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ENVIRONMENTAL ALERT

IN THIS **ISSUE**

NO LONGER ALL UP IN THE AIR? DEVELOPMENTS IN AIR QUALITY REGULATION OVER THE LAST YEAR

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This comes just a few days after a reportedly "slightly tweaked version" of the 2018 Carbon Tax Bill (Bill) was approved by Parliament's Standing Committee on Finance. Once finalised, the Bill will come into operation on 1 June 2019. The Bill is the result of an eight-year stakeholder engagement process. According to Treasury, the impact of the carbon tax will be reviewed in three years to consider the:

- impact of the tax on the country's greenhouse gas (GHG) emissions and its commitments under the Paris Agreement;
- appropriateness of the tax rate and the tax-free thresholds;
- alignment with the DEA's proposed carbon budgets;
- interaction with the electricity levy and renewable energy premium; and
- impact on fuels and motor vehicle emissions taxes.

Although the carbon tax has perhaps been most central to the climate change discourse, various other regulatory enactments and amendments have also been introduced over the past 12 months that impact on the regulation of air quality and emissions.

This Newsletter highlights some of these developments.

New and improved Air Quality Framework

The National Environmental Management: Air Quality Act, No 39 of 2004 (AQA) is the statute that regulates air quality management in South Africa. The practical mechanisms for the implementation of AQA are contained in the National Framework for Air Quality Management in the Republic of South Africa (Framework). It provides norms and standards for all technical aspects of air quality management. The Framework is revised every five years and the latest iteration of the Framework was published on 26 October 2018.

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Chapter 5 deals with problem identification and prioritisation and provides norms and standards for the setting of standards for ambient air quality, listed activities and emission standards, controlled emitters and controlled fuels.

Substantively, the most important aspects of the Framework are Chapters 3 and 5.

Chapter 3 deals with the responsibilities of *inter alia* industry, which include:

- taking reasonable steps to prevent the emission of any offensive odour caused by any activity on their premises;
- taking reasonable and effective steps to control dust from their activities;
- compliance with any relevant standards for emissions from point, non-point or mobile sources in respect of substances or mixtures of substances identified by the Minister, member of the executive council or a municipality;
- compliance with relevant emission standards in respect of controlled emitters if an activity undertaken by the industry and/or an appliance used by the industry is identified as a controlled emitter; and
- compliance with the requirements of the regulations on emissions reporting developed under s12 of AQA.

Chapter 5 deals with problem identification and prioritisation and provides norms and standards for the setting of standards for ambient air quality, listed activities and emission standards, controlled emitters and controlled fuels. Chapter 5 further provides for Air Quality Management Plans, information on regulations, compliance and enforcement, air quality impact assessments and the linkages between the approval process for environmental impact assessments and application for an atmospheric emission licence (AEL).

Some of the notable differences from the 2012 version includes:

- less stringent requirement for postponements: it is sufficient for any applicant for an application for postponement of compliance with the minimum emission standards (MES) to simply show that the industry's air emissions are not causing direct adverse impacts on the surrounding environment. Under the 2012 version, an applicant had to show that, in addition to no adverse impacts currently being experienced, it *will not cause any adverse impacts* (5.4.3.4);
- although s40 of AQA specifies timeframes within which decisions on AEL applications must be reached, it pertains only to new AEL applications. AQA does not regulate the timeframes within which licensing authorities must reach decisions on the transfer, review, variation and renewal of AELs or provisional AELs. At present, licensing authorities have a discretion in this regard. The Framework now provides specific timeframes (each varying between 30 and 90 days) for AEL issuance (with or without an environmental authorisation (EA)), renewal, review, or variation (with and without an emission increase);
- the Framework now expressly provides that an environmental management inspector (EMI) from the DEA may conduct compliance monitoring activities in any facility issued with an AEL, and that such EMI should inform and share the findings of the compliance with the licensing authority; and

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GHG Reporting Regulations were published in April 2017, and intended to introduce a single national GHG reporting system that would enable the implementation of carbon tax.

- the Framework makes it clear that municipal Air Quality Officers (AQO) are also responsible for compliance monitoring for dust generating activities, as contemplated in the National Dust Control Regulations, which regulations are due to be amended.

Extended period for registration under National GHG Emission Reporting Regulations, 2016 (GHG Reporting Regulations)

GHG Reporting Regulations were published in April 2017, and intended to introduce a single national GHG reporting system that would enable the implementation of carbon tax. This system is seen as fundamental to the carbon tax regime, as the data collected in terms of these Regulations will be used to verify a company's self-reported tax liability. Due to the problems experienced with reporting in terms of the electronic database, a further notice was published on 1 February 2019, calling on affected data providers under the GHG Reporting Regulations to manually submit their registration and GHG data. Data providers who were initially required to register by 31 March 2018 and have not done so yet have until 4 March 2019 to register.

Dust control regulations to be replaced

The National Dust Control Regulations, which regulate the control of dust in all areas, are also expected to be replaced. Draft Dust Control Regulations were published in May 2018 (Draft Dust Regulations). In terms of the Draft Dust Regulations, any person conducting a mining operation or any listed activity that requires a fugitive dust emission management plan, or any person required by an air quality officer by written notice, must implement a dustfall monitoring programme, as required in terms of these Regulations.

The following key changes from the current regime are anticipated:

- sampling must be conducted according to the latest version of American Standard for Testing and Materials method D1739. ie ASTM D1739 - 98 and not ASTM D1739 – 70, which is currently being used. Unlike the current Dust Regulations, other internationally approved standards will not be acceptable;
- a welcome change is that exceedances that are of a naturally occurring, non-anthropogenic source and extreme weather or geological event will be exempted;
- any person who has not conducted a dustfall monitoring programme and is now required to do so, must submit a first dustfall monitoring report in the prescribed form within three months of the implementation of the Draft Dust Regulations; and
- the Draft Dust Regulations require monthly dustfall monitoring reports to be submitted to the AQO. The monitoring reports must include information on sensitive receptors; proof that standard test methods were used; and meteorological data including, at least hourly values for wind speed and wind direction.

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The List and Standards were however amended late in 2018 to impose restrictions on postponement and suspension applications.

The Draft Dust Regulations will come into effect on 1 November 2019, unless otherwise stipulated. While the Draft Dust Regulations will result in an improved clarity of the requirements on the standard test method that is used, the reporting requirement for the measurement of meteorological information on an hourly basis could mean that weather stations are required for every facility. This is expected to have significant cost implications.

Rolling postponements rolled out under listed activities and minimum emission standards

Other legal developments include amendments to the Listed Activities and Associated Minimum Emission Standards (List and Standards) under the AQA to limit the possibility of applying for rolling postponements or suspension of compliance timeframes.

The List and Standards identify activities that result in air emissions which may have a significant detrimental impact on the environment, including health, social, economic and ecological conditions. To manage this impact, the List and Standards prescribe minimum emission standards in respect of each activity.

The List and Standards differentiate between "existing" and "new" plants. The former means any plant or process that was legally authorised to operate before 1 April 2010, or where an application for an EA was made prior to 1 April 2010. A new plant, in turn, refers to a plant or process where application for an EA was made on or after 1 April 2010.

Strict compliance timeframes are prescribed requiring:

- new plants to comply with the prescribed new plant emission standards (Compliance Timeframe 1);
- existing plants to comply with the minimum emission standards for existing plants by 1 April 2015 (Compliance Timeframe 2); and
- existing plants to comply with minimum emission standards for new plants by 1 April 2020 (Compliance Timeframe 3).

Prior to amendment, the List and Standards allowed for application to be made by existing plants for postponement of Compliance Timeframes 2 and 3. Although a single postponement was not permitted to exceed 5 years, there was no restriction on the number of postponements that could be applied for.

The List and Standards were however amended late in 2018 to impose restrictions on postponement and suspension applications, namely that:

- no postponement applications may be made regarding Compliance Timeframe 2;
- an existing plant may apply for a once-off postponement of Compliance Timeframe 3, which postponement may not exceed five years and will not be valid beyond 31 March 2025. The latest date to apply for a 5-year postponement is therefore 31 March 2020; and

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The restrictions are likely to have significant CAPEX implications for large-scale emitters previously dependent on rolling postponements.

- an existing plant that is to be decommissioned by 31 March 2030 may apply for a once-off suspension of Compliance Timeframe 3 by latest 31 March 2019. These plants must however comply with existing plant minimum emission standards from the date of grant of the suspension application.

It is however unclear from the above whether those entities that have already applied for and obtained postponements prior to amendment of the List and Standards, may apply for a further and final once-off postponement.

The restrictions are likely to have significant CAPEX implications for large-scale emitters previously dependent on rolling postponements, as they will have to invest in technological and infrastructural upgrades to ensure compliance. As noted above, however, the Framework does provide for less stringent requirements for postponements.

Holders of AELs should also note the following amendments:

- changes to activities in Category 2 of the List and Standards, petroleum products storage tanks and transfer facilities, with various new standards being prescribed for these;
- changes to the special arrangements pertaining to Category 5.4 (cement production (using conventional fuels and raw materials)) and the replacement of Category 9.2 (chemical recovery furnaces) and Category 9.5 (wood drying and manufacture of wood products); and
- Annexure A (Methods of sampling and analysis) has been replaced by a new Annexure A.

Revised timeframes for submission of national pollution prevention plans

The National Pollution Prevention Plan Regulations (PPP Regulations), which came into effect on 21 July 2017, were amended in 2018. The PPP Regulations prescribe the requirements for pollution prevention plans (PPPs) required under the AQA. The PPP Regulations must be read together with the Declaration of Greenhouse Gases as Priority Air Pollutants (GHG Declaration).

Under the GHG Declaration, any person/company conducting a production process listed in Annexure A, which involves the emission of any of the listed GHGs in excess of 0.1 Megatonnes annually, reported as carbon dioxide equivalents (CO2-eq), and/or if directed by the Minister, is required to submit a PPP to the Minister for approval (Affected Industries). It is understood that the requisite directive is imposed generally under the GHG Declaration and PPP Regulations, as Affected Industries identified in terms of Annexure A are required to submit PPPs.

Annexure A listed production processes include coal mining; the production/refining of crude oil; and the production/processing of natural gas, liquid fuels from coal or gas, cement, glass, ammonia, nitric acid, carbon black, iron and steel, ferro-alloys, aluminium (excluding foundries), polymers, pulp and paper, and electricity (combustion of fossil fuels excluding the use of back-up generators).

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Affected Industries were required to submit their first PPP to the DEA by 21 December 2017.

Affected Industries were required to submit their first PPP to the DEA by 21 December 2017. This first PPP should have covered a period from 21 July 2017 up to 31 December 2020. Subsequent PPPs (to be submitted within five months of existing plans being reconciled) should cover periods of five calendar years each. This was amended in 2018 and the submission date of a first PPP to the DEA was extended to on or before 21 June 2018. Subsequent PPPs must be submitted within five months of existing plans being reconciled.

As regarding the reconciliation of PPPs, the following should be noted:

- as the PPP Regulations were promulgated on the 21 July 2017, the phase up to 2020 (first PPPs) will be implemented over a period of less than five years;
- the annual reports to register progress of the preceding calendar year on implementation of the approved PPP are to be submitted by the 31 March of each year;
- the PPPs must be reconciled at the end of each phase (ie 31 December 2020; 31 December 2025: etc.); and
- to develop and finalise the new PPP for the subsequent phase(s), companies are given five months from the time the lifespan of the existing PPP ceases, thus, the submission of subsequent plans which will cover a five-year period from 1 January 2021 to 31 December 2025, will be due on 31 May 2021.

Persistent on phasing out persistent organic pollutants

South Africa is a party to the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention), which is a global treaty that protects human health and the environment from persistent organic pollutants (POPs). POPs are organic compounds that are resistant to environmental degradation through chemical, biological, and photolytic processes. They remain intact in the environment for long periods; become widely distributed geographically; accumulate in the fatty tissue of humans and wildlife; and have harmful impacts on human health and environment.

The Stockholm Convention obliges state parties to, depending on the type of POP, either reduce the unintended release or ban or restrict the use of POPs. Proposed

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A key objective of the Climate Bill is the formalisation and allocation of carbon budgets which, prior to its promulgation, have been unregulated.

new regulations to phase out the use of POPs were initially published by the Minister of Environmental Affairs (Minister) on 30 June 2017 and replaced by a revised set of regulations on 24 July 2018 (Draft POPs Regulations).

The purpose of these Regulations is to prescribe the requirements for phasing out the use, production, distribution, import and export of the following chemicals and formulations containing the following chemicals (and all resulting wastes):

- Hexabromobiphenyl (phased out by 31 December 2020);
- Pentachlorobenzene (phased out by 31 December 2019);
- Peflourooctane Sulfonic Acids; its salts (PFOS) and Perfourooctane Sulfonyl Fluoride (phased out by 31 December 2021);
- Hexabromophenyl Ether and Heptabromodiphenyl Ether (phased out by 31 December 2020); and
- Tetrabromodiphenyl Ether and Pentabromodiphenyl Ether (phased out by 31 December 2020),

(Listed POPs).

The Draft POPs Regulations contain a general prohibition on use, production, distribution, import or export of the Listed POPs; certain notification requirements; requirements to develop phase-out plans; reporting obligations and offences and penalties up to an amount of R10 million.

Climate Change Bill risks further fragmentation of air quality regulation

South Africa's Climate Change Bill (Climate Bill) was published for comment on 8 June 2018, and aims to build an effective climate change response, whilst ensuring a long-term, just transition to a climate resilient and lower carbon economy and society. This will be achieved through the development of a national framework by the Minister that is intended to provide for clear appropriate mechanisms, systems and procedures for achieving the objects of the Climate Bill.

To that effect, the Climate Bill seeks to establish a Ministerial Committee on Climate Change (Climate Change Committee) that will enable the implementation and coordination of the Climate Bill's objectives across all government sectors and spheres.

One of the objectives of the Climate Bill is the determination of Sectoral Emissions Targets (SETs). SETs are GHG emission allowances determined by the Minister, in consultation with the Climate Change Committee, and allocated to an emitting sector or sub-sector over a defined time period. A Sector Emission Reduction Plan will be prepared for each GHG emitter sector and sub-sector and set out how each sector will meet the prescribed SETs within five years from their publication.

A key objective of the Climate Bill is the formalisation and allocation of carbon budgets which, prior to its publication, have been unregulated. The Climate Bill obliges the Minister to determine a GHG emission threshold and allocate a carbon

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Industries are urged to be cognisant of the above and future developments on the regulation of air emissions and quality.

budget to a specific person in accordance with the threshold for not less than three successive five-year periods. Persons to whom carbon budgets have been allocated must also submit and implement a GHG mitigation plan, providing for their carbon budget compliance.

As a way to encourage companies to participate in the carbon budget system, the Carbon Tax Bill prescribes that companies who have been allocated carbon budgets are eligible for a 5% tax-free allowance. This allowance is, however, limited to participation in the first and unregulated phase of the carbon budget, for which entities must first obtain written consent from the DEA before they become eligible to benefit.

The Bill also gives the Minister a wide discretion to publish regulations in relation to any matter necessary to give effect to South Africa's obligations in terms of an international agreement relating to climate change. Similar to AQA, this allows for governance by regulations and risks further fragmentation of an already over-regulated framework.

Conclusion: Air quality regulation and its impact on development

Industries are urged to be cognisant of the above and future developments on the regulation of air emissions and quality. Its relevance within the sustainable development framework has perhaps best been portrayed by the ongoing Thabametsi-saga.

In 2017, the Minister had dismissed an appeal against the decision of the Chief Director of Integrated Environmental Affairs to grant an EA for the Thabametsi power station. The EA was however made conditional to a climate change impact assessment (CCIA) being submitted to the DEA. Earthlife Africa however took the matter on review to the High Court, arguing that the condition constitutes a "tick box" exercise, given that neither the Minister nor DEA would have the legal competence to withdraw the EA based on the findings of the CCIA. The High Court set aside the Minister's decision to dismiss the appeal. The appeal was remitted back to the Minister for reconsideration, who the Court ordered to take into account

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The CCIA was made available in June 2017 and, after having considered the CCIA and an independent review of the assessment.

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inter alia a CCIA; public comments on this report; and any additional information required by the Minister to reach a decision.

The CCIA was made available in June 2017 and, after having considered the CCIA and an independent review of the assessment, the Minister again dismissed the appeal and confirmed that the EA had been rightfully granted.

Despite the Draft Integrated Resource Plan confirming the need for 1000MW of coal-based electricity:

- further review proceedings have been instituted against the Minister for again dismissing the Thabametsi appeal;
- NGOs are actively opposing other coal powered projects in court and through internal appeal procedures; and
- reports indicate that some financial institutions have withdrawn their support of the coal-based power projects.

The activism of NGOs and diminishing support from financial institutions is a pertinent indicator to industry on the potential and far-reaching impacts of the developing air quality regulatory framework. As compliance with these developments will evidently be scrutinised by I&APs and lenders, corporations are encouraged to take heed.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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