

OUR REF : NJ/Kilifi County/County Regulations/19/1

YOUR REF : TBA

8.05.2019

Chief Officer, Environment,
County Government of Kilifi,
P.O. Box 519,
Kilifi, Kenya

copy sent to mjeneby@kilifi.go.ke

Dear Sir/Madam,

**REF: SUBMISSIONS ON THE KILIFI COUNTY ENVIRONMENT (REGULATION
AND CONTROL) (AIR QUALITY REGULATIONS) 2018**

We convey our sincere appreciation for the opportunity you have given the public to participate in the drafting of the Kilifi County Environment (Regulation and Control) (Air Quality Regulations) 2018 (the Draft Regulations).

We hereby submit our views, comments, suggestions and recommendations on the draft regulations, which we attach to this letter for your consideration.

Yours Sincerely,

Justus Kithi Tsofa, Senior Community Environmental Officer,
Natural Justice,
justus@naturaljustice.org.za

Comment 1: Interpretation Section

Air Pollution

The definition of the term “Air Pollution” excludes the actions or events that lead to air pollution and only lists the substances that contaminate the air. “Air Pollution”, as defined in these regulations, means any change in the composition of air caused by smoke, soot, dust (including fly ash), cinders, solid particles of any kind, gases, fumes, aerosols and odorous substances and any other pollutants that exceed ambient Air Quality Standards. To promote clarity, we propose that this definition be amended as follows:

“Air Pollution” means any change in the composition of the air caused by the release into the air or presence of smoke, soot, dust (including fly as), cinders, solid particles of any kind, gases, fumes, aerosols and odorous substances and any other pollutant that exceed ambient Air Quality Standards.

Comment 2: Draft Regulation 6 - Obligation to Notify

This provision is inconsistent with the Environmental Management and Coordination Act (EMCA)¹ and the Constitution, to the extent that it gives the Chief Officer the sole power to receive written notifications about changes in the activities of the owners of premises that are potentially harmful. Sub regulation 2 also states that the Chief Officer has the power to give approval or object to the notification stating the reason(s) for their decision.

Under the EMCA, NEMA is mandated to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of the national government in the implementation of all policies relating to the environment. Although the duty to control air pollution falls under the county government’s mandate, the constitution calls upon both the national and county governments to carry out their functions on the basis of consultation and cooperation.² In our opinion, therefore, the powers granted to the Chief Officer should be exercised in consultation with the County Director of Environment.

We recommend that Regulation 6 be amended as follows:

- “(1) An owner or occupier of a premises shall not, without giving prior written notification to the Chief Officer and the County Director of Environment-
- (a) Carry out any change in licensed operation of his premises;
 - (b) Carry out any work on any premises that may result to air pollution;

¹ Act No. 18 of 1999.

² Article 6 of the Constitution of Kenya, 2010.

- (c) Construct on any land, any building or premises designed or used for a purpose that may result in air pollution;
 - (d) Make, cause or permit to be made any change of, to, or in any plant, machine or equipment used or installed at the premises that causes a material change in the quantity or quality of emission from an existing source; or
 - (e) Carry out any changes or modifications to an existing air pollution control system
- (2) The written notification shall be submitted to the Chief Officer and the County Director of Environment, not less than fourteen days before the commencement of such work in such form as determined by the Chief Officer.
- (3) The Chief Officer may, with the approval of the County Director of Environment, give approval or object to the notification and the decision shall be accompanied with reasons thereof.

Comment 3: Draft Regulation 9 - General Prohibition

This provision falls short of a prescribed penalty that will deter the public from engaging in activities that are likely to cause air pollution. A hefty penalty will promote compliance. Alternatively, this regulation should prescribe a fine for restoring the environment to its original state and for compensating the people affected by pollution as a consequence of a person's activities. This is in line with the polluter pays principle which requires a person who pollutes the environment to pay for the damage caused.

Secondly, the draft regulation 9 (1) suggests that no person shall discharge a contaminant into the air from an source without a licence, subject to exemptions which have not been identified in these regulations. It is our view that no exemptions should be made to this regulation. Allowing exemptions often paves way for abuse and circumvention of the spirit of the law behind securing the right to a clean healthy environment. It is important to note that matters environment are so serious that it calls for the exercise of caution. In the case of *Peter K Waweru v The Republic* the court declared that the right to a clean and healthy environment is equal to the right to life. Thus, it is necessary to either totally eliminate any threats to the environment or minimise them as much as possible. This is in line with the principles of environmental management.

Kenya has also expressed its commitments to fighting climate change through the enactment of the Climate Change Act and ratification of International Laws addressing climate change. These regulations should therefore work towards coming up with a framework that seeks to help Kenya achieve its climate change commitments.

In view of these comments, we recommend the amendment of this regulation by eliminating the provision on any exemptions that are intended to apply to this section and the insertion of a penalty or fine in the event that a person contravenes this provision. Our suggestion is as follows:-

" 9(1) A person who discharges a contaminant into the air from any source without a licence shall be guilty of an offence and liable to a fine of One million or imprisonment for a period of not less than 5 years and not exceeding 10 years or both.

(2) No person shall discharge a contaminant in the ambient air from any source or equipment which causes a concentration in the ambient air which is greater than the maximum concentration specified in a licence.

(3) A person who contravenes the provisions of sub-regulation (2) above shall be guilty of an offence and liable to a fine of One million or imprisonment for a period of not less than 5 years but not exceeding 10 years or both."

Comment 4: Regulation 12: Performance Monitoring of Air Pollution Control System

The owner or occupier of a premise is duty bound to install instruments or equipment that will monitor the performance of the components of the air pollution control system, according to the draft regulations. The owner or occupier should then submit its findings to the Chief Officer on a quarterly basis or as advised.

Since NEMA is the main institution responsible for environmental monitoring and evaluation of compliance with the standards laid down in law, we believe that a copy of the report should also be submitted to the County Environmental Officer.

We further suggest that a regular recordings of the findings should be made available in the owner or occupiers's premises, for inspection, as and when the need arises.

Comment 5: Amendment to eliminate the technical terms

Some of the terms used in regulation 14 and regulation 18 are too technical for persons who lack the required expertise to understand. All legislation are drafted for use by ordinary citizens. Currently, legislators are encouraged to use plain english in drafting legislation and other legal documents to promote a better understanding of the law by lay people. The general rule is that where the use of technical terms is unavoidable, a definition or brief description of terms should be provided in the interpretation section. Our recommendations are as follows:

1. *Draft Regulation 14: Limit Values and Technical Standards*

Some of the units of measurement used in this clause should be defined. They include "standard conditions for temperature", "standard conditions for dry gas" and "Toxicity Equivalency Factors (TEF)".

2. *Draft Regulation 18: Continuous Emission Monitoring*

A definition or brief description of how to compute the "daily average", "half-hour average" and "daily operating time" should be provided.

Comment 6: Regulation 15: Prohibition on Emission Dilution

Regulation 15 prohibits a person from diluting or causing to be diluted, any emissions at any time or point before it is released to the atmosphere. To facilitate and promote the enforcement of this regulation, it should be amended to include an offence and a penalty prescribed for the offence. We recommend an amendment as follows:

"15 (1) A person who dilutes, or causes or permits to be diluted, any emission at any time or point before it is emitted to the atmosphere, is guilty of an offence and liable to a fine of one million or imprisonment for a period of not less than 5 years and not exceeding 10 years."

Comment 7: Regulation 16: Hazardous Substances

This regulation contains a typographical error at sub-regulation (2). The phrase "...shall apply" is missing at the end of regulation 16 (2). For the avoidance of doubt and the rise of speculation, an amendment should be done as follows:-

"16(2) In the case of the use or handling or unintentional release of hazardous or toxic substances, the limit values and technical standards prescribed in Schedule II shall apply."

Comment 8: Regulation 17: Periodic Monitoring

Regulation 17 (4) requires the owner or occupier of a premise to submit a quarterly monitoring report in accordance with the specifications to the Chief Officer. We recommend that a copy of the report should also be submitted to the County Environmental Officer, in order to facilitate monitoring of compliance by NEMA.

Comment 9: Regulation 18: Continuous Emission Monitoring

An obligation is placed on the owner or occupier of the premises to submit to the Chief Officer the results of evaluations within three (3) months after the end of each calendar year. We are of the view that a copy of the same report should be submitted to the County Environmental Officer to enable them monitor compliance with the set standards. Thus, Regulation 18 (5) should be amended as follows:-

"18 (5) The owner or occupier of the premises shall submit to the Chief Officer and the County Environmental Officer, the results of evaluations within three months after the

end of each calendar year, and such evaluation results are to be kept and maintained by the owner or occupier for at least 3 years.”

Secondly, regulation 18 (6) states that in the event that the emission standards exceed the prescribed limit values, the owner or occupier of the premises shall notify the Chief Officer within twenty four hours from the discovery of the excess emission. Similarly, the owner or occupier of a premise shall notify the Chief Officer not later than one hour from the occurrence of failure of a monitoring device. While these provisions are progressive, we believe that enforcing them and ensuring compliance may be difficult if a penalty is not prescribed for them. Therefore, we recommend the amendment of this clause to include specified punitive measures under this regulation.

Comment 10: Regulation 19: Emissions Declarations

Regulation 19 (1) requires the owner or occupier of a premise which carries out any of the activities or industries specified in Schedule II to submit to the Chief Officer an emission declaration every year. We recommend that a copy of the declaration be submitted to the County Environmental Officer for continuous monitoring of the premise.

Regulation 19 (3) states that in the event of a change in occupancy, the new owner or occupier shall submit an emission declaration for the next calendar year. The risk of having such a provision is that the initial owner of a premise may escape liability in case they are guilty of committing acts prohibited under these regulations during the period of their proprietorship. We opine that premises whose occupancy or ownership changes should be treated as a new premise and hence the new owner required to submit the first emission declaration three (3) months after the effective date of change or commencing operations in the new premises.

Comment 11: Regulation 23: Accidental or emergency release or discharge

According to this regulation, any accidental, emergency or unauthorised release or discharge of a contaminant or pollutant into the air should be reported to the Chief Officer by the person responsible. Failure to notify the Chief Officer in the prescribed form amounts to an offence. We recommend that, in addition to notifying the Chief Officer, the person responsible should also inform the County Environmental Officer at the NEMA offices due to the vital role they play in ensuring that the environment is protected from damage. As an independent body, they are better placed to ensure that the necessary corrective measures are taken. This will help avoid situations where a county officer may be compromised by the offender to conceal the occurrence of such an incident. This provision should also prescribe a specific punishment or penalty for the offence in order to facilitate its enforcement in court.

Our proposed amendments, in view of this comment, is as follows:-

"Where any accidental, emergency or unauthorised release or discharge of a contaminant or pollutant into the air occurs, the person in charge of the undertaking which caused the release or discharge shall immediately inform the Chief Officer or the nearest police station within twenty four hours of the occurrence and submit a written report to the chief officer and the County Environmental Officer, within seven days...

Failure to notify the department of accidental release or discharge constitutes an offence punishable with a fine of one million or imprisonment for a period of not less than 5 years and not more than 10 years or both."

Comment 12: Regulation 26: Improvement Notice and Prohibition Order

The fine prescribed in this section is not uniform for both natural and corporate persons. Regulation 26 (4) states that the failure to comply with an improvement notice or a prohibition order is an offence. Such an offence would attract a fine of not less than KShs. 10,000 and not more than KSh 50,000 or a jail term of 6 months or both where the offender is a natural person. But where the offender is a corporate business entity, the fine will be not less than KSh. 2,000,000 and not more than KSh. 5,000,000 or a jail term of 1 year or both.

The punitive measures prescribed for natural persons are too lenient given the potential environmental and health impacts that may arise from committing such an offence. Similarly, the jail term prescribed for corporate or business entities is not adequate. The challenge with having such lenient punishment is that they will not be deterrent enough. Most people who violate the law will, therefore, opt to pay fines or serve jail terms at the expense of exercising caution, in line with the precautionary principle. It is also our argument that having different punishments for natural and corporate entities will not promote compliance across all sectors. Both entities have a high potential of damaging the environment and should therefore be treated equally. Following the concerns expressed, we recommend the amendment of regulation 26 (4) to provide a uniform punishment and hefty penalties for committing the prohibited acts under this regulation.

"26 (4) Failure to comply with the order constitutes an offence which upon conviction of an individual, will attract a fine of not less than one million shillings and a jail term of not less than 5 years and not exceeding 10 years or both."

Comment 13: Regulation 40: Offence and Penalty

This clause provides a blanket punishment and/or penalty for offences committed under the regulations and whose penalties have not been prescribed. This blanket penalty fails to take into consideration, the seriousness of the social, economic, health and environmental

consequences that might accrue due to air pollution. Besides, it is important to note that the extent of damage caused as a result of contravening the provisions of these regulations differ from one case to the other. Therefore, having a single penalty to apply to all situations overlooks the fact that different circumstances will call for different measures. This clause also prescribes very lenient and flexible penalties which are not deterrent enough particularly for first offenders who are both natural and corporate persons. We opine that penalties and punishments that are adequate to achieve justice, should be clearly stated under the specific provisions prohibiting the omission or commission of certain acts. Thus, our view is to have this provision deleted and the include penalties in all sections of the regulation that prescribe an offence.

Conclusion

The above are our humble views on the draft regulations, which we hope will provide relevant insights during the drafting of the final air quality regulations.