

14 August 2023

Ms Barbara Creecy

Minister of Forestry, Fisheries & the Environment

Ministry of Forestry, Fisheries & the Environment

By email: fshaik@dfpe.gov.za; llevendal@dfpe.gov.za; nmagagula@dfpe.gov.za

Dr Patience Gwaze

Chief Director: Air Quality Management and National Air Quality Officer

Department of Forestry, Fisheries & the Environment

By email: pgwaze@dfpe.gov.za

Dear Mesdames

Paragraph 12A of the List of Activities

1. Just Share is a non-profit shareholder activism organisation. We exercise the rights and powers of shareholders, using research, advocacy and activism, to advance social and environmental justice.
2. We are writing to seek clarity on your interpretation of paragraph 12A of the List of activities which result in atmospheric emissions which have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage, 2013 (“the List of Activities”).
3. We were very grateful when the List of Activities was amended on 31 October 2018, to make clear that:
 - 3.1. No further postponements of 2015/existing plant minimum emission standards (MES) would be granted (para 11D); and
 - 3.2. Only one postponement is permitted of 2020/new plant MES, and no such postponement will be valid beyond 31 March 2025 (para 11A).
4. We also noted the following amended and additional provisions regarding: once-off suspensions of compliance (paras 11B and 11C); what should be included in the para 11A and para 11B applications (para 12); the national air quality officer (NAQO) and licensing authority’s powers in relation to such applications (para 13); and the new para 12A addressing alternative limits/loads.





5. In paragraph 241.5.8 of the *Deadly Air* judgement of March 2022,¹ the Minister was directed - in making regulations to implement and enforce the Highveld Priority Area Air Quality Management Plan - to pay due regard, *inter alia*, to:

*the need to address the postponement and/or suspension of compliance with MES in the priority area; including to ensure that the atmospheric emission licences of all facilities that have not obtained once-off suspension of compliance and **that cannot meet new plant MES by April 2025** are withdrawn, and decommissioning and rehabilitation of those facilities is enforced. (our emphasis)*

6. Paragraphs 11-14 of the List of Activities all fall under the heading “Postponement of compliance timeframes” and para 11 introduces the provisions as providing for the postponement of compliance timeframes as contemplated in the “National Framework for Air Quality Management in the Republic of South Africa” (now referred to as “the 2017 National Framework for Air Quality Management in the Republic of South Africa (“the Framework”)).
7. Para 11 provides:

As contemplated in paragraph 5.4.3.5² of the National Framework for Air Quality Management in the Republic of South Africa, published in terms of Section 7 of this Act, an application may be made to the National Air Quality Officer for the postponement of the compliance time frames in paragraph (9) and (10) for an existing plant.

8. Paragraph 5.4.3.4 of the Framework sets out the conditions in terms of which “a proponent of a Listed Activity will be allowed to apply for a postponement or suspension of the compliance date and such an application will be considered”. It includes, amongst such conditions: “[o]ther requirements as may be specified by the [NAQO]”.
9. In other words, the requirements set out in the List of Activities should be read together with those in the Framework (which falls under the National Environmental Management: Air Quality Act, 2004 (AQA)’s definition of “this Act”), and any other requirements the NAQO may specify.
10. We also understand that para 12A is part of and must be read together with the postponement requirements. It **governs the emission limits that will apply during the postponement**. We understand **para 11A to refer to the timeframe of the postponement (which cannot be longer than 31 March 2025)**, and **para 12A to refer to the emission limits that will be applied during this postponement period**. Timeframes for the postponement and emission limits applicable during that timeframe cannot exist independently of one another.

¹ *Trustees for the time being of groundwork Trust and another v Minister of Environmental Affairs and others (United Nations Special Rapporteur on Human Rights and the Environment as Amicus Curiae)* [2022] JOL 53812 (GP), available at <https://cer.org.za/wp-content/uploads/2022/03/TRUSTEES-JUDGMENT-DATED-18-MARCH-2022-1.pdf>

² This should be para 5.4.3.4.



11. However, we have since realised that opinions on the application of para 12A are divided, and that both some representatives of industry and some decision-makers regard this as a self-standing provision, unrelated to the rest of the postponement provisions. We are aware that para 12A has been interpreted:
 - 11.1. as being able to be applied for at any time, for any number of times, and unrelated to any postponement application;
 - 11.2. as being able to govern periods beyond 31 March 2025; and
 - 11.3. as even being able to include alternative emission limits/loads that are weaker than the 2015/existing plant MES.
12. In our view, this interpretation **clearly undermines the purpose of the 2018 amendments to the List of Activities**, which was to put an end to “rolling postponements” and make clear that:
 - 12.1. **all facilities had to comply with the 2020/new plants MES by 31 March 2025** (assuming they had obtained a postponement until that date); **unless**:
 - 12.1.1. they had met the requirements for and obtained a **once-off suspension of compliance**, in which event the **facility could comply with 2015/existing plant MES until it was decommissioned** by the date in its detailed decommissioning schedule (**no later than 30 March 2030**).
13. There is also **no reasonable interpretation of an application in terms of para 12A that does not amount to a postponement**. As set out above, para 12A also falls under the heading “Postponement of compliance timeframes”. The 31 March 2025 deadline applies to such applications too.
14. **If para 12A is intended to allow facilities “that cannot comply with [emission standards for] a particular pollutant or pollutants” to receive additional leniency beyond 31 March 2025, then the prohibition in para 11A is completely superfluous.** Every single facility (except perhaps for any that do not comply with *any* emission standards) would simply instead apply in terms of para 12A, so that these applications are not limited to 31 March 2025 and/or to compliance with 2020/new plant standards.
15. In our understanding of the List of Activities, read with the Framework, **a facility seeking leniency beyond any postponement of compliance already granted to it, is legally required, whether it frames this application as one in terms of para 11A or para 12A:**



- 15.1. to seek condonation for applying later than 31 March 2019 (Framework para 5.4.3.4)³ (it is difficult to understand how good cause can be shown to grant condonation so many years later);
 - 15.2. to provide a detailed justification and reasons for the application (para 12(b));
 - 15.3. to prepare an atmospheric impact report, as prescribed⁴ (para 12(a), Framework para 5.4.3.4), and such AIR must demonstrate:
 - 15.3.1. that the facility's air emissions are not causing direct adverse impacts on the surrounding environment (Framework para 5.4.3.4); and
 - 15.3.2. where there is no ambient air quality standard (AAQS) for the pollutants in relation to which application has been made, that there is no material increased health risk (para 12A(c)(ii));
 - 15.4. to demonstrate that there is material compliance with the national AAQS (NAAQS) in the area for pollutant or pollutants applied for (para 12A(c)(i)) – the Framework's requirement is stricter: that "ambient air quality in the area is in compliance with the applicable [NAAQS]" (para 5.4.3.4);
 - 15.5. to demonstrate a previous reduction in emissions of the said pollutant or pollutants, measures and direct investments implemented towards compliance with the relevant new plant standards (para 12A(b); and
 - 15.6. to conduct public participation as required⁵ (para 12(c), Framework para 5.4.3.4).
16. We would be grateful to receive your confirmation that this is the correct interpretation of para 12A and the process to be followed. If you do not agree, we would appreciate receiving your reasons in this regard.
17. Kindly also provide us with a copy of the final report submitted to DFFE by the *Expert Panel to provide strategic and technical guidance towards effective management of SO₂ emissions from old and existing plants*.⁶ If such report will not be made available, please provide your reasons for this decision.
18. We look forward to your response at your earliest convenience, and ideally by 31 August 2023.

³ Although this deadline is only contained in para 11B of the List of Activities (which deals with once-off suspensions of compliance), we understand that the Minister and NAQO regard this deadline as also being applicable to paragraphs 11A and 12A, which we support.

⁴ This must comply with the Regulations prescribing the format of the Atmospheric Impact Report (*Government Gazette* No. 36904), as contemplated in Section 30 of AQA.

⁵ As specified in the National Environmental Management Act, 1998 and the Environmental Impact Assessment Regulations, 2014.

⁶ <https://cer.org.za/wp-content/uploads/2020/05/Annexure-1-ToR-SO2-Expert-Panel.pdf>



Yours faithfully
JUST SHARE

Per:

Robyn Hugo
Director: Climate Change Engagement
rhugo@justshare.org.za