



JUST SHARE

Investor power for a fairer South Africa

The Honourable Ms AF Muthambi

Chairperson of the Portfolio Committee on Environment, Forestry and Fisheries

For the attention of:

Ms Tyhileka Madubela
Committee Secretary

Portfolio Committee on Environment, Forestry and Fisheries

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Dear Tyhileka

JUST SHARE'S COMMENTS ON THE CLIMATE CHANGE BILL [B9-2022]

1. Just Share is a non-profit shareholder activism organisation. We believe that responsible investment is necessary to create a just, inclusive and sustainable economy. We use engagement, advocacy and activism to drive urgent action to combat climate change and reduce inequality.
2. We align ourselves with and support the submissions on the Climate Change Bill [B9-2022] ("the Bill"), made by the Life After Coal Campaign ("LAC").¹ Just Share's additional comments focus on the compliance and enforcement provisions of the Bill, particularly its lack of meaningful penalties.

¹ https://cer.org.za/wp-content/uploads/2022/05/Life-After-Coal-comments-Climate-Change-Bill-2022_27_May_2022.pdf



3. In addition, we would like to **request an opportunity to make a verbal presentation to the Committee on Environment, Forestry and Fisheries.**
4. Below, after a brief introduction, we make submissions on the Bill's compliance and enforcement provisions.
5. **In short, to have any prospect of fulfilling its intended objects, the Bill must identify additional violations and provide for more - and more significant – penalties for non-compliance.**

Introduction

6. The Bill's compliance and enforcement provisions are wholly inadequate to achieve its stated objects. The Bill provides for only a single criminal offence and contains very limited provision to hold emitters accountable. Provision must be made for additional violations (both criminal offences and administrative penalties), significantly higher fines, and much less leniency and other opportunities to delay compliance. As set out in the LAC's submissions, numerous important provisions contain no timeframes at all; and/or defer any consequences for non-compliance to future potential regulations. This is enormously problematic and bears no relation to the urgency with which meaningful climate action must be taken to limit the worst impacts of the climate crisis, and to adapt to those impacts that are already faced by people in South Africa (SA). These impacts will only get more severe unless emissions are drastically curbed.
7. Despite increasing awareness of the urgency of taking climate action, the global policy response to climate risk has been weak and inadequate. Global emissions continue to rise. Sophisticated climate lobbying and extensive greenwashing have been integral in delaying and obfuscating meaningful climate action. A key reason for government climate inaction has been the unprecedented lobbying activity - by the fossil fuel industry and associated industry associations - to weaken, delay and oppose climate-related regulation.² In many instances, this manifests itself in "high-level public positions of support for the Paris goals, but closed-door undermining of climate action".³
8. In SA, lobbying by fossil fuel interests, including the Minerals Council, the Industry Task Team on Climate Change, Business Unity South Africa, and Sasol, has resulted in the extension of the first phase of the carbon tax - which makes provision for companies to receive 60%-95% tax allowances such as rebates or exemptions - until 2026. This, in circumstances where South Africa's climate risk is severe, and a meaningful carbon tax is widely acknowledged as an essential tool to reduce greenhouse gas (GHG) emissions. It appears from the Nedlac report on the Bill that business pushback and lobbying has weakened the Bill.
9. The Intergovernmental Panel on Climate Change (IPCC), in 2021 and 2022, released the three working groups' contributions to the Sixth Assessment Report.⁴ Bearing in mind that many

² <https://influencemap.org/climate-lobbying>

³ <https://www.unpri.org/pri-blog/time-must-be-called-on-negative-climate-lobbying/8259.article>

⁴ <https://www.ipcc.ch/assessment-report/ar6/>



scientists regard the IPCC reports as conservative and cautious, the three working group reports have made clear that:

- a. with half of the global population already “highly vulnerable” to the climate crisis, the dire impacts of climate change will affect every place on Earth. These impacts will include: rising sea levels, heatwaves, droughts, and floods. Mass die-offs of species are underway and key ecosystems are losing their ability to absorb carbon dioxide (CO₂), turning them from carbon sinks into carbon sources;
 - b. many of the unprecedented changes to the climate are rapidly becoming “irreversible”;
 - c. limiting global warming to 1.5°C requires “rapid and deep and in most cases immediate” cuts to carbon emissions in all sectors;
 - d. countries are failing to take the necessary actions to limit global heating: overshooting 1.5°C - the internationally-agreed goal for avoiding climate catastrophe - is now “almost inevitable”; and
 - e. as things stand, temperatures could rise by as much as 3°C.
10. Temperatures rises of 3°C would be catastrophic. It is expected that temperature rises on the African continent would be about **double the rest of the globe**.
11. In the first peer-reviewed study that expands on the International Energy Agency’s (IEA)’s recent finding that no new coal mines or oil and gas fields can be developed under a 1.5°C warming limit,⁵ new research assessed the committed or “locked in” CO₂ emissions of existing and approved fossil fuel extraction facilities.⁶ It demonstrates that **almost half of existing fossil fuel production sites need to be shut down early if global heating is to be limited to 1.5°C**, the level essential to avoid the worst impacts of the climate crisis.
12. And yet, the world’s biggest fossil fuel firms are planning or building **195 “carbon bomb” oil and gas projects** that would **each emit at least 1bn tonnes of CO₂**.⁷ These projects would **collectively emit 640bn tonnes of CO₂, more than enough to breach the carbon budget for 1.5°C**. This is equivalent to about **18 years of current global CO₂ emissions**. **About 60% of these projects have already started production**.
13. This evidence demonstrates the severity of the climate crisis, and that such regulation as currently exists to limit GHGs is failing dismally to ensure the requisite climate action to limit the most dire impacts of climate change.
14. SA has an extremely carbon-intensive economy and is highly exposed to climate risk. These risks will **impact marginalised, poor communities in SA worst**. Africa is **particularly vulnerable to climate change** (this is true regarding both the physical impacts of climate change and regarding adaptation to its impacts) and has low adaptive capacity. SA is likely to warm at twice the global rate and will experience the **impacts of global heating very acutely**.⁸

⁵ <https://www.iea.org/reports/net-zero-by-2050>

⁶ <https://iopscience.iop.org/article/10.1088/1748-9326/ac6228>

⁷ <https://www.sciencedirect.com/science/article/pii/S0301421522001756>

⁸ <https://justshare.org.za/wp-content/uploads/2021/05/210430-Comments-on-the-draft-NDC.pdf>



15. Despite these hard facts, SA's Integrated Resource Plan for electricity foresees adding at least 4,500 megawatts of new fossil fuel electricity; which is not only **expensive and not required for energy security**, but which will, if built, have **massive GHG emissions**, and **multiple other negative impacts on human health and the environment**.
16. **Rapid, extensive scaling up of renewable energy** generation is the **most cost-optimal energy pathway, presenting significant economic benefits and opportunities**. This is not controversial, despite the outdated narratives peddled by many in government and business about fossil fuels being required for "development", job creation, and "baseload" power.
17. Accelerating SA's electricity sector transition – aligned to the Paris Agreement goals - provides the potential for a massive post-Covid green stimulus, based on accelerated clean energy investment, localisation of value chains, and resolution of SA's chronic power shortages. Such transition will both mitigate the risk posed to the SA economy and constitutional rights through SA's carbon intensity, and bring enormous economic benefits for people in SA.
18. What is overwhelmingly clear from the current dire state of the climate, is that, to date, **voluntary measures by governments and emitters to reduce GHG emissions, and low (if any) penalties for excessive emissions have dismally failed to achieve their goal**. It is imperative that effective climate change legislation be enacted without delay. The long-awaited Climate Change Bill cannot afford to be weak on compliance and enforcement, particularly given SA's significant emissions.

Penalty provisions

Carbon budgets and GHG mitigation plans

19. In terms of section 23 of the Bill, the Minister of Environment, Forestry and Fisheries ("the Minister") is required to publish (in the Gazette) a list of:
 - a. GHGs which she "reasonably believes cause or are likely to cause or exacerbate climate change", and
 - b. activities which emit one or more of these GHGs and which she "reasonably believes cause or are likely to cause or exacerbate climate change" ("the list of activities").
20. The list of activities must, among other things, determine quantitative GHG emission thresholds expressed in CO₂eq to identify persons:
 - a. to be assigned a carbon budget; and
 - b. required to submit GHG mitigation plans to the Minister.
21. Problematically, given its centrality to assigning carbon budgets in terms of section 24, there is **no timeframe provided for the publication of the list of activities**.
22. In terms of section 24, a person to whom a carbon budget has been allocated, must prepare and submit to the Minister, for approval, a GHG mitigation plan; which must:



- a. describe the mitigation measures that the person, to whom a carbon budget is allocated, proposes to implement in order to remain within their allocated carbon budget; and
 - b. comply with the content requirements of such plans as may be prescribed.
23. When allocating carbon budgets, the Minister must, among other things, consider the alignment of the carbon budgets with the national GHG emissions trajectory. There is **no timeframe for the trajectory to be determined** in terms of section 21, despite the importance of this trajectory to the Bill's entire mitigation architecture.⁹
24. As set out below, **the failure to submit a GHG mitigation plan is the only offence in the Bill** (in terms of section 32).
25. A person to whom a carbon budget has been allocated must, in terms of section 24(6):
 - a. implement the approved GHG mitigation plan;
 - b. monitor annual implementation of the plan in accordance with the prescribed methodology;
 - c. evaluate progress on the allocated carbon budget; and
 - d. annually report on the progress against the allocated carbon budget to the Minister in the manner prescribed.
26. In the event that such reporting indicates that the person has failed, is failing, or will fail to comply with the allocated carbon budget, the person must provide a description of measures they will implement in order to remain within the allocated carbon budget. But **no provision has been made for how to address the situation where the person “has failed” to comply with the budget, and no penalty is attached to this failure.**

Offence in the Bill

27. The 2018 Bill had created two offences:
 - a. the failure to prepare, submit and implement an approved GHG mitigation plan; and
 - b. GHG emissions' exceedance of that person's carbon budget.
28. The 2021 version of the Bill (which was apparently approved by Cabinet) provided, in relation to offences and penalties:
 - a. the failure to prepare and submit a GHG mitigation plan to the Minister is a criminal offence; and

⁹ It is also extremely problematic that the interim trajectory is the outdated and wholly-inadequate 2015 Nationally Determined Contribution (NDC) “peak, plateau and decline” trajectory, rather than the 2021 updated NDC, which is much more ambitious (despite this, only the lower limit of the range (of CO₂-eq) is consistent with South Africa's fair share of GHG emissions for a 1.5°C global pathway: <https://cer.org.za/news/cabinets-more-ambitious-climate-target-a-step-in-right-direction>).



- b. a person whose GHG emissions exceed their carbon budget will be subjected to a higher carbon tax rate on emissions above the carbon budget as provided for in the Carbon Tax Act (“the modalities of which will be outlined in the carbon budget regulations, including modalities and procedures for dealing with non-implementation of mitigation plans”).

- 29. Now, the **only offence in the current Bill is the failure to prepare and submit a GHG mitigation plan to the Minister** (section 32). On conviction, the person is liable to the s49B(2) of the National Environmental Management Act, 1998 (NEMA) penalties. For a first offence, this is a fine not exceeding R5 million and/or to imprisonment for a period not exceeding five years; and in the case of a second or subsequent conviction, a fine not exceeding R10 million and/or imprisonment for a period not exceeding 10 years.
- 30. In other words, the current Bill (like the 2021 Cabinet-approved version, but unlike the 2018 version) **no longer contains specific provision for a failure to “implement” the plan** - which appears to create the unacceptable result that simply *submitting* the plan is good enough to avoid committing an offence. **Nor** is any penalty attached to a **failure to report, monitor or effect remedial action if there is non-compliance with the GHG mitigation plan**. These failures should attract **personal director liability** and the potential **revocation of licences**.
- 31. In addition, the penalty provided for the solitary offence in the Bill (the failure to prepare and submit a GHG mitigation plan) – of a fine of R5 million and/or five years’ imprisonment (for a first conviction) is **wholly inadequate to be a proper deterrent**. We elaborate below on the need for administrative penalties.
- 32. It is also unacceptable that **no penalty is attached to exceeding a carbon budget**. In other words, there is **no longer a provision for exceeding a carbon budget to amount to a criminal offence (as per the 2018 version of the Bill) and/or to attract a higher carbon tax rate (as per the 2021 version)**. Instead, the Bill provides that the Minister may make regulations, *inter alia*, in relation to the management of climate change response, including the determination, review, revision, compliance with and enforcement of an allocated carbon budget, amendment and cancellation of a carbon budget allocation, the content, implementation and operation of a GHG mitigation plan, and all matters related thereto. Such regulations may provide that any person who contravenes them commits an offence and will be liable, upon conviction, to the penalties contemplated in section 49B(2) of the NEMA. In other words, such regulations, and their content, are discretionary.
- 33. The Minister of Finance in the 2022 Budget Speech referenced a higher carbon tax rate on emissions exceeding the carbon budget, but this provision is not contained in the current version of the Bill. No public explanation has been provided for this omission. In this regard, we note that, although “Carbon Tax Act” (CTA) is defined in the Bill, there is no reference to the CTA in the Bill.
- 34. Corporate pushback and lobbying has resulted in the first phase of the carbon tax being extended by three years for the period 1 January 2023 to 31 December 2025. This also has implications for the carbon budgets to be issued in terms of the Bill – although the Department



has given contradictory information on this, it appears that the mandatory carbon budgets will now also be postponed till 2026. In other words, there will be **more than three-and-a-half more years of emissions that will attract barely any carbon tax**. This despite the demands of climate science for global emissions to be halved in the next seven-and-a-half years, and the evidence that carbon pricing has substantial benefits – beyond emissions reduction.¹⁰

35. One of the most pernicious arguments that anti-climate lobby groups use to delay implementation of climate regulation is the claimed need for alignment between the carbon tax, carbon budgets, and sectoral emissions targets (SETs). However, there is simply no reason why this need be the case: a carbon tax should be implemented, while the carbon budgets and SETs are being determined.
36. **Failure to comply with a carbon budget is an egregious contravention, with significant consequences for climate action.** Currently there is **no penalty attached** to this failure and the Bill, as currently drafted, **does not oblige the Minister to make regulations to provide any penalty for this failure**. It is unacceptable to defer consequences of violating carbon budgets to potential future regulations that might be made by the Minister at an undetermined point in the future. This should be **made an offence and clearly linked to the requirement to pay additional carbon tax on excess emissions**. But this cannot be the only penalty provision for non-compliance with carbon budgets. Provision should also be clearly made for **personal director liability and for authorisations to be revoked** when there is non-compliance with a carbon budget.
37. Unless significant penalties are attached to this failure, persons to whom carbon budgets have been allocated will simply “budget” for the excess tax rate (if any) or other fine, and exceed their budgets. The **costs of non-compliance have to exceed the benefits**, in order to avoid the Bill being toothless. This problem is exacerbated by the provision made in the Bill for an emitter to apply for the carbon budget to be cancelled or revised “under prescribed circumstances” (section 24(7)(b); especially since such circumstances are not prescribed in the Bill.
38. Given that a meaningful carbon tax (and, it seems, mandatory carbon budgets) have been deferred until 2026, it is even more important that such violations be severely penalised. It is also unacceptable that the **failure to implement a GHG mitigation plan is no longer an offence, nor does it attract any other penalty**. It is clearly meaningless to penalise the failure to submit such plan, but not the failure to implement it. Penalties should also be introduced in the Bill; for example: for providing false and/or misleading information under the Bill; for failure to comply with a SET (section 22); and for failure to comply with plans to phase out or phase down synthetic GHGs (section 25). These contraventions should also be listed as offences and/or be subject to administrative penalties, and the consequences of non-compliance must be significant.

¹⁰ See for eg: <https://www.imf.org/en/Topics/climate-change/climate-mitigation#:~:text=Carbon%20taxes%20are%20one%20of,2%C2%B0C%20or%20less;https://openknowledge.worldbank.org/bitstream/handle/10986/35624/Beyond-Mitigation-Quantifying-the-Development-Benefits-of-Carbon-Pricing.pdf?sequence=1&isAllowed=y>



Administrative penalties

39. Securing criminal sanctions is an arduous, time-consuming process.¹¹ Compliance with laws depends on the risk of being caught and convicted, and on the severity of punishment imposed,¹² all of which are currently minor risks in SA environmental law.¹³ Environmental crimes are both under-investigated and under-prosecuted. Government's substantial resource constraints – both human and financial – have also seriously hindered criminal compliance and enforcement endeavours. Many officials lack the required capacity and skills for effective compliance and enforcement and staff turnover is also high. If an offence is detected and a decision made to prosecute, the prosecutor must prove the violator's guilt beyond reasonable doubt in criminal court.¹⁴ Even if this onerous burden of proof is met and a fine is imposed, it is generally far too low to deter non-compliance - particularly when the benefits of breaking the law are significant.¹⁵
40. Administrative penalties avoid many of the main constraints of criminal enforcement – including: the burden of proof, and the time and complexity inherent in securing a criminal conviction. We recommend that administrative penalties be introduced into the Bill. To the extent that enabling legislation is required for this purpose, this should be prioritised.
41. Offenders of the Bill are corporate entities, and **substantial benefits can accrue to an offender who contravenes its provisions – and have, indeed, accrued to corporate entities who have never, to date, been penalised for their GHG emissions**. Therefore, to serve as a sufficient deterrent, penalties should be much higher than those currently contemplated in the Bill. For instance, they could be linked to a meaningful percentage of the activity's commercial value; such as a percentage of annual turnover or exports. In addition, as has been set out above, more violations must be identified as subject to penalties.

¹¹ Glazewski J (ed) Environmental Law in South Africa [26.4].

¹² Kidd M 'Criminal Measures' in Paterson A & Kotze L (eds) Environmental Compliance and Enforcement in South Africa: Legal Perspectives (2009) 241- 242.

¹³ Fourie M 'How civil and administrative penalties can change the face of environmental compliance in South Africa' 2009 (16)2 South African Journal of Environmental Law and Policy 95, 98-88; Kidd M Environmental Law (2011) 269-270,272-273; Craigie et al 'Environmental Compliance and Enforcement Institutions' in Paterson A & Kotze L (eds) Environmental Compliance and Enforcement in South Africa: Legal Perspectives (2009) 98; Paterson 'An Incentive-based Approach to Environmental Regulation' in Paterson A & Kotze L (eds) Environmental Compliance and Enforcement in South Africa: Legal Perspectives (2009) 306; Kidd M 'Criminal Measures' in Paterson A & Kotze L (eds) Environmental Compliance and Enforcement in South Africa: Legal Perspectives (2009) 242-243.

¹⁴ Glazewski J (ed) Environmental Law in South Africa [26.4]; Fourie M 'How civil and administrative penalties can change the face of environmental compliance in South Africa' 2009 (16)2 South African Journal of Environmental Law and Policy 95,120,124.

¹⁵ Hugo, R. 2014. Administrative penalties as a tool for resolving South Africa's environmental compliance and enforcement woes. University of Cape Town; Fourie M 'How civil and administrative penalties can change the face of environmental compliance in South Africa' 2009 (16)2 South African Journal of Environmental Law and Policy 95, 97-103,105,127.



Conclusion

42. The Bill clearly does not go far enough to ensure accountability for those who contribute significantly to and/or exacerbate the impacts of the climate crisis.
43. We call upon the Committee to introduce meaningful penalties and other compliance and enforcement provisions to ensure that the Bill is not only effective, but constitutional. We refer to the specific amendments to the Bill as proposed in the LAC submissions.
44. We would **appreciate an opportunity to make a submission to the Committee.**
45. Please let us know, should you require further information.

Yours faithfully

JUST SHARE

per: 

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