Recent Amendments to Air Pollution Limits

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Our Constitution enshrines the right to an environment that is protected for the benefit of present and future generations and that is not harmful to one's health or well-being. Flowing from this, the State has passed a myriad of environmental legislation. The National Environmental Management: Air Quality Act 39 of 2004 ("**Act**") is one of our primary pieces of environmental legislation and aims to give effect to the environmental right in our Constitution. The Act regulates air pollution from various industrial and mining-related activities, whether electricity generation, fuel storage, waste incineration, or cement production, and sets the permitted amount of pollution which may be emitted in each case. In October 2018, the Department of Environmental Affairs brought into effect certain amendments in this regard. This article spells out two of these amendments, namely an increase in sulphur dioxide emission limits for electricity generators and cement producers and the prohibition of 'rolling' postponements of compliance with prescribed emission limits, which postponements have been notably sought by many of Eskom's power plants.

Activities which cause air pollution as well as their associated pollutant limits (referred to as 'Minimum Emission Standards' ("**MES**")) are listed under a Schedule to the Act. (Note that listed activities under the Act must obtain an atmospheric emission licence, which this article does not deal with). The Schedule of Listed Activities and Associated MES under the Act was first promulgated in 2010 (and then again in 2013) and provides for two sets of emission standards – a less stringent set of limits for businesses which were operational before 2010 ("**Old Plant MES**") and a more stringent set of limits for businesses operational after 2010 ("**New Plant MES**"). Post-2010 operations had to comply immediately, or on commissioning, with the more stringent New Plant MES, namely from 2010, whereas the timeframes for older plants are staggered: first to comply with the less onerous Old Plant MES by 2015 (with a five-year lead time) and then to comply with the more onerous New Plant MES by 2020 (with a ten-year lead time). The rationale for this phased compliance was that many operations built before 2010 were generally not designed in a way to comply with the current air emission limits, and the installation of air pollution abatement technology is incredibly costly.

The two key amendments brought into effect in October 2018 apply to pre-2010 operations and reflect an apparent inability of these older operations to either meet the pollutant limits by 2020, or at all.

The first critical amendment of October 2018 is an increase in the sulphur dioxide limits for solid fuel burning installations used for steam raising or electricity generation. All such pre-2010 installations are now entitled to emit double the previous 2020 sulphur dioxide limits (an increase from 500 mg/Nm^3 to 1000 mg/Nm^3). This particular amendment is currently being challenged by various civil society organisations as it was not gazetted for public comment before being promulgated into law (other amendments were gazetted for comment though), and we wait to see the court's decision in this regard. A further sulphur dioxide increase was brought into effect for cement producers using conventional fuels and raw materials (in particular pyritic limestone), namely all pre-2010 operations may now emit, from 2020, 60% more than previously allowed (an increase from 250 mg/Nm^3 to 400 mg/Nm^3). This amendment was gazetted for public comment before becoming law, and so does not face the same procedural challenges as with electricity generators. The outcome for cement producers is that there is significantly more leeway in terms of their sulphur dioxide emissions, although note that the conditions of one's atmospheric emission licence may override this.

The second key amendment brought into effect in October 2018 deals with so-called 'rolling' postponements. Prior to the 2018 amendments, an operation (in any industry) could apply to *continually* 'postpone' compliance with their 2015 and/or 2020 emission limits as there was no express legislative cap on how many times an operation could apply for such a postponement. Many of Eskom's power plants, for example, applied for a postponement of their 2015 emission limits and then again applied for a postponement of their 2020 limits, largely due to the time and cost implications of retrofitting their aging infrastructure. These rolling postponements have been criticised for the obvious reason that an unlimited number of postponements could effectively result in an ongoing permission to pollute. The recent amendments prohibit these rolling, or unlimited, postponements and rather provide that pre-2010 operations may now only apply for a *once-off* postponement of compliance with their 2020 targets which may not go beyond 2025, and there may not be any (further) postponements of compliance with 2015 targets. This prohibition of rolling postponements is welcome. There is however a worrying new provision 12A which effectively allows yet another postponement: an older operation (in any industry) may apply for an "alternative emission limit" (undefined) with respect to a 2020 pollutant limit *or* limits, provided the operation is in compliance with all other emission standards. Notably there is no cap

on how many times an operation may apply in this regard, and there is an express provision for one *or more* pollutants. The net effect is that rolling postponements of compliance with air pollution limits may *still* be allowed, simply under a different provision. No doubt the same concerns raised with the now-prohibited rolling postponements will resurface with this new provision 12A. Moreover, this provision was not gazetted for public comment, and so will in all likelihood face the same procedural challenges as the sulphur dioxide amendments.

There are therefore three aspects to the recent amendments which may require revisiting. Firstly, the extent of the sulphur dioxide increases is significant – increases of 60% and 100%. This is particularly of concern in the case of large-scale electricity generation, namely Eskom's power plants. It is suggested that any increase to emission limits be more gradual, alternatively form part of a site-specific exemption. Secondly, the back-door provision of 12A which provides for a rolling postponement of compliance by another name is problematic as it has the potential to render the MES meaningless in certain cases, where a 12A application is granted. In this respect, it is suggested that an "alternative emission limit" be restrictively defined and this application process be made more stringent. Lastly, the promulgation of the amendments without public participation contravenes the Act which mandates a consultative process before amending the Listed Activities and Associated MES. It is suggested that the Department of Environmental Affairs, which unfortunately has repeatedly made this mistake, complies with the law-making consultation requirements as set out in the various environmental Acts and the Constitution.