulations where the conflict cannot be resolved.

### Assessment Norms and Standards

The Assessment Norms and Standards provide a 'standard assessment methodology' for the assessment of waste for the purpose of disposal to landfill, including identification of chemical substances present in the waste and sampling and analysis to determine the total concentrations (TC) and leachable concentrations (LC) of the elements and chemical substances in the waste.

The TC and LC limits of the chemical substances in waste are required to be compared to the threshold limits specified in the Assessment Norms and Standards for total concentration (TCT limits) and leachable concentrations (LCT limits), which determines waste types (Type 0 - Type 4) for disposal to landfill.

### Disposal Norms and Standards:

The Disposal Norms and Standards, among other things, specify various classes of landfill site and the types of waste, as assessed under the Assessment Norms and Standards and otherwise listed or regulated under the regulations, which may be disposed of into the various classes of landfill site and the requirements for such disposal.

They also impose waste disposal restrictions, including prohibitions and restrictions on the disposal of waste to landfill with reference to particular compliance timeframes. Wastes which may not be disposed of to landfill with immediate effect are:

- waste which, in the conditions of a landfill, is explosive, corrosive or oxidising according to SANS 10234 or SANS 10228;
- waste with a pH value of <6 or >12;

- flammable waste with a closed cup flashpoint lower than 61 degrees Celsius;
- reactive waste that may react with water, air, acids or components of the waste, or that could generate unacceptable quantities of toxic gases within the landfill;
- waste compressed gases (according to SANS 10234 or SANS 10228);
- untreated Healthcare Risk Waste;
- lead acid batteries;
- whole waste tyres; and
- infectious animal carcasses and animal waste.

Longer timeframes are prescribed for other specified wastes. For example, re-usable, recoverable or recyclable used lubricating mineral oils and oil filters may not be disposed of to landfill from four years after the coming into effect of the regulations.

It may be possible for a particular waste matter to fall within two different categories of waste referred to in the Norms and Standards to which different requirements apply, such as differing timeframes for compliance. Where dealing with such waste, waste generators and managers are advised to act cautiously, for example, to comply with the shorter timeframes or more stringent thresholds.

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