

A photograph of several wind turbines in a field, overlaid with a teal geometric shape that frames the text. The background is a light blue sky with some clouds.

ENVIRONMENTAL LAW ALERT

3 MARCH 2022



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Micro-managing air quality and pollution control measures: Minister proposes regulations to enforce compliance in priority areas

As the primary statute regulating air quality, the National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA) has introduced prescribed standards to ensure the protection and enhancement of air quality and the prevention of pollution in South Africa. This includes the National Ambient Air Quality Standards (AAQ Standards), which set ambient air quality standards for sulphur dioxide (SO₂), nitrogen dioxide (NO₂) and particulate matter, amongst other priority pollutants.



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

Micro-managing air quality and pollution control measures: Minister proposes regulations to enforce compliance in priority areas

As the primary statute regulating air quality, the National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA) has introduced prescribed standards to ensure the protection and enhancement of air quality and the prevention of pollution in South Africa. This includes the National Ambient Air Quality Standards (AAQ Standards), which set ambient air quality standards for sulphur dioxide (SO₂), nitrogen dioxide (NO₂) and particulate matter, amongst other priority pollutants.

If it is reasonably believed that the AAQ Standards are or may be exceeded in a particular area, or if other factors are present that may cause a significant negative impact on air quality in that area to the extent that an air quality management plan (AQMP) for the area is required, NEMAQA authorises the Minister of the Department of Forestry, Fisheries and the Environment (DFFE) to declare an area a priority area. Areas that have been declared as priority areas to date are the Vaal Triangle Airshed, the Highveld and the Waterberg Bojanala.

Over the years various emission control measures and tools have been implemented by DFFE in an attempt to bring emitters into compliance and to contribute to the AAQ Standards. These include listing the activities that result in atmospheric emissions that have a detrimental impact on the environment (NEMAQA Listed Activity) and the minimum prescribed emission standards attached to them. Emitters,

unless they have been granted an extension, were required to comply with the new plant minimum emission standards by April 2020. That notwithstanding, the compliance timeframe came and went with many emitters continuing to operate outside of the prescribed limits. It is therefore evident that, despite the introduction of these emission control measures, it has been recognised that cumulative emissions of certain pollutants continue to exceed AAQ Standards.

PROPOSED REGULATIONS

On 11 February 2022 the DFFE Minister (Minister) published the Proposed Regulations for Implementing and Enforcing Priority Area Air Quality Management Plans (proposed regulations) in terms of section 20 of NEMAQA, whereby the Minister or Member of the Executive Council may prescribe regulations necessary for implementing and

enforcing approved priority area AQMPs. The obligations prescribed by the proposed regulations are not in themselves novel emission control mandates, but aim to co-ordinate existing regulated tools and requirements to achieve the successful implementation of AQMPs for the benefit of the communities within the priority areas. This co-ordination will first identify the key stakeholders that the proposed regulations' measures apply to, namely emitters identified as significant contributors to poor air quality in a priority area. Such stakeholders include anyone conducting a NEMAQA Listed Activity; declared controlled emitters; mining operations; and national, provincial and local spheres of government.

The proposed regulations provide that stakeholders must implement "emission reduction interventions" assigned to them within the

Micro-managing air quality and pollution control measures: Minister proposes regulations to enforce compliance in priority areas

CONTINUED

timeframes set out in the AQMP applicable to the priority area in which they are located. Notably, stakeholders will be required to submit an emission reduction and management plan that aims to minimise, prevent and manage their emissions to the national air quality officer for approval. These plans must include details of their emission reduction activities, implementation timeframes, and the applicable monitoring and evaluation process. Following approval, stakeholders must implement their emission reduction and management plans within the AQMP's specified timeframes. In respect of reporting requirements, stakeholders must attend and report to the committee representing priority area role players, and annual progress reports on the implementation of the AQMP must be presented to

the committee by the national air quality officer. Notably, the proposed regulations also require stakeholders to provide necessary funding or resources for the implementation of the broader AQMP.

ALIGNMENT WITH ONGOING OBLIGATIONS

With the implementation of the proposed regulations, stakeholders will need to align the proposed measures with their ongoing atmospheric emission compliance obligations, which include compliance with:

- their particular operating, monitoring and reporting conditions in their AELs or provisional AELs;
- the reporting requirements contained in the National Greenhouse Gas (GHG) Emission Reporting Regulations, where applicable;

- the requirements prescribed by the National Pollution Prevention Plan (PPP) Regulations read together with the Declaration of Greenhouse Gases as Priority Air Pollutants, in terms of which any person or company conducting a production process that involves the emission of any of the listed GHGs in excess of 0.1 megatonnes annually is required to submit a PPP to the Minister for approval; and
- the remaining obligations stemming from stakeholder being located within a priority area.

As PPPs relate to GHG emission reduction measures and not NO₂, SO₂ and PM emissions, they are distinct from the requirement for an emission reduction and management plan in the proposed regulations. As an aside, PPPs will, however, be deemed to be GHG applicable.

Micro-managing air quality and pollution control measures: Minister proposes regulations to enforce compliance in priority areas

CONTINUED

mitigation plans in terms of the latest iteration of the Climate Change Bill, which are required to be prepared and submitted for approval by entities to whom carbon budgets have been allocated.

Whether the proposed regulations have the desired effect of improving the implementation of and compliance with AQMPs will remain to be seen. However, the additional layer of compliance pressure that the proposed regulations seek to impose does paint a picture of a more co-ordinated approach and enhanced compliance to achieve AAQ Standards.

Comments on the draft are due 30 days from 11 February 2022, and entities that may qualify as stakeholders based on their role in a priority area are encouraged to take cognizance of the anticipated obligations that they may be required to comply with when the proposed regulations are implemented. Should you be interested in submitting comments on the proposed regulations, please do not hesitate to reach out to our team as we are well placed to assist with drafting submissions on your behalf.

**MARGO-ANN WERNER AND
LAURA WILSON**



OUR TEAM

For more information about our Environmental Law practice and services in South Africa and Kenya, please contact:



Allan Reid

Joint Sector Head
Director
Mining & Minerals
T +27 (0)11 562 1222
E allan.reid@cdhlegal.com



Anton Ackermann

Associate
Corporate & Commercial
T +27 (0)11 562 1895
E anton.ackermann@cdhlegal.com



Clarice Wambua

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E clarice.wambua@cdhlegal.com



Laura Wilson

Associate
Corporate & Commercial
T +27 (0)11 562 1563
E laura.wilson@cdhlegal.com



Margo-Ann Werner

Director
T +27 (0)11 562 1560
E margo-ann.werner@cdhlegal.com



BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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@cdhlegal.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@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2021 10874/MAR

