Briefing

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Polluters won’t pay: compliance & enforcement void in the Climate Change Bill & draft carbon budget regulations

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1. Introduction

On 13 February 2024, Just Share provided input in a workshop hosted by the Department of Forestry, Fisheries and the Environment (DFFE) on the forthcoming draft carbon budget regulations ("the draft regulations").

The Climate Change Bill ("the Bill") is currently before the National Council of Provinces. Section 27(2)(a)(i) of the Bill requires the Minister of Forestry, Fisheries and the Environment ("the Minister") to make regulations 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 greenhouse gas mitigation plan, and all matters related thereto".

The Bill states that a regulation made in terms of the Climate Change Act may provide that any company that contravenes or fails to comply with a provision of the Act commits an offence and will be liable, upon conviction, to the penalties contemplated in section 49B(2) of the National Environmental Management Act, 1998 (NEMA).[1]

The purpose of the DFFE workshop was to solicit input to inform the draft regulations. After briefly setting out the relevant background, this briefing summarises Just Share's presentation at the workshop.

In short, Just Share argues that meaningful penalties for the failure to comply with a carbon budget and/or greenhouse gas (GHG) mitigation plan must be included in the draft regulations (especially as it is highly unlikely that these will be included in the Climate Change Act at this stage). This means that the regulations must provide that the failure to comply with certain provisions of the Act is an offence and/or will be subject to administrative penalties.

2. No penalties for violation of carbon budgets in the Climate Change Bill

The focus of Just Share's comments on the Climate Change Bill, including in the National Assembly (in May 2022 and in May 2023) and most recently in the NCOP in January 2024), has been the Bill's lack of adequate compliance and enforcement mechanisms. The submissions have emphasised that this failure significantly undermines the effectiveness of the Bill's mitigation architecture.

List of greenhouse gases and list of greenhouse gas-emitting activities

Section 23 of the Climate Change Bill requires the Minister to publish:

- a list of GHGs which the Minister reasonably believes cause or are likely to cause or exacerbate climate change; and
- a list of activities which emit, or have the potential to emit, one or more of these listed GHGs.

[1] Section 27(3) of the Bill.

The list of activities must, *inter alia,* set out quantitative GHG emission thresholds to identify companies to be assigned a carbon budget. These companies are required to submit GHG mitigation plans to the Minister.

Section 23 also states that these thresholds: must be based on the availability of feasible mitigation technology, and must take into account any opportunities and constraints to implementation of policies and measures.

Carbon budgets and GHG mitigation plans

In terms of section 24 of the Climate Change Bill, the Minister must allocate a carbon budget to any entity that conducts an activity listed in terms of the list of GHG-emitting activities. When allocating carbon budgets, the Minister must take all relevant considerations into account, including (a) the socio-economic impacts of imposing the carbon budget; (b) the best available science, evidence and information; (c) the best practicable environmental options available and alternatives that could be taken to mitigate GHG emissions; (d) national strategic priorities; (e) the alignment of the carbon budgets with the national GHG emissions trajectory - noting that the cumulative amount of GHG emissions which the carbon budgets represent are not equivalent thereto;[2] and (f) progress on the implementation of the GHG mitigation plans.

A carbon budget must have a duration of at least three successive five-year periods; and must specify the maximum amount of GHG emissions that may be emitted during the first five-year period.

There is no public participation prescribed in the process of allocating carbon budgets.[3] The Climate Change Bill indicates that "the Minister must follow a fair procedure prior to the issue of the carbon budget including consultation with the person to whom a carbon budget is allocated".[4]

A company allocated a carbon budget must prepare and submit to the Minister, for approval, a GHG mitigation plan, which describes the mitigation measures it proposes to implement in order to remain within the allocated carbon budget. At the time when the carbon budget is assigned for the first mandatory carbon budget cycle, all approved pollution prevention plans as contemplated in section 29 of the National Environmental Management: Air Quality Act, 2004 and the National Pollution Prevention Plans Regulations, 2017, must be deemed to be GHG mitigation plans.

Section 24 states that a company allocated a carbon budget must:

- implement the approved GHG mitigation plan;

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[2] According to section 21 of the Bill, this trajectory must: (a) specify the national GHG emissions reduction objective represented by a quantitative description of the total amount of GHG emissions projected to be emitted during a specified period in South Africa; (b) be informed by relevant evidence-based and latest information regarding the total current and projected amounts of GHG emissions in the country and (c) be consistent with the principles and objectives of the Climate Change Act and South Africa's international obligations. Until the Minister publishes the national GHG emissions trajectory, the latest updated Nationally Determined Contribution (NDC) (in terms of the Paris Agreement) serves as the trajectory. The GHG emissions represented by the carbon budgets will not match the NDC/emissions trajectory as not all GHG-emitting activities will be represented by carbon budgets – only those that meet the GHG emission threshold identified in the list of activities.

[3] Section 29 of the Bill.

[4] Section 28.

- monitor annual implementation of the plan in accordance with the prescribed methodology;
- evaluate progress on the allocated carbon budget;
- annually report on the progress against the allocated carbon budget to the Minister in the manner prescribed; and
- in the event that such reporting indicates that the company "has failed, is failing or will fail to comply with the allocated carbon budget, provide a description of measures" it will implement in order to remain within the allocated carbon budget. (Just Share has pointed out in our comments on the Bill that it is nonsensical to require a description of measures to remain within the budget after the budget has already been exceeded and its period has been concluded).

The only offence in the Climate Change Bill related to carbon budgets and GHG mitigation plans is for the failure to prepare and submit a GHG mitigation plan to the Minister.

A person convicted of this offence is liable to 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, to a fine not exceeding R10 million and/or to imprisonment for a period not exceeding 10 years.[5]

The failure to *implement* or to comply with the GHG mitigation plan is not penalised in the Bill, nor is the failure to comply with a carbon budget.

As set out in section 4, because the Climate Change Act will be a specific environmental management Act (SEMA), various compliance and enforcement provisions of NEMA will also apply to it, including important powers of environmental management inspectors, and court orders available on conviction for offences in terms of the Climate Change Act and any regulations in terms of the Act.

3. Carbon tax as a compliance instrument

DFFE and National Treasury appear to be intending to address the issue of the exceedance of a carbon budget by making provision for the payment of extra carbon tax on the emissions that exceed the budget. In other words, no penalties are intended to be added to the Climate Change Bill or the draft regulations to address the consequences of violating a carbon budget or a GHG mitigation plan.

The 2022 Budget Review stated that:

> *The mandatory carbon budgeting system comes into effect on 1 January 2023 at which time the carbon budget allowance of 5 per cent will fall away. To address concerns about double penalties for companies under the carbon tax and carbon budgets, it is proposed that a higher carbon tax rate of R640 per tonne of carbon dioxide equivalent will apply to greenhouse gas emissions exceeding the carbon budget. These amendments will be legislated once the Climate Change Bill is enacted.*

[5] Section 32 of the Bill.

We explain below why the reference to “double penalties” is problematic.

DFFE has also indicated that its intention is to state in the draft regulations that exceedances of carbon budgets will be addressed through excess carbon tax, for which provision will be made in the Carbon Tax Act, 2019 (CTA).

The 2024 Budget Review stated that:

> *The Climate Change Bill remains under consideration in Parliament. The 2022 Budget announced a higher carbon tax rate of R640 per tonne of CO_2 equivalent on all greenhouse gas emissions exceeding the carbon budget. The amendments were to be legislated once the Climate Change Bill was enacted. It is now proposed that the higher tax rate on emissions exceeding carbon budgets come into effect after the bill is enacted and the Department of Forestry, Fisheries and the Environment gazettes the relevant regulations. Implementation is expected from 1 January of the calendar year after the legislation is finalised.*
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> *The carbon budget allowance of 5 per cent would fall away once the mandatory carbon budgeting system comes into effect. Government proposes that once that allowance falls away, there is an equivalent increase of the carbon offset allowance by 5 per cent to encourage investment in green energy projects.*

To date, certain companies have been voluntarily participating in the carbon budget process and receiving a 5% carbon budget allowance in terms of the CTA (in addition to the significant other allowances applicable in terms of the CTA).[6] Although the intention, as reflected in the 2022 Budget Review, was for mandatory carbon budgets to apply from January 2023 - on the understanding that the Climate Change Act would be in force by then - DFFE has subsequently advised that mandatory carbon budgets will now only be implemented from January 2026. The draft regulations must be finalised and published for implementation before then. The carbon budget allowance in the CTA has been extended until 31 December 2024, and will presumably be extended again by National Treasury, until 31 December 2025, if mandatory carbon budgets apply only from January 2026.

These delays are concerning, particularly because:

- the carbon tax has already been delayed for a decade;
- there is a low tax rate for phase 1;
- there are enormous tax-free allowances for phase 1;
- there is a low escalation rate for the tax; and
- phase 1 of the tax, with its significant tax-free allowances, has been extended by three years and phase 2 will now only apply from January 2026.

Before this plan to use the CTA as a compliance mechanism for the carbon budgets could reach fruition, a number of steps would have to be completed:

[6] In terms of schedule 2 of the CTA, many fossil fuel-related activities can receive up to 95% allowances.

- the Climate Change Act, already many years overdue, would have to be promulgated after the Parliamentary process has concluded;
- the carbon budget regulations would need to be drafted, put out for public comment, and published for implementation;
- carbon budgets would have to become mandatory; and
- the CTA would have to be amended to make provision for the excess tax for budget exceedances, put out for public comment, and thereafter published for implementation.

The excess carbon tax would only apply from the first year of the carbon budget commitment period which is likely to be 2026. DFFE has indicated that National Treasury and SARS will still make a determination as to whether accounting in relation to the tax shall be done annually or at the end of the commitment period. In other words, if mandatory carbon budgets apply from 2026, for carbon tax accounting purposes, National Treasury and SARS will determine whether compliance with the carbon budget shall be assessed on an annual basis, or only after the end of the first five-year commitment period of the mandatory budget (so post 2030, if mandatory carbon budgets apply from 2026).

Industry push-back

Organised business has been lobbying against and pushing back on many aspects of the carbon tax for years. In addition to complaints about the rate of the tax, organised business has argued that no tax should be paid on emissions **within** the carbon budget, and that it should only pay tax after the first five-year carbon budget period, rather than every year. It is also argued that any kind of penalty for exceedance of a carbon budget would amount to an unlawful “double penalty” in circumstances where excess tax will be levied for this violation. As set out below, Just Share strongly disagrees with this view.

Fossil fuel companies and industry associations have also used arguments about the claimed need for “integration and alignment” between carbon budgets and the carbon tax as an anti-climate lobbying mechanism to delay regulation. This argument is also addressed below.

4. Penalties for exceeding carbon budgets do not constitute “double jeopardy”

In the 13 February 2024 workshop, Just Share focused on the need for the draft regulations to ensure meaningful consequences for the failure of an emitter to comply with its carbon budget and/or GHG mitigation plan, and the impact that anti-climate lobbying has had in delaying and weakening climate change regulation.

Just Share highlighted that there is strong consensus that taxing carbon emissions (at a rate related to GHG emission reductions commensurate with the best available climate science) is a powerful tool to change behaviour by altering economic incentives. However, on its own, excess tax on emissions exceeding a carbon budget will not be an adequate disincentive to ensure Paris-aligned emission reductions. As set out above, it appears that this excess tax may only be calculated and payable after 2030, at the end of the first five-year budget commitment period.

Anti-climate lobbying

Independent research demonstrates that, in South Africa, obstructive corporate climate policy engagement is putting the country's climate goals in jeopardy. To date, fossil fuel companies and industry associations have played a major role in delaying ambitious climate policy and legislation like the Climate Change Act and the CTA. Years of effective lobbying have also created and reinforced harmful and false arguments that serve to avoid and delay climate action and to preserve the status quo. The lack of lobbying regulation and the lack of voluntary lobbying disclosure have significantly aided these efforts.

Although delaying the second phase of the carbon tax was intended "to send an important price signal to companies to continue to transition their activities towards low carbon cleaner business practices and to take early action", there was still significant pushback from organised business when the most recent amendments to the CTA's tax rate were proposed.

In September 2022, Business Unity South Africa (BUSA), the Energy Council of South Africa (ECSA), the Minerals Council South Africa, Business Leadership South Africa (BLSA), the South African Petroleum Industry Association (SAPIA), and the Energy Intensive Users Group (EIUG), published an "organised business joint position on carbon tax", in which they called for, amongst other things: government to consider a higher carbon price only "post 2035"; a delay in annual carbon tax increases until "at least 2030"; and the retention and increase of tax-free allowances for big emitters.

This clear anti-climate lobbying tactic was roundly rejected by National Treasury, which criticised organised business for its "lack of vision" and "lack of leadership." Although Treasury published its amendments to the tax rate, standing firm against industry lobbying, the increases to the tax rate remain far too low to incentivise a just transition to a low-carbon economy and to ensure that the "polluter pays".

To be effective, the carbon tax rate must be related to GHG emission reductions commensurate with the best available climate science. The fact that the most recent low carbon tax increases will not incentivise Paris-aligned climate action is supported by various expert views, including 2021 research by the National Business Initiative.[7] In addition, there is no doubt that future efforts to increase the carbon tax will continue to be vigorously opposed by fossil fuel companies and industry associations.

Just Share pointed out that if the carbon tax - and the carbon tax on excess emissions above carbon budgets to be set only after the Climate Change Act and carbon budget regulations are enacted - and are not set at rates high enough to be an adequate disincentive to emissions, emitters will simply "budget" for the payment of the taxes. Emissions will continue to increase, or, at best, not reduce at anything close to the scale and rate required. This would severely limit the prospects of the Climate Change Act achieving its crucial objectives, which include "to enable the development of an effective

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[7] See annexure 1 of https://justshare.org.za/wp-content/uploads/2022/11/221114-Comments-on-proposed-amendments-to-the-Carbon-Tax-Act-2019-Select-Committee-on-Finance.pdf and https://www.youtube.com/watch?v=WGziNg_LAtc

climate change response and a long-term, just transition to a low-carbon and climate-resilient economy and society for South Africa in the context of sustainable development".[8]

The aims of the Climate Change Act will not be achieved unless the chief GHG emitters drastically and urgently reduce their emissions. This is not controversial. Yet it is clear from comments on the Climate Change Bill that emitters have vigorously opposed limitations on their emissions, threatening dire socio-economic consequences should they be required to reduce emissions faster than they would like. This despite the fact that, as set out above, "the socio-economic impacts of imposing the carbon budget" is one of the issues that the Minister is required to consider when carbon budgets are allocated.

Voluntary measures and incentives

There are also several references in industry comments on the Climate Change Bill to the need for *incentives* to comply with budgets, rather than penalties for failing to comply. Of course a primary purpose of penalisation is its deterrent effect. Once polluters are forced to internalise the enormous costs of their emissions – which are currently offloaded onto the fiscus and the taxpayer - they will decarbonise and transition to lower-carbon operations.

In some six years' time, climate science requires emissions to be halved to give the world the best chance of keeping emissions rise as close to 1.5 degrees Celsius as possible. Instead, global emissions continue to rise and the timeframe to take meaningful climate action to avoid the worst impacts of the climate crisis is rapidly narrowing. Every year, the impacts of climate change increase, and the costs to society of the damage caused by extreme weather events escalates.

What is overwhelmingly clear is that 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. Companies have been aware of the imperative to decarbonise for over two decades and have consistently failed to take the requisite action at the pace required to reduce emissions in line with climate science. Their claims that they will voluntarily do so in the future should simply not be taken seriously.

"Double penalties" and integration and alignment

There is currently no penalty in the Climate Change Bill for exceeding a carbon budget or failing to implement a GHG mitigation plan. It also appears that DFFE does not intend to include any penalties in the draft regulations. Instead, the proposal is that the CTA will be amended to make provision for additional tax to be paid – at a prescribed rate - on emissions that exceed the carbon budget.

The payment of tax is not a penalty. It is not correct, as organised business claims, that penalising the exceedance of carbon budgets and/or failing to implement GHG mitigation plans through administrative and/or criminal penalties, as well as taxing excess emissions, constitutes "double penalisation".

[8] The long title of the Climate Change Bill.

There is no legal impediment to administrative penalties, criminal penalties and taxation operating in tandem. Legislation which combines criminal and administrative penalties is common.[9] A single act may give rise to more than one consequence. This is not tantamount to "double jeopardy"[10] – as argued in some of the industry comments on the Climate Change Bill.[11]

Comments on the Climate Change Bill and other public advocacy from organised business also argues that there is a need for "integration and alignment": between the carbon tax and carbon budgets, but also - especially for Sasol – between air quality and climate change regulation. These arguments should be very carefully interrogated and all the implications assessed. For instance, Sasol has recently indicated that its ability to comply with its GHG emission reduction targets is contingent on it being granted leniency to regulate its toxic emissions of sulphur dioxide (not a GHG) through an alternative load-based emission limit. The latter is currently the subject of an appeal to the Minister.

Although it is carefully designed to sound eminently reasonable and practical, there is no evidential basis to support the assertion that climate regulation must be delayed until there is "alignment" between carbon budgets and the carbon tax. Practically speaking, neither the tax nor the budget has to "wait" for the other, and all emissions reduction time lost is precious.

Mitigation of GHG emissions can and should happen independently in the carbon budget and carbon tax processes. No "alignment" is required. Both carbon budgets and carbon tax are related to the size of a company's GHG emissions: reduced emissions mean that compliance with the carbon budget is easier, and less tax is payable.

These arguments by business have, however, been instrumental in ensuring multi-year delays both in the implementation of an effective carbon tax and in the promulgation of a robust Climate Change Act. They have also resulted in significant delays in the implementation of *any* compliance and enforcement regime.

If the intention is to limit any enforcement of GHG mitigation plans and carbon budgets to the CTA (as seems to be the case), and even assuming that the excess tax is set high enough to be an adequate disincentive for repeat violations, it will be many years before this tax is levied. In addition to the many time-consuming procedural steps that would need to be completed first, carbon budgets also have a long duration (three five-year periods). In the interim, there is no consequence for emitters that continue business-as-usual or even increase their GHG emissions - apart from a carbon tax that experts confirm will not incentivise Paris-aligned climate action.

This waiting-for-alignment argument is just another example of the harmful anti-climate lobbying narrative that has served to delay climate action and preserve vested interests.

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[9] See for example, the Financial Intelligence Centre Act, 2001 and the Financial Sector Regulation Act, 2017.
[10] See, for example: *Pather and another v Financial Services Board and others* [2017] 4 All SA 666 (SCA); *Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and Another* [2005] (6) BCLR 613 (CAC); *Motloung and another v Commissioner for the South African Revenue Services and others* [2022] JOL 56320 (FB).
[11] In particular by the Minerals Council of South Africa.

Compliance and enforcement benefits lost

There are other major disadvantages of the intention not to penalise the exceedance of carbon budgets or the failure to implement GHG mitigation plans. The Climate Change Act (and any regulations made thereunder) is a SEMA,[12] which means that various provisions of NEMA apply to it – including NEMA's enforcement and compliance provisions.[13]

However, if the Climate Change Act does not make compliance with carbon budgets and/or implementation of GHG mitigation plans a positive obligation, and failure to comply with these instruments an offence, then several valuable NEMA provisions will not be available.

DFFE is also in the process of drafting an Administrative Penalties Bill, which, once implemented, will amend NEMA to provide for the introduction of both fixed and variable monetary penalties into environmental law. Since the current wording in the Climate Change Bill fails to clearly make compliance with carbon budgets and/or GHG mitigation plans a positive obligation, there is also no clear indication that DFFE will enforce and sanction any such non-compliance through administrative penalties.

This also means that the powers of environmental management inspectors as set out in NEMA – such as to issue compliance notices for non-compliance with legal provisions or authorisations– are reduced. For instance, an inspector will not be able to issue a compliance notice for the failure to meet a carbon budget and/or to implement a GHG mitigation plan, unless compliance with the budget and/or plan is legally required. Nor, in the event of non-compliance with a compliance notice, will the Minister be empowered to revoke or vary the budget and/or plan and recover the costs of taking "any necessary steps" from the company that has failed to comply.[14] Various other powers that environmental management inspectors have in relation to offences and breaches of laws and instruments issued in terms of legislation[15] would also not be available.

Since the violation of a carbon budget and/or GHG mitigation plan is not currently an offence, it is also not deemed to be included in Schedule 1 to the Criminal Procedure Act, 1997 (CPA).[16] Schedule 1 offences are those in relation to which arrests can be carried out, both by a peace officer and a private person, without a warrant.[17]

If the breach of a carbon budget and/or GHG mitigation plan were made an offence, that would also empower a court, on conviction, to, *inter alia*: withdraw any authorisation issued to the offending company if the rights conferred by the authorisation were abused; disqualify the offender from obtaining an authorisation for up to five years; and order that all competent authorities authorised to issue permits or other authorisations be notified of the disqualification.[18]

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[12] Section 5 of the Bill.
[13] See chapter 7 of NEMA.
[14] Section 31N of NEMA.
[15] Sections 31H – 31K of NEMA.
[16] Section 31A of NEMA.
[17] Section 40 and 42 of the CPA deals with these circumstances.
[18] Section 34C of NEMA.

If these breaches were included in NEMA's Schedule 3, several additional options would be available to a court on conviction, including for: the recovery of loss or damage resulting from the offence; the award of damages, compensation or a fine in the amount of the monetary value of any advantage gained or likely to be gained by the offender; remedial measures to be undertaken; reasonable costs incurred in the investigation and prosecution of the offence; employers' liability; and directors' liability.[19]

In short, not criminalising the failure to comply with a GHG mitigation plan and/or carbon budget and not specifically requiring compliance with these instruments means that a host of powerful enforcement provisions are not available to DFFE.

The carbon budget and mitigation plan regulations (or the Climate Change Bill) should state:

- *that compliance with a carbon budget and a GHG mitigation plan is legally required; and*
- *that non-compliance with these instruments is a criminal offence.*

In addition, Schedule 3 of NEMA should be amended to include this offence, the existing offences in the Bill, and any other offences that are included in the draft regulations and the Bill.

5. Conclusion

Failure to comply with a carbon budget should be considered an egregious contravention, with significant consequences for climate action. Offenders of the Climate Change Act (once enacted) are corporate entities, and substantial benefits accrue to an offender that contravenes its provisions. Indeed, substantial benefits have already accrued to corporate entities which have never, to date, been penalised for their GHG emissions, apart from paying a low carbon tax which has had no impact on emissions, despite the harm that these emissions cause to the public and to the environment.

The costs of non-compliance must exceed the benefits to avoid the Climate Change Act being toothless. Unless significant penalties are attached to the failure to comply with a carbon budget and/or GHG mitigation plan, emitters to whom carbon budgets have been allocated will simply "budget" for any excess tax rate (or other fine) and exceed their budgets with impunity.

In short, the carbon budget regulations must include meaningful penalties and other compliance and enforcement provisions to ensure that the Climate Change Act is effective and that Paris-aligned emission reductions are achieved. The draft regulations cannot simply defer all enforcement and compliance of carbon budgets and mitigation plans to be addressed through the CTA.

Failing to take more significant steps to reduce emissions in the short and medium term, will require steeper and deeper emission reduction cuts in future, with more severe consequences for our economy and the majority of people in South Africa. These draft regulations must limit these prospects.

End

[19] Section 34 of NEMA.