Comments on the *Draft National Greenhouse Gas Emission Reporting Regulations* gazetted by the Minister of Environmental Affairs in June 2016

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Introduction

ERC welcomes the opportunity to provide comments on the Draft National Greenhouse Gas Emission Reporting Regulations (DEA 2016); hereafter the ‘Regulations’. The Regulations have been published for comment, by the Minister of Environmental Affairs in terms of the National Environmental Management: Air Quality Act (Act 39 of 2004; as amended up to 2014; hereafter ‘NEMAQA’). There are many improvements to the regulations as now drafted. The comments focus on possible further enhancement and should be read bearing in mind this overall positive assessment. Some general comments are made first, followed by detailed specific comments on the text of the Regulations and their Annexures.

1) General comments

a) The Paris Agreement and South Africa’s international obligations

The Paris Agreement represent a major achievement in multi-lateral negotiations (UNFCCC 2015). South Africa was key to the negotiations under the Durban Platform, and is expected to ratify soon. The Agreement marks a shift beyond a world divided into two Annexes, with developing countries having softer commitments than developed countries. The Agreement is a treaty in all but name, being recognised as a treaty under the Vienna Convention on the Law of Treaties. Within this overall form, there are obligations on Parties. Article 13 of the Paris Agreement contains legally binding provisions on transparency of action and support. The Agreement also has obligations to submit successive mitigation Nationally Determined Contributions (NDCs), and to “pursue domestic measures” to achieve NDCs (Article 4.2). The specificity of language in both these Articles makes clear that the provisions on reporting are legally binding.

While this is not the place for a detailed analysis of every provision, it is relevant to highlight two aspects. Article 13.7 requires that “each Party shall regularly provide the following information” and then specifies national GHG inventory reports and information necessary to track progress in implementing and achieving nationally determined contributions on mitigation. Both the GHG inventory, and information tracking NDC implementation, are subject to technical expert review, specified in Article 13.11 and 13.12. In short, South Africa is legally required under a new climate treaty to report on its GHG inventory and on progress on implementation of its mitigation contribution every two years. It is therefore worth reflecting on how the relevant elements of our domestic mitigation system (whose developing is under way) will contribute to meeting these obligations, especially since the process of drafting these regulations began before the outcome of the Paris negotiations were known. This is more specifically addressed in our comments below.

b) Facilities as the basic reporting unit

The draft Regulations published in 2016 makes significant improvements compared to the earlier version published in June 2015, and most notably, there is greater clarity on the status of facilities. Facilities are defined in section 1, and companies (data providers under Category A) must register all facilities exceeding thresholds specified in Annexure 1, and then report GHG emissions from these. We assume that the intent of the regulations is that data be reported per registered facility. In our view this should be further clarified in the provisions on registration, and making reporting boundaries subject to verification and validation (see specific comments below). It may be helpful to have explanatory information elaborating the precise relationship between companies, facilities, activities and installations (though this is improved, compared to the previous draft). We have elaborated on this point in the specific sections below.
c) Data verification
In our view, a major remaining weakness in the draft regulations is the lack of independent verification of data, which has been used in other jurisdictions to ensure accuracy and assure the quality of data provided. We have provided further comments below.

d) Transparency and publication of data
In most other jurisdictions which have mandatory reporting of GHGs, GHG emissions data is freely available to the public, even though some of the supporting activity data is not (for reasons of commercial confidentiality). In our view, in view of the fact that GHG emissions impose a cost on the rest of society, publication of this information is strongly in the public interest.

e) Capacity for implementation
Although this does not form part of the regulations per se, we note that implementation of the proposed regulations will require a considerable amount of additional capacity in government. While we feel that the Department of Environmental Affairs’ current staff who work in this area are doing an excellent job with very few resources, implementation of these regulations will require considerably more capacity, and we would like to emphasise the critical importance of providing adequate additional capacity for their successful implementation. This would include not only adequate staff with the appropriate levels of expertise to oversee the reporting system itself (as well as related functions such as the GHG inventory), but would also ideally cover the outreach process which will be necessary to ensure that data providers are adequately informed on the reporting process as it is introduced.

2) Specific comments on the text of the regulations

a) Definitions
“data provider” – the definition of data provider does not provide enough clarity on who the legally responsible entity is for reporting emissions from activities in Annexure 1. It would be more precise to specify simply that the legal entity which has operational control of each facility which Annexure 1 activities take place should be the responsible entity for reporting. It is also worth bearing in mind the use of reported data for other purposes such as the carbon tax, given that the entity legally responsible for reporting emissions from activities listed in Annexure A will also be responsible for any carbon tax incurred on those emissions. The difference between type A and type B data providers is not clearly stated, and the current definition seems only to apply to type A data providers. It is also not clear whether the definition would also apply to local authorities or other public entities.

“facility” – the definition should be more precise, and should give some guidance in relation to facility boundaries.

“installation” – it’s not clear what the distinction is between a facility and an installation. Most jurisdictions use one or the other. Since facilities are registered, it seems preferable to use one term.

b) Classification of emissions sources and data providers
The flexibility which 4(2) provides is important, but it would be much more effective if the competent authority were given the power to “require” additional data providers to provide data, rather than to merely “request” the data.

There seems to be a missing column in Annexure 1 – paragraph 4(1) refers to information “… relating to a category identified in table Annexure 1 (Category B Column) to these Regulations”. Also, the cost implications of extensive requests for data should be addressed, if these go beyond data that has already been published (e.g. in papers or online).
c) Registration
There seems to be a missing clause in 5(1), and the clarity concerning which activities make it mandatory for a facility to be listed could be improved. We suggest including the words in capitals, so that it reads: “A person classified as a Category A data provider in regulation 4(1)(a) of these Regulations must register all facilities where activities EXCEED THE THRESHOLDS listed in Annexure 1, on the National Atmospheric Emissions Inventory System by providing the relevant information as listed in Annexure 2 to these Regulations, within 30 days after the commencement of these Regulations or within 30 days after commencing such an activity once this regulation is in force. “

d) Reporting requirements
The current version of the draft regulations implies that data providers should report emissions for each facility. This is a very welcome approach. However, the intent should be more clearly reflected in 7(1), which should refer to “each” facility (instead of “all”, which could be read as the requirement to submit an aggregate number for all facilities). The requirement should be clearly stated – that each facility is registered, and that data providers report emissions for each activity in Annexure 1 for each individual facility. In Annexure 3, it is suggested to add a column on the left-hand side of the table, headed “Facility”. As it stands currently, the Table implicitly refers to activities. With the additional column, reporting is for each facility, and GHG-emitting activities within each facility.

7(1) seems to be missing a reference to Tier 3 data?

e) Reporting boundaries
It would seem to make sense to provide these as part of the registration details, and subject to the same conditions. There should be guidance on how reporting boundaries should be determined, and this process should be subject to verification and validation.

f) Completeness
A reference to fugitive emissions is missing?

g) Methods
Methods for measuring emissions should be uniform for all emissions in the country, and the technical guidelines provide an excellent basis for this. The guidelines should be periodically reviewed and updated, and submissions from data providers should contribute to this process, but the competent authority should not be bound by the timeframes proposed in 10(3) and 10(4), and the goal of uniform, transparent data would be better served by a formal and regular updating process. We therefore propose that the limitations placed on the competent authority be removed.

The reference in subregulation (3) should be to subregulation (2), not (1)?

h) Verification and validation of information
ERC had highlighted in comments on the earlier drafts that independent third-party verification is essential to ensure quality data. While we note the additional provisions on validation in this draft, the regulations remain too weak and do not provide for an essential component – independent review. Independent third-party verification is crucial to ensuring the credibility and quality of data. We would propose that very large emitters be required to have their data verified by an independent third party appointed by the competent authority, at the expense of the data provider, and that provision be made for occasional verification of any data provided by the competent authority, at the discretion of the competent authority.

We propose that 11(5) should be rephrased to read:
“The competent authority may conduct on-site or installation- or facility-specific verification and validation of emissions reported by Category A data providers at its discretion at any time. Should information provided by the by Category A data provider concerned be insufficient for the purposes of validation and verification, the competent authority may require verification by an independent assessment.”

In addition, the timeframe specified in 11(1) and 11(2) is onerous, unrealistic and does not serve the purpose of collating high quality emissions information. While there is merit in the competent authority assessing data as rapidly as possible, there should be no time limit imposed on the authority’s assessing of the information. Furthermore, there should be no time limit on the authority’s right to raise queries concerning the data. In other jurisdictions, authorities may query data for periods between five and ten years.

11(5) – this should cover tier 1 data as well.

i) Transparency, publishing data, confidentiality and public access to information

The Regulations define transparency, and this is appropriate, given the context of legal requirements under the Paris Agreement, as outlined above. Our view is that public access to GHG emissions information is not only a right, given that GHG emissions affect everyone, but that it is also necessary to facilitate high-quality policymaking to address climate change.

International good practice includes publishing data. For instance, Section 24 of Australia’s National Greenhouse and Energy Reporting Act (2007) obliges the relevant authority to publish all GHG information annually, and empowers it also to publish associated information, unless a data provider successfully applies for an exemption (Australia 2007). Since many of the large emitters in Australia also operate here, it is clear that regular publication of emissions data does not have a deleterious effect on commercial operations. The current draft, in regulations 12 and 14, should be amended to require publication unless there are very specific reasons not to. It is not clear from the draft what constitutes “confidential information”. This should be clearly specified. Moreover, there should be a clear mandate to the competent authority to publish GHG emissions from facilities, and also associated relevant information, unless a data provider has provided acceptable reasons why such data should not be published. The default should therefore be that GHG emissions data reported to DEA should be public and published.

ERC recommends that 1) section 14 precede section 12; 2) the chapeau of current 14(1) be changed to read “The competent authority shall at least annually publish and place in the public domain all information reported pursuant to these regulations, including NAEIS data, and the processes under these regulations, as long as that information does not --” and then include the sub-paragraphs; and 3) the chapeau of current section 12(1) be changed to read “The competent authority may disclose confidential information obtained in terms of these Regulations at any time, if …” and then include the sub-paragraphs. Emissions data should not be classified as “confidential”.
References


