Centre *for* Environmental Rights

Advancing Environmental Rights in South Africa

SUBMISSIONS ON THE DRAFT AIR QUALITY MANAGEMENT BY-LAW **"ANNEXURE 3"**

1 Our clients herein make the following submissions on the draft by-law.

2 Kindly take note that where recommended amendments or additions to the provisions of the by-law are included, these are underlined and in bold. Suggested deletions are reflected in bold and in brackets.

3 With regard to the public participation procedures to be followed in terms of these by-laws, we point out that the provisions of PAJA - which require adequate notice of the nature and purpose of any proposed administrative action and a reasonable opportunity to make representations[1] - and Chapter 4 of the Local Government Municipal Systems Act, 2000 (MSA) must be followed by the Municipality in relation to all decisions taken and authorisations granted and/or amended in terms of the by-laws. Section 17(2) of the MSA provides that *"[a] municipality must establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality, and must for this purpose provide for - … notification and public comment procedures, when appropriate; … public meetings and hearings by the municipal council and other political structures and political office bearers of the municipality, when appropriate …"* . We are advised that the Municipality has adopted a public participation policy, but have not been able to access a copy of this policy. Our clients submit that this policy must comply not only with the MSA, but also with the requirements of PAJA.

Submissions on Chapter 1 – Interpretation and Duty of Care

4 It is submitted that the heading for Chapter 1 in the contents page should read: "*Chapter 1: Interpretation and Duty* ***of*** *Care*".

5 It is noted that definitions for "landscaping activities" and "recreational outdoor activities", as recommended in the preliminary submissions, have not been included. Our clients persist with the recommendation that these activities should be defined.

6 It is recommended that a definition of "food chain" as referred to in and in the context of section 6(3)(d) of the by-law be included for the sake of clarity.

7 It is noted further that the list of legislation we recommended for section 3 of the draft by-law has not been included. We stand by our submissions that the additional legislation recommended, such as the National Veld and Forest Fire Act, 1998 - which is relevant to section 16 of the draft by-law - and the National Environmental Management: Waste Act, 2008 - which is relevant to section 17 - should be included.

Submissions on Chapter 2 – Planning and Local Emissions

8 It is noted that section 5 makes provision for an air quality management plan (AQMP) and that it provides that the AQMP is to be binding on the Municipality.[2]

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[1] S3(2)(a) and (b), Promotion of Administrative Justice Act, 2000.

[2] S5(2) Draft By-law (Clean Version) 3 May 2015.

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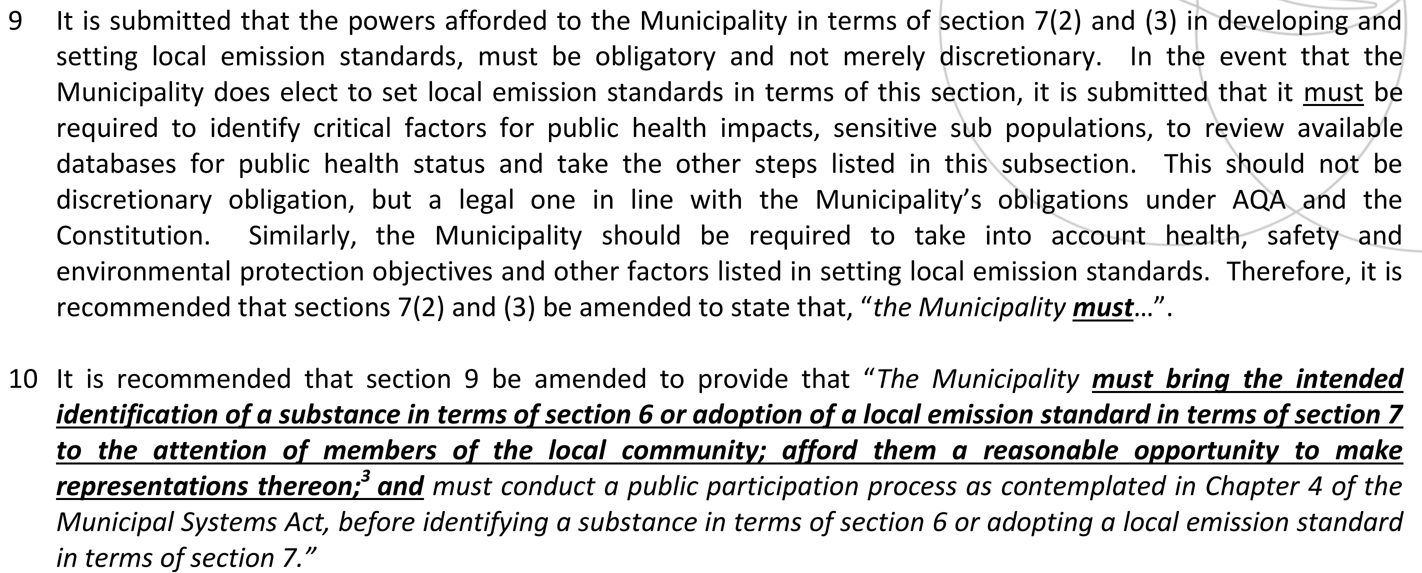

9 It is submitted that the powers afforded to the Municipality in terms of section 7(2) and (3) in developing and setting local emission standards, must be obligatory and not merely discretionary. In the event that the Municipality does elect to set local emission standards in terms of this section, it is submitted that it <u>must</u> be required to identify critical factors for public health impacts, sensitive sub populations, to review available databases for public health status and take the other steps listed in this subsection. This should not be discretionary obligation, but a legal one in line with the Municipality's obligations under AQA and the Constitution. Similarly, the Municipality should be required to take into account health, safety and environmental protection objectives and other factors listed in setting local emission standards. Therefore, it is recommended that sections 7(2) and (3) be amended to state that, "*the Municipality* ***<u>must</u>***…".

10 It is recommended that section 9 be amended to provide that "*The Municipality* ***<u>must bring the intended identification of a substance in terms of section 6 or adoption of a local emission standard in terms of section 7 to the attention of members of the local community; afford them a reasonable opportunity to make representations thereon;[3] and</u>*** *must conduct a public participation process as contemplated in Chapter 4 of the Municipal Systems Act, before identifying a substance in terms of section 6 or adopting a local emission standard in terms of section 7."*

<u>Submissions on Chapter 3 – Specific Regulatory Measures</u>

11 It is submitted that section 11, which deals with small boilers - insofar as the Municipality is entitled to require an authorisation to install and operate a small boiler - should place an obligation on a person authorised to operate a small boiler to install emission measuring equipment and to conduct emissions monitoring as and when required in terms of AQA and its applicable regulations, in this case the Declaration of a Small Boiler as a Controlled Emitter and Establishment of Emission Standards.[4]

12 With regard to the provisions on dust emissions in section 14, it is noted that:
- 12.1 it is unclear what would constitute "*emergency maintenance activities*" in terms of section 14(4)(a). Specific requirements for such activities should be listed and provision should be made for any such activities to last for a specified period of time only. It is submitted that maintenance activities, even in emergencies, cannot constitute a justification for harmful dust emissions;
- 12.2 section 14(4)(c) should read "horse **<u>trails</u>**" not "trials" as it currently stands; and
- 12.3 it is unclear what is meant by "*any other path that has been designated as an exclusive use area for purposes other than travel by a motor vehicle*." It is recommended that this provision be reworded to provide more clarity on the instances where this provision would apply.

13 With regard to section 16 - emissions caused by open burning - it is unclear how any open burning intended to be conducted by the Municipality itself would be regulated. It is submitted that:
- 13.1 any burning by the Municipality should not be exempt from regulation and that section 16(1) should be amended to, at least, require that the Municipality give reasonable prior written notice of any proposed burning activities to adjacent property owners/occupiers; and
- 13.2 sections 16(2) and (3) should be amended to read that "*the Municipality may not authorise,* ***<u>nor itself conduct, any</u>*** *open burning …"*

14 The provisions of section 16(4) are vague and will be difficult to implement in light of the undefined and broad terms such as "*recreational outdoor activities*". It is recommended that "recreational outdoor activities" be defined in section 1 of the by-law and that it be made clear that this provision applies <u>only</u> to camp fires and fires used solely for outdoor cooking and other recreational purposes; for ceremonial occasions; or for human warmth and comfort and which do not create a nuisance and do not use synthetic materials or refuse for fuel.

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[3] S3(2)(b) Promotion of Administrative Justice Act, 2000.

[4] Government Notice 831, Government Gazette 36973 of 1 November 2013.

Submissions on Chapter 4 – Authorisation Procedures

15 While it is noted that section 1(4) of the draft by-law expressly recognises that any administrative processes conducted in terms of the by-law must be conducted in terms of PAJA, it is nevertheless fundamental, as submitted above, that the public participation process followed in the authorisation application process and the process for the amendment of an authorisation is consistent and fair. In this regard it is necessary that the requirements of PAJA and chapter 4 of the MSA - and any appropriate public participation policies or guidelines adopted by the Municipality in terms of section 17 of the MSA – are applied.

16 In light of the above, it is recommended that section 26(2) be amended to read "*[i]f the environment or the rights or interests of other parties are likely to be adversely affected by a decision on the application, the applicant must conduct a public participation process,* ***which brings the application to the attention of interested and affected parties and affords them a reasonable opportunity to make representations, and which complies with the provisions of Chapter 4 of the Local Government Municipal Systems Act, 2000 and with the Promotion of Administrative Justice Act, 2000***".

17 It is recommended that subsection 27(1) be amended:
   17.1 to provide that "*the Municipality* ***must****, in writing, reject an application that is not in order because - …*"; and
   17.2 to include the following subsection, "**(d)** ***it is in any other respect incomplete, contains errors or does not meet the requirements of section 26***"

18 It is recommended that section 29(3)(a) be amended to provide, "*… to conduct a public participation process* ***which brings the proposed amendment to the attention of interested and affected parties and affords them a reasonable opportunity to make representations and which is in accordance with the provisions of chapter 4 of the Local Government Municipal Systems Act, 2000 and with the Promotion of Administrative Justice Act, 2000***".

19 It is recommended that section 29(6)(c) also be amended to provide, "*(c)conduct an appropriate public participation process,* ***in accordance with the provisions of chapter 4 of the Local Government Municipal Systems Act, 2000 and the Promotion of Administrative Justice Act, 2000*** *to bring the proposed amendment to the attention of interested and affected parties* ***and to afford parties a reasonable opportunity to make representations thereon***."

20 It is noted that section 30, titled "Rectification of the unlawful commencement of an activity" provides for "rectification" applications to be made to the Municipality by persons conducting an activity without the requisite authorisation. With regard to this section, it is submitted that:
   20.1 The CER and its clients have, for several years, maintained and provided evidence[5] to show that ex post facto authorisation provisions, like section 24G of National Environmental Management Act, 1998 (NEMA) and section 22A of AQA are inappropriate, unnecessary, create perverse incentives and are subject to abuse. It will require a significant amount of additional work for already over-stretched officials who now have to consider applications, ask for additional information, ensure public participation (see paragraph 20.8 below), impose and administer fines; moreover, many of the decisions taken will be challenged on appeal and/or review. In summary, not only are such provisions burdensome, but have been shown to undermine the entire regulatory system by creating a quick "bypass" of the prescribed application system that companies – many of whom will easily be able to afford the fine - are quick to exploit.
   20.2 Instead, based on international best practice, we submit that, if it is discovered that a company has commenced illegally with listed activities, that company must stop and mitigate the damage, and must accept punishment in the form of criminal prosecution and/or administrative penalty. After completion of

[5] Some copies of the submissions are available at http://cer.org.za/hot-topics/section-24g. Others can be made available to the Municipality on request.

enforcement action, the company may apply for authorisation following the proper procedure. In that case, it is appropriate for the following mitigating factors to be taken account in the determination of a criminal sentence and/or an administrative penalty, for example: the fact that the offender voluntarily disclosed that it unlawfully commenced the activity; payment of an "administrative fine"; and steps taken by the company in mitigation.

20.3 We therefore strongly urge the Municipality to scrap this provision in its entirety.

20.4 If however, section 30 is retained in the by-law (which we submit would be a grave and irresponsible step, given the evidence provided above):

20.4.1 it is necessary that this provision state clearly – that it does not apply to activities listed in terms of section 24 of NEMA,[6] or activities listed in terms of section 21 of AQA, which would require an environmental authorisation under NEMA and/or an atmospheric emission licence (AEL) in terms of AQA. For those activities requiring an AEL, the Municipality would be the licensing authority in terms of AQA.[7]

20.4.2 Insofar as the activities referred to in section 30 pertain to activities that would also require an AEL and/or environmental authorisation, however, it is necessary that this section be aligned with section 24G of NEMA and/or section 22A AQA.

20.4.3 The heading of this section should be changed to "**<u>Consequences of unlawful commencement of activity</u>**". This is in keeping with the equivalent provisions in sections 24G of NEMA and 22A of AQA. Even if ex post facto authorisation is granted, the activity is not being "rectified" – it remains unlawful and an offence, but it is merely authorised prospectively (as appears from section 30(3)(b)). The use of the word "rectification" creates confusion.

20.4.4 Section 30(5) provides that "[i]*f the Municipality has established a system for imposing and collecting administrative fines, a person contemplated in subsection (1) must pay an administrative fine, which may not exceed R5 million and which must be determined by the Municipality, before the Municipality may act in terms of subsection (3)."* It is submitted that section 30 can and must only apply in circumstances where the Municipality <u>has</u> established a system for imposing and collecting administrative fines without the punitive aspect of the administrative fine attached to such an application for retrospective authorisation, this provision undermines the entire purpose of the prohibitive requirement even more than with the fine! In addition, experience with section 24G has shown that far more than a "system" is required – amongst other thing, there needs to be a policy (DEA and provinces use a calculator) to ensure the imposition of proportional and consistent fines. In other words, it is submitted that:

20.4.4.1 section 30(1) should be amended to provide as follows:

"*A person who* ***<u>commences, undertakes or</u>*** *conducts an activity without an authorisation required in terms of this By-law may apply to the Municipality for [**rectification]** **<u>such authorisation, provided that the Municipality has established a policy for imposing and a system for collecting administrative fines.</u>***"

20.5 In addition, since a section 30 applicant commits an offence every time the applicant commences an activity without authorisation, every such instance should be subject to the maximum fine. In other words, an applicant should not be permitted to limit its potential fine to R5 million in circumstances where it applies for ex post facto authorisation for having commenced more than one activity without the Municipality's permission - the maximum administrative fine should apply to each such unlawfully-commenced activity. It is therefore submitted that:

20.5.1 section 30(5) should be amended to provide as follows:

"[i]*f the Municipality has established a policy for imposing and a system for collecting administrative fines, a person contemplated in subsection (1) must pay an administrative fine, which may not exceed R5 million* ***<u>per activity commenced, undertaken or conducted</u>****, and which must be determined by the Municipality, before the Municipality may act in terms of subsection (3).*"

[6] The listed activities published under GN R 983, R 984 and R 985 of Government Gazette 38282 of 4 December 2014.
[7] S36.

20.5.2 The by-law should make clear that the applicant may be directed to implement more than one of the options in section 30(2).

20.5.3 The by-law must be amended to make provision for interested and affected parties to make submissions on the quantum of a section 30 fine. In relation to section 24G of NEMA , the CER obtained an opinion from senior counsel, a copy of which is attached as annexure "**3A**", and which concludes as follows:

"*A court is likely to find that rational decision-making calls for a class of persons to be heard in respect of the quantum of a fine before a decision is made in that regard. That class is not unlimited, but it includes those who will be affected by the decision and those who have experience and special expertise on the matter. A practical and common sense way to achieve this would be for the persons registered as [interested and affected parties] in the public participation process to be given the opportunity to comment before a decision is made*."

Submissions on Chapter 5 – Compliance and Enforcement

21 It is recommended that section 31(1) be amended as follows: "*The Municipality must appoint as many authorised persons as* ***[it considers]*** *necessary for undertaking compliance monitoring and enforcement with this By-law,* ***and it must ensure that, at all times, there are adequate and appropriate authorised persons employed by the Municipality to effectively fulfil the compliance and enforcement functions in terms of this By-law***."

Submissions on Chapter 6 – General Matters

22 Section 36(3) fails to specify the section number being referred to, namely section 2 of the by-law, which deals with the objectives of the by-law. This provision should read "*…granting the exemption will not significantly prejudice the objectives referred to in section* **2** *of this By-law*."

23 It is noted that section 36, which deals with exemptions, does not list any circumstances under which the Municipality would not be authorised to consider and/or grant an exemption. In the preliminary submissions, it was recommended that provision be made for instances in which exemptions cannot apply, for example, in cases of severe harm or risk of irreparable harm or detriment to human health and/or the environment. In addition, no exemptions should be provided from the requirement to obtain authorisations in terms of the by-law. Our clients reiterate these recommendations and request that this section be amended accordingly.

Submissions on Schedule 1 – List of Identified Substances

24 In terms of section 6, Schedule 1 contains those substances which may present a threat to the health or wellbeing of people in the municipal area. Section 6 also makes provision for the Municipality to identify additional substances. We point out that not all of the substances listed in schedule 1 would be relevant to the NDM and recommend that the Municipality bear this in mind when adopting any local emission standards in terms of section 7 of the by-law. It is recommended that local emission standards are only set for those pollutants which would be present in ambient air within the HPA, so as not to place unnecessary obligations on the Municipality and thereby unduly strain its already limited capacity and resources.

Conclusion

25 We reiterate that any failure to make submissions on any provisions of the draft by-law referred to herein should not be construed as an acceptance of such provisions, and our clients reserve their rights to make further submissions and/or contest the provisions of the by-law at a later stage.