DLA CLIFFE DEKKER HOFMEYR

ENVIRONMENTAL

ALERT

28 MAY 2014

IN THIS ISSUE

AMENDMENTS TO NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT, NO. 39 OF 2004

High fines introduced for failure to obtain authorisation and welcomed streamlining of applications for environmental consents.

Persons who proceed without the required atmospheric emissions licences (AELs) will now be required to apply for retrospective authorisation of their activities and could be liable for a maximum administrative fine of up to R5 million.

This is one of a number of amendments to the National Environmental Management: Air Quality Act, No. 39 of 2004 (AQA) that came into force on 19 May 2014.

Under the recently promulgated National Environmental Management: Air Quality Amendment Act, No. 20 of 2014, retrospective authorisation will now also be required whenever a party commenced with an activity without a provisional registration or registration certificate required by the Atmospheric Pollution Prevention Act, No. 45 of 1965, or atmospheric emissions licence required by the AQA.

Should a person apply for retrospective authorisation, as is the case with s24G of the National Environmental Management Act, No. 107 of 1998 (NEMA), the Minister responsible for environmental affairs (Minister) or Provincial Member of the Executive Council (MEC), as the case may be, is given a wide discretion as to what should be required from the applicant. This may include ceasing all operations until authorisation is granted and further requiring such a party to take steps to remediate any adverse effect of the activity on the environment, including human health.

The National Prosecuting Authority may still institute criminal prosecution for conducting activities unlawfully, despite payment of the administrative fine. Criminal penalties under the AQA are a maximum fine and imprisonment of up to R5 million and/or 5 years for a first offence (or both) and R10 million and/or 10 years (or both) for a second or subsequent offence. The decision to issue a retrospective AEL to an applicant may be deferred until the National Prosecuting Authority decides whether to prosecute and criminal proceedings have been finalised.

The amendments to the AQA have also introduced a welcomed streamlining of environmental applications, especially as 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 AELs for atmospheric emission activities listed under the AQA. The Minister or the Provincial MEC 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 under NEMA (Listed EA Activities). Under these Acts, the Minister is the competent authority if the Listed EA Activity or waste management activity

continued

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.

Where an air emission activity is also classified as a Listed EA Activity and a waste management activity under the Waste Act, the Minister may now issue an integrated licence if *inter alia* they are also the competent authority to issue EAs and WMLs under NEMA and the Waste Act respectively.

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

Whenever a licensing authority fails to take a decision on an AEL application within the prescribed time period, the applicant may apply to the Minister or Provincial MEC, as the case may be, to take the decision. This may ensure that there is not a backlog of applications for AELs at metropolitan and district municipalities.

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

The amendments therefore give further clarity as to the interaction between applications for EAs under NEMA and the granting of AELs under the 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. The AQA previously only stated that when considering an AEL application the licensing authority must take into account all relevant matters, including s24 of NEMA (which relates *inter alia* to the requirements for EAs) and "any applicable notice issued" or regulation made pursuant to those sections. The amendments now require that the decision maker must take specific cognisance when considering whether to grant an AEL of any applicable EIA conducted and the decision taken on the application for an EA under NEMA.

The amendments discussed above arguably ensure the long-awaited streamlining of competencies between various state organs and stand to introduce a range of benefits, including a less arduous bureaucratic system generally applicable to environmental approvals under South Africa's environmental law.

Sandra Gore and Gareth Howard

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Environmental practice and services, please contact:

Terry Winstanley
National Practice Head
Director
T +27 (0)21 481 6332
E terry.winstanley@dlacdh.com

Helen Dagut
Director
T +27 (0)21 481 6334
E helen.dagut@dlacdh.com

Tracy-Lee Erasmus
Senior Associate
T +27 (0)11 562 1590
E tracy-lee.erasmus@dlacdh.com

Sandra Gore
Director
T +27 (0)11 562 1433
E sandra.gore@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com