ENVIRONMENTAL

IN THIS ISSUE

NEW ONEROUS REGULATION AND FINANCIAL IMPLICATIONS FOR RESIDUE STOCKPILES AND DEPOSITS

Legal obligations for residue stockpiles and deposits created by mining rights holders have been unclear since their inclusion in the National Environmental Management: Waste Act, 59 of 2008 ("Waste Act"). Residue stockpiles and deposits were previously regulated under the Minerals and Petroleum Resources Development Act 28 of 2002 ("MPRDA"). If the residue stockpiles and deposits constitutes waste, as defined under the Waste Act, they will now be regulated by the Waste Act.

Regulations concerning the planning and management of residue stockpiles and deposits have recently been published under the Waste Act.

This comes shortly after the High Court, in the matter of Aquarius Platinum SA (Pty) Ltd v Minister of Water and Sanitation & Others (unreported case 75622/2014 (GNP)) set aside the promulgation of the National Environmental Management Laws Amendment Act 25 of 2014 ("NEMLAA"), which amended the Waste Act to include residue stockpiles and deposits. The reasoning for setting aside NEMLAA was that it required residue stockpiles and deposits to be managed in the 'prescribed manner'. It was held that the absence of regulations under the Waste Act dealing with planning and management of residue stockpiles and deposits created legal uncertainty, as companies would be left with no direction on how to deal with such residue in the 'prescribed manner'.

The Constitutional Court would need to confirm the High Court's judgment but the current promulgated Regulations may render the matter moot, in which case it may not considered by the Constitutional Court.

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The Regulations have provisions regarding the planning and management of residue stockpiles and deposits. This includes prescribed characterisation and classification processes; risk analysis and design and site selection process (including geotechnical and hydrological investigations). The ongoing determination and management of their impacts; and monitoring and reporting systems are also dealt with.

Pollution control barriers systems must now be designed according to previous regulations published under the Waste Act that were compiled for landfill sites. These systems may significantly increase the construction costs for mining companies, amounting to hundreds of millions of rand.

The requirements are far more onerous than those in the MPRDA and parties constructing or operating residue stockpiles and deposits are recommended to assess whether they are applicable to their operations.

FIRST INDUSTRIES MAY BE REQUIRED TO SUBMIT WASTE MANAGEMENT PLANS

Several industries may be required to submit industry waste management plans in terms of proposed Regulations published under the Waste Act. These industries include Paper and Packaging, Electrical and Electronic Equipment and Lighting.

It is proposed that any party engaged in the commercial manufacture, conversion, refurbishment or import of new and/or used paper and packaging materials; lighting equipment or electrical and electronic equipment which are intended for distribution in South Africa (a "Producer") must register with the Minister of Environmental Affairs within 60 days of the notice and furnish prescribed information.

A Producer would be required to belong to an industry waste management plan and within a year of registration either comply with an industry waste management plan approved by the Minister; or prepare and submit to the Minister an industry waste management plan for approval.

The contents of an industry waste management plan are prescribed in the Waste Act and included in the proposed Regulations. This includes how the industry will prioritise reduction, re-use and recycling and then recovery of waste and implement measures to give effect to best environmental management practice. Incentives and financial contribution that will be applied to encourage end users to practice good waste management, as well as measures to increase national awareness may also be required. Social responsibility issues and methods to include the formal sector in the plan would need to be addressed.

Public consultation processes with state organs and interested and affected parties may also be required.

Significant penalties for non-compliance with this requirement are proposed.

NEW WASTE ACT ADMISSION OF GUILT FINES: A SUFFICIENT DETERRENT?

Admission of guilt fines are now applicable to certain specified offences under the Waste Act. The maximum fine is R5, 0000.

The Regulations only apply to general waste and not hazardous or priority waste, as defined under the Waste Act.

Whilst general waste has less environmental impacts than hazardous waste, it is likely that these Regulations will be severely criticized by environmental groups as the maximum admission of guilt fine is extremely low, particularly when compared to other fines under the Waste Act and does not provide any significant deterrent.

ADMINISTRATIVE FINES FOR UNLAWFUL COMMENCING LISTED ACTIVITIES – POTENTIAL INCREASED RISK OF MAXIMUM FINE BEING IMPOSED

New draft Regulations may increase the risks of the imposition of a maximum R5 million administrative fine (on first conviction) on "culpable applicants" under s24G of the National Environmental Management Act, 107 of 1998 ("NEMA").

Section 24G regulates applications for rectification by parties who have unlawfully commenced with an activity without the required environmental authorisation ("EA") or waste management license ("WML"). The new draft Regulations propose criteria for determining fines and the procedure to be followed ("Draft Section 24G Regulations").

Under the Draft Section 24G Regulations where a culpable applicant, as defined in the Regulations, submits a s24G application, the "fines recommendation committee" (to be established under these Regulations) must recommend to the competent authority that the applicant pay the maximum fine of R5 million. Whether an applicant is culpable would be assessed on, among other things, if it had knowledge of the unlawfulness of commencing an activity without the required EA or WML.

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The proposed s24G application form allows applicants to include representations regarding the quantum of the fine. It is proposed under the Draft Section 24G Regulations that consideration must be taken of several factors including: impacts or potential impacts caused by the activity; applicant's compliance history (including whether a final administrative enforcement notice has been issued to the applicant); and whether any of the directors of the applicant are or were involved as directors of another entity responsible for a contravention. A director would include members of a close corporation or partners in a partnership. The competent authority would also consider whether any previous s24G application had been received from the applicant.

These factors would be used in a "fine calculator," that would include a formula for the determination of an appropriate fine. This formula is not included in the Draft Section 24G Regulations.

The Draft Section 24G Regulations provide that where more than one listed activity commenced without a required EA or WML a single fine may be imposed in certain circumstances.

There has been significant uncertainty as to the criteria considered by the environmental authorities when determining an appropriate administrative fine under s24G of NEMA. The Draft Section 24G Regulations are welcomed, as they will provide more credibility and clarity on the process used to determine the fine imposed. It will also provide applicants with grounds upon which to challenge the reasonableness of any s24G fines. This is provided that the formula included in the fines calculator will be published and circulated for public comment.

PLATFORM FOR AIR EMISSION OFFSETS

Draft Guidelines have been published to provide for circumstances under which an environmental offset may be considered under the National Environmental: Air Quality Act (the "Draft Offset Guidelines").

Environmental offsets are generally defined in the Draft Offset Guideline as "*measures that counterbalance, counteract or compensate for the adverse impacts of an activity on the environment.*" In an air quality context it is envisaged that the offset will counterbalance the adverse environmental impact of atmospheric emissions in order to "*deliver a net ambient air quality benefit within the affected airshed /s*".

The Draft Offset Guidelines propose offsets may be considered as conditions to approvals for applications submitted for:

- postponement of compliance timeframes under s21 of the National Environmental: Air Quality Act;
- variation of an atmospheric air emission licence ("AEL") where the variation will result in an increase in atmospheric emissions; and
- an AEL in areas where National Ambient Air Quality Standards are being or are likely to be exceeded.

The Draft Offset Guideline further propose the following underlying principles for the implementation of the environmental offsets:

- *It is outcome based.* The implementation and evaluation of the offset should be based on the overall improvement of air quality and other positive outcomes. The ability of the proposed offsets to improve air quality must be demonstrated.
- No *"like for like"*. The offset projects should address pollutants whose ambient concentration are of concern in an area and not where a specific facility is of concern.
- *Additionality*. The offsets should not be seen as a substitute for the efforts that can be made to reduce emissions but as an additional measure.
- *Sustainability*. The offset projects should achieve long term air quality improvement without adversely affecting other socio-economic and environmental objectives.
- *Measureable and scientifically robust*. Offsets should reflect actual emission reductions and not inaccurate accounting of emissions.

Under the Guidelines, an applicant is responsible for identifying, securing and managing offsets programmes and must demonstrate financial capability for their implementation. The approval of offset programme will require a public participation process and applicants will have to submit monitoring and progress reports to confirm compliance with the programmes.

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