

CLIMATE CHANGE BILL - SUMMARY AND CONTENT

12 June 2018 | Africa Group, London
Legal Briefings - By **Matthew Burnell**

On 8 June 2018 the Minister of Environmental Affairs published the Climate Change Bill (“**the Bill**”) for public comment. The Bill provides a framework for climate change regulation in South Africa aimed at governing South Africa’s sustainable transition to a climate resilient, low carbon economy and society. The Bill provides a bare procedural outline that will be developed through the creation of frameworks and plans. As a result, the precise impact that this proposed legislation will have on business is not certain.

A brief summary of the Bill is set out below.

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CHAPTER 1 - INTERPRETATION, OBJECTIVES AND APPLICATION

Definitions

Section 1 contains a list of the relevant definitions which inform the interpretation of the Bill. There are concerns with a number of the defined terms including:

- the definition of “adaptation” which deals with the adjustment of ‘natural, human, social and ecological systems’ to the effects of climate change. The definition does not include economic or commercial systems. This appears to be an oversight as commercial or economic systems should go through the process of adapting to the actual or expected effects of climate change. For example, by apportioning money over time for infrastructure investments to minimize the impacts of climate change or adapting the financial model of a company to take climate change considerations into account. The definition of ‘adaptive capacity’ which deals with a systems’ ability to adapt to the effect of climate change (i.e. it does not single out specific kinds of systems). It therefore seems unusual that the definition of adaptation refers to specific kinds of systems; and
- the definition of “vulnerability” is problematical. Firstly, it is unclear whether there are objective criteria which would indicate whether a system is susceptible or vulnerable to the impacts of hazard; and secondly, it is unclear what constitutes a “hazard”.

Some of the other definitions require grammatical changes in order to ensure consistency and certainty.

Objects of the Act

The Bill seeks to:

- provide a framework for a coordinated response to climate change by all spheres of government;
- provide to the effective management of the impacts of climate change by ‘enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to building social, economic, and environmental resilience’;¹ and
- ensure that South Africa makes a ‘fair contribution to the global effort to stabilize greenhouse gas concentrations in the atmosphere at a level that avoids dangerous anthropogenic interference with the climate system within a timeframe and in a manner that enables economic, employment, social and environmental development to proceed in a sustainable manner.’²

Principles

The Bill must be interpreted and applied by the principles contained in section 2 of the National Environmental Management Act 107 of 1998 (“the NEMA”) and, in particular, the principle of intergenerational equity, the principle of common but differentiated responsibilities and the principle of sustainable development.³

Application of Act

The Bill will apply throughout the Republic of South Africa including its internal waters, territorial waters, exclusive economic zone, the continental shelf and the Prince Edward Islands.

Conflicts with other legislation

The Bill notes that in the event of any conflict between a section of the Bill and other legislation, the Bill shall prevail to the extent that the section relates to climate change. This may be problematical.

CHAPTER 2 - POLICY ALIGNMENT AND INSTITUTIONAL ARRANGEMENTS

The Nationally Environmentally Sustainable Development Framework

Within two years of the Bill becoming an Act, the Minister of Environmental Affairs (“**the Minister**”) must develop a nationally environmentally sustainable development framework that seeks to achieve the objects set out above and South Africa’s obligations in terms of climate change related agreements by developing appropriate mechanisms, systems and procedures (“**the framework**”). The framework may assign and delineate responsibilities to different spheres of government and organs of state who must take the framework into consideration when fulfilling their duties set out in the Bill.

The framework will need to be reviewed every five years by the Minister and may be amended. The framework and each iteration thereof will need to be the subject of a public participation process in accordance with the Bill, which is set out in more detail below.

Alignment of laws and policies

Each sphere of government and organs of state must coordinate and harmonise their policies, plans, programmes and decisions to ensure that the risks of climate change impacts and associated vulnerabilities are taken into consideration and give effect to the national adaptation and mitigation objectives⁴ contained in the Bill.

Institutional arrangements and coordination

The Bill introduces the Ministerial Committee on Climate Change (“**the Committee**”) which is comprised of the Ministers responsible for various functions and all MECs responsible for the environment.⁵ The Committee is responsible for coordinating efforts aimed at transitioning to a climate resilient and lower carbon economy in terms of the White Paper on National Climate Change Response and South Africa’s Nationally Determined Contribution in terms of the Paris Agreement⁶ and for determining areas that require further regulation. In fulfilling these functions, the Committee may also create an advisory committee in terms of the NEMA to advise them accordingly.⁷

A Provincial Committee on Climate Change (“**the Provincial Committee**”) is also established by the Bill.⁸ The Provincial Committee is made up of relevant departments in the province and all mayors of municipalities located in the province.⁹ The MEC responsible for environmental matters in the province is responsible for convening meetings of the Provincial Committee. Like the Committee, the Provincial Committee is responsible for ‘coordinating climate change response actions in the province towards a transition to a climate resilience and lower carbon economy and society in accordance with the White Paper on National Climate Change Response and South Africa’s Nationally Determined Contribution’¹⁰ as well as recommend ‘any climate change matter to the’¹¹ Committee and ‘provide progress reports on climate change response actions’¹² to the Committee.

CHAPTER 3 - CLIMATE CHANGE RESPONSE: PROVINCES AND MUNICIPALITIES

The MEC responsible for environmental matters and a Mayor of a Municipality must within one year of the Bill becoming an Act ‘undertake a climate change needs and response assessment for the province or municipality, as the case may be, and such climate change needs and response assessment must be reviewed at least once every five years’ (“the assessment”).¹³ Within two years of the Bill becoming an Act, based on this assessment, a climate change response implementation plan must be developed for the province / municipality (“the plan”).¹⁴ This plan must also be reviewed every five years.

The assessment must include an analysis of the nature of the province / municipality and the unique climate change risks and needs of that province / municipality.¹⁵ In addition, the assessment must identify measures to manage these risks and needs, consider the adaptation considerations and options that are required in respect of the province / municipality and map the risks, ‘vulnerabilities, areas, ecosystems, communities and households’¹⁶ that are susceptible to impacts of climate change and the measures that are required to manage the climate change response.¹⁷

The plan ‘must:

- a. Include measures or programmes relating to both adaptation and mitigation;
- b. Take account of the risks and vulnerabilities associated with climate change;
- c. Include mechanisms for their effective implementation that align with national sector plans;
- d. Cover all priority sectors; and

e. Comply with any requirements as prescribed by the Minister or MEC.¹⁸

CHAPTER 4 - NATIONAL ADAPTATION TO IMPACTS OF CLIMATE CHANGE

The Minister, in consultation with other state departments, provinces and municipalities may (within one year of the Bill becoming an Act) develop 'a national adaptation objective to guide the Republic's adaptation to climate change impacts, the development of resilience and the Republic's contribution to the sustainable development agenda.'¹⁹ The Minister may also publish indicators for measuring compliance with these objectives and set the date by when the adaptation objectives must be incorporated into relevant national planning instruments, policies and programmes relating to climate change.²⁰

Based on these objectives the Minister must (in consultation with other state departments and provinces) develop a National Adaptation Strategy aimed at:

Reducing the vulnerability of society, the economy and the environment to the effects of climate change, strengthening resilience of the socio-economic and environmental system and enhancing the adaptive capacity of the national environment and economy to the impacts of climate change;

Minimizing the risk and vulnerabilities to current and future climate scenarios;

Achieving national adaptation objectives;

Providing a strategic and policy directive for adapting to the impacts of climate change; and

Providing an integrated and coordinated approach to managing adaptation measures by organs of state in all spheres of government, and where relevant should also include non-governmental organisations, the private sector and local communities.'²¹

The National Adaptation Strategy must include and be informed by *inter alia*:

a consideration of the ‘current and future climate change scenarios’²² (taking into consideration the anticipated impacts over the short, medium and long term, the anticipated environmental and socio-economic impacts and the possible adaptation response);

an ‘assessment of the Republic’s vulnerability to climate change related risks at a sectoral, cross-sectional and geographic level, including a consideration of relevant national disaster risk assessments in terms of the Disaster Management Act’;²³ and

an outline of the adaptation options available to reduce identified vulnerabilities by building adaptive capacity and resilience in the context of actual or anticipated social, economic and environmental costs.’²⁴

The Bill also places an obligation on Ministers responsible for sector departments and State Owned Entities (“**SOEs**”) to identify and map climate change risks and vulnerabilities in respect of ecosystems and communities that may be affected by climate change and establish measures and mechanisms to manage these impacts. These Ministers and SOEs must, within 2 years of the Bill becoming an Act, develop an implementation plan that gives effect to these objectives. The Ministers and SOEs are required to report on the progress made in implementing this plan.

The Minister must synthesize this information and report to Cabinet to demonstrate achievement (or not) of the Republic’s national and international climate change obligations.

CHAPTER 5 - GREENHOUSE GAS EMISSIONS AND REMOVALS

National greenhouse gas emissions trajectory

The Minister is required to determine a national greenhouse gas emissions trajectory that sets out the quantity of greenhouse gas reduction objectives and the volumes of greenhouse gases to be emitted over a period within the Republic. The trajectory must be informed by current information regarding projected volumes of greenhouse gases emitted and be consistent with South Africa’s international obligations.

Once published, this trajectory will bind all spheres of government, SOEs, organs of state and persons. Therefore, before finalizing the trajectory, it will be subject to a public participation process in accordance with the provisions set out below.

Sectoral emissions targets

The Minister (in consultation with the Committee) must set sectoral emissions targets (“**SETs**”) for greenhouse gas emitting sectors and sub-sectors.²⁵ The SETs must align with the greenhouse gas emission trajectory. The SETs will be reviewed every five years and amended following a public participation process.²⁶

The Minister responsible for each sector or sub-sector must prepare a Sector Emissions Reduction Plan (“**SERP**”) which sets out the manner in which the sector/ sub-sector will meet the SETs within the 5 year period.²⁷ The Minister must prescribe the minimum requirements for the content of the SERP.²⁸

Section 12(5) of the Bill states that the SERP must be published in the Gazette by the responsible Minister for the sector / sub-sector and after publication must be submitted to the Minister within 6 months of publication of the SETs in the Gazette. The SERP must be reviewed upon every subsequent revision of the SETs. There does not appear to be any public participation process in the development of the SERPs.²⁹

The responsible Minister will need to report annually to the Presidency regarding the implementation of the SERP and the achievement of the SETs. The Minister must collate, compile and synthesise the SERPs and thereafter submit them to Cabinet on an annual basis.³⁰

An MEC responsible for environmental matters and a Mayor of a municipality must support the implementation of the SET by preparing and implementing a climate change response implementation plan which’ is aligned with the sectoral priorities and targets.³¹

Carbon budgets

The Minister will publish a notice determining a greenhouse gas emissions threshold for purposes of determining persons that will be allocated a carbon budget.³² The proposed carbon budget thresholds must be subject to a public participation process.

The allocated carbon budget must apply to a specified person for not less than 3 successive five year periods. The carbon budget must be reviewed every five years. ‘The Minister must review and revise a carbon budget allocated to a person within a reasonable time if the national greenhouse gas inventory demonstrates an increase in national greenhouse gas emissions above the greenhouse gas emissions trajectory.’³³

The Minister may require a person to whom a carbon budget has been allocated, to prepare a greenhouse gas mitigation plan which sets out the manner in which describes the manner in which that person will comply with the carbon budget.

A person to whom a carbon budget has been allocated must comply with the carbon budget, implement the approved greenhouse gas mitigation plan properly, monitor annual greenhouse gas emissions, monitor and report on progress towards compliance with the carbon budget and to the extent that the person has failed to comply with the carbon budget, they would be required to provide an explanation of the measures that will be implemented to achieve compliance.³⁴

A person may (in extreme circumstances) apply for an extension of the timeframes within which they must comply with the carbon budget. Such an application will need to include a detailed explanation justifying the extensions including the 'technological, environmental, economic, financial, social and employment reasons' and any supporting documents that may be necessary.³⁵

The Bill is not integrated with the Draft Carbon Tax Bill and the carbon budgeting process set out in that Bill.

Phase down and phase out of synthetic greenhouse gas emissions and declaration

The Minister (in consultation with the Ministers responsible for energy and trade and industry and any other affected party) must develop a plan to phase down or phase out the use of synthetic greenhouse gases. This plan must be reviewed every five years. Synthetic greenhouse gas emissions are defined in the Bill as 'man-made greenhouse gas such as hydrofluorocarbons (HFCs); perfluorocarbons (PFCs); and sulphur hexafluorides (SF6).' This list can be expanded upon by the Minister following a public participation process.³⁶

The plan must consider *inter alia*

how exporters and importers of synthetic greenhouse gases account for their emissions;³⁷

the measures that can be implemented to reduce/ phase out synthetic greenhouse gases;³⁸

prescribing limits and uses for synthetic greenhouse gases;³⁹ and

timelines for the phasing out of synthetic greenhouse gases.⁴⁰

The Minister may publish a carbon budget applicable to emitters of synthetic greenhouse gas emissions.

CHAPTER 6 - GENERAL MATTERS AND TRANSITIONAL ARRANGEMENTS

Regulations

This Chapter empowers the Minister to develop regulations that give effect to the framework, the management of greenhouse gas emissions (such as carbon budgeting, phasing down or out of synthetic greenhouse gases and incentivizing behavior changes to transition to a low carbon economy) and the monitoring, evaluation and assessment of climate change adaptation measures.

The Bill permits the Minister to 'provide that any person who contravenes or fails to comply with a provision [of the regulation] is guilty of an offence and liable in the case of a first conviction to a fine not exceeding R5 million, 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 or imprisonment for a period not exceeding R10 million or imprisonment for a period not exceeding 10 years and in both instances, to both such fine and such imprisonment.'⁴¹

Consultation and public participation

When exercising any power in terms of the Bill, the Minister and MEC must follow the appropriate consultation processes (i.e. consulting with Cabinet or the Executive Council), adopt the principle of co-operative governance contained in Chapter 3 of the Constitution and allow for public participation in the process.⁴²

The public participation process includes publishing a notice in the Gazette and at least one newspaper distributed nationally (or if the power will only affect a specific area, then in at least one newspaper that is distributed in that area).⁴³

The notice must invite parties to submit comments within 30 days of the publication of the notice and must provide sufficient information to enable members of the public to submit meaningful representations and objections.⁴⁴

The Minister or MEC may allow any interested and affected person or community the opportunity to present oral representations or objections. The Minister or MEC is obliged to consider all representations / objections prior to exercising the power concerned.⁴⁵

Delegation

The Minister may delegate powers in terms of the regulations (aside from the duty to publish the framework or regulations) to an official in the Department of Environmental Affairs. Such a delegation must be in writing and may be conditional.⁴⁶ It should be noted that, to the extent that any decision is made by such delegated person, an appeal could be submitted in terms of the Appeal Regulations to the Minister.

Offences and Penalties

A person commits an offence if they fail to prepare, submit and implement an approved greenhouse gas mitigation plan and if their greenhouse gas emissions exceed the allowances prescribed in the carbon budget.

Upon conviction a person shall be liable (in the case of a first conviction) to a fine not exceeding R5 million and /or imprisonment not exceeding 5 years and in respect of a second or subsequent conviction to a fine not exceeding R10 million and / or imprisonment not exceeding 10 years.

In determining the fine, the Bill notes that 'due consideration' must be given to:

'The severity of the offence in terms of its impact on health and well-being of the citizens of the country and the environment; and

The monetary or other benefits that accrued to the convicted person through the commission of the offence.'⁴⁷

It is unclear whether offences in terms of the Bill will be included in Schedule 3 of the NEMA which would then also trigger additional liabilities in terms of section 34 of the NEMA, including *inter alia* director liability.

Appeals

All appeals in terms of the Bill will be managed in terms of section 43 of the NEMA and the Appeal Regulations. The Appeal Regulations will need to be amended to include this Act in due course.

Transitional provisions

The Declaration of Greenhouse Gases as Priority Air Pollutants, the National Pollution Prevention Plans Regulations and the National Greenhouse Gas Emissions Reporting Regulations published in terms of the National Environmental Management: Air Quality Act 39 of 2004 shall remain in force until they are amended or replaced by regulations published in terms of the Bill.

The Submission of Comments

Comments must be submitted to the Director General: Department of Environmental Affairs, Dineo Ngobeni by 8 August 2018. Comments can be submitted by:

post to Private Bag X447, Pretoria 001;

hand to Environment House, 473 Steve Biko Street, Arcadia, Pretoria 001; or

email to Climate@environment.gov.za

Should you require any assistance in compiling comments, please do not hesitate to contact us.

¹ S2(b) of the Bill.

² S2(c) of the Bill.

³ S3 of the Bill.

⁴ S7 of the Bill.

⁵ S8(1) of the Bill.

⁶ S8(6) of the Bill.

⁷ S8(8) of the Bill.

⁸ S8(9) of the Bill.

⁹ Ibid.

¹⁰ S13(a) of the Bill.

¹¹ S13(b) of the Bill.

¹² S13(c) of the Bill.

¹³ S9(a) of the Bill.

¹⁴ S9(b) of the Bill.

¹⁵ S9(3) of the Bill.

¹⁶ S9(4) of the Bill.

¹⁷ S9(4)(c) of the Bill.

¹⁸ S9(2) of the Bill.

¹⁹ S10(1)(a) of the Bill.

²⁰ S10(1)(b) and (c) of the Bill.

²¹ S10(4) of the Bill.

²² S10(5)(b) of the Bill.

²³ S10(5)(c) of the Bill.

²⁴ S10(5)(d) of the Bill.

²⁵ S12(1) of the Bill.

²⁶ S12(3) of the Bill.

²⁷ S12(4) of the Bill.

²⁸ S12(9) of the Bill.

²⁹ S12(5) of the Bill.

³⁰ S12(8) of the Bill.

³¹ S12(10) of the Bill.

³² S13(1) of the Bill.

³³ S13(6) of the Bill.

³⁴ S13(9) of the Bill.

³⁵ S13(11) of the Bill.

³⁶ S14(5) of the Bill.

³⁷ S14(2)(a) of the Bill.

³⁸ S14(2)(b) of the Bill.

³⁹ S14(2)(c) of the Bill.

⁴⁰ S14(2)(d) of the Bill.

⁴¹ S15(2) of the Bill.

⁴² S16 of the Bill.

⁴³ S17(2) of the Bill.

⁴⁴ S17(3) of the Bill.

⁴⁵ S17(4) of the Bill.

⁴⁶ S18(2) of the Bill.

⁴⁷ Section 19(3) of the Bill.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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