

OUR REF: NJ/NEMA/Review of EIA Regulations on Ozone Depleting
Substances/SB.2020/20/1

YOUR REF: TBA

Director General
National Environmental Management Authority
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P.O. Box 67839-00200
NAIROBI



6.03.2020

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Dear Sir/Madam,

**RE: SUBMISSIONS ON THE REVIEW OF THE ENVIRONMENTAL MANAGEMENT
AND CO-ORDINATION (CONTROLLED SUBSTANCES) REGULATIONS, 2007.**

We refer to the above matter and the recent call for public participation.

Pursuant to Article 10(2) and Article 118 of the Constitution of Kenya 2010, we hereby submit our comments on the above-mentioned Regulations for your consideration during the review process.

Sincerely,



Rose Birgen
Natural Justice
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No.	Regulation	Sub-heading of the Regulation	Proposed Changes	Rationale For Proposed Changes
1.	3 (1)	Classification of controlled substances	<p>We propose an amendment to incorporate an additional provision requiring the Competent Authority to review the list of controlled substances at intervals of 3 to 5 years as follows: -</p> <p><i>3 (4) The Authority, shall, in consultation with the relevant lead agency, and subject to the Minister's approval, review the list of controlled substances after every 3 years.</i></p> <p>In addition to consulting lead agencies, we propose that the Authority also works closely with the Ozone Secretariat and the Secretariat of the Multilateral Fund for the implementation of the Montreal Protocol to develop the list of controlled substances.</p> <p>We propose an adjustment to Regulation 3(1) as follows: -</p> <p><i>3 (1) The Authority shall, in consultation with the relevant lead agencies, <u>the Ozone Secretariat and the Secretariat of the Multilateral Fund</u>, prepare and submit to the Minister for approval, a list of controlled substances.</i></p> <p>Alternatively, the term 'lead agency' should be defined in the</p>	<p>The reasoning behind this proposal is that scientific discoveries revealed over time may show that certain substances which are still in use and appear safe may be detrimental to the environment and harmful to the ozone layer. The law should therefore be constantly reviewed to reflect these new discoveries.</p> <p>The Regulations require the Authority to develop a list of controlled substances in consultation with relevant lead agencies. However, it is our view that involving the Ozone Secretariat and the Secretariat of the Multilateral Fund will ensure that the list developed is in harmony with internationally recognized control substances which States undertake to control in order to protect the ozone layer.</p>

			context of these regulations to mean all relevant government agencies and departments including the Ozone Secretariat and the Secretariat of the Multilateral Fund.	
2.	5 (2)	Labelling of controlled substances	In labelling a container holding a controlled substance, we suggest the inclusion of the scientific composition of the controlled substance.	Including the scientific composition of the controlled substance is necessary for ensuring that the Authority takes appropriate scientific measures depending on the nature and characteristics of the substance in question, whenever an accident occurs.
3.	7	Disposal of controlled substances	<p>This regulation should include a third sub-regulation requiring the Competent Authority to report all instances where a controlled substance is accidentally disposed of in a manner likely to detrimentally cause harm to the environment. These incidents should be reported to the Ozone Secretariat and the National Environmental Management Authority (NEMA) within 24 hours of the occurrence of an event.</p> <p>An additional sub-regulation may read as follows: -</p> <p><i>7 (3) Where, in the course of disposing a controlled substance, an accident likely to cause damage to the environment and the ozone layer occurs, the</i></p>	In the spirit of transparency and accountability the Ozone Secretariat, which oversees the implementation of the 1985 Vienna Convention on the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer nationally and NEMA which is Kenya's environmental watchdog, ought to be informed of such incidents.

			<p><i>Authority shall notify the Ozone Secretariat and NEMA within 24 hours of the occurrence of the incident and state the immediate measures taken to minimize or completely prevent negative impacts from the accident.</i></p>	
4.	9, 10, 11	<p>Reg. 9: Manufacturing of Controlled Substances</p> <p>Reg. 10: Application for Export</p> <p>Reg. 11: Importation of Controlled Substances</p>	<p>Deposit bonds should also be imposed on persons who manufacture, export or import controlled substances into Kenya.</p>	<p>Regulation 12 (2) (b) requires applicants for an approval to transport controlled substances through Kenya to deposit a refundable deposit bond with the Authority. This, in our opinion, is a measure that should also be applied to applicants for licenses or permits to manufacture, export and import controlled substances. It will ensure that the applicants handle controlled substances with extra caution to prevent unnecessary environmental damage.</p>
5.	15	<p>Communication of decision and issue of licence</p>	<p>We propose that the Authority's decision to issue or deny a license or permit and the reasons thereof be officially <i>Gazetted</i> in addition to notifying the applicant directly.</p> <p>The amendment can be done as follows: -</p> <p><i>15. The Authority shall <u>gazette its decision</u> and communicate the same to the applicant, in writing, within forty-five days (45) of receipt of the application and shall state the reasons for such decision where the application has been rejected.</i></p>	<p>It is the public's constitutional right to be informed of all decisions by the Authority including applications for licenses and permits especially where these decisions may impact their lives. This is also in line with the Fair Administrative Actions Act which requires all State organs and administrative bodies to provide feedback on their decisions with reasons for arriving at a particular conclusion.</p> <p>Keeping the public informed will therefore allow any person aggrieved by a decision to</p>

				challenge it before a competent authority and within the prescribed timeframes.
6.	21	Maintenance of a register	<p>NEMA should consider inserting an additional clause providing that the register of all information listed in Regulation 21 (2) shall be a public document available for inspection or photocopying by the public upon request.</p> <p>This can read as follows: -</p> <p><i>21(3) All information contained in the register maintained by the Authority as per sub-regulation (1) and (2) above shall be a public document available for inspection and photocopying by the public upon request.</i></p>	<p>Every person has the right to access information on all licenses and permits issued by the Authority as provided for in Article 35 of the Constitution of Kenya and Section 3A of the Environmental Management and Co-ordination Act, 1999 (EMCA). Access to information is essential in environmental governance as it ensures that citizens can participate effectively in decision-making processes, as well as, question the actions of the Authority where an alleged violation of their right occurs or is likely to occur.</p> <p>As such, information should be made easily available within the shortest time possible and at the lowest or no cost at all.</p>
7.	22	Exemptions	We propose the total repeal of this regulations.	It will go against the precautionary principle to exempt some controlled substances from the application of these regulations. The current climate crisis we are already experiencing globally calls for the application of strict regulations that do not allow room for causing more damage. Therefore, we are of the view that all controlled substances must be regulated.

8.	23	Illegal procurement	<p>We propose the prescription of a monetary punishment in addition to the revocation of the licence where a person illegally procures a controlled substance.</p>	<p>Regulation 23(1) provides that where an imported controlled substance fails to meet the specifications of the licensed controlled substance, the Authority shall require the licensee to return the controlled substance to the country of origin at the licensee's cost or pay for the cost of disposal of the controlled substance. It goes on to provide that the Authority shall revoke the license of a person who contravenes Regulation 23 (1).</p> <p>In addition to revoking the license, we are of the opinion that the Authority should also impose a monetary fine to ensure that the provisions are deterrent enough.</p>
9.	24 (2) (b)	Role of Authority	<p>The Authority should also report to the Ozone Secretariat and the Multilateral Fund Secretariat about all incidents of non-compliance and how they have dealt with such incidents.</p> <p>We therefore propose an amendment as follows: -</p> <p><i>24 (2) In carrying out its monitoring role the Authority shall be responsible for-</i></p> <p><i>(b) periodic reporting to the Ozone Secretariat and the Multilateral Fund Secretariat on the produced, imported, exported or consumed controlled</i></p>	<p>This will ensure that the Authority, Ozone Secretariat and the Multilateral Fund Secretariat work together to promote safety in handling controlled substances.</p>

			<i>substances as well as the levels of compliance by license holders and any actions taken to address instances of non-compliance.</i>	
10.	28	General penalty for offences	We suggest a review of the penalties for the violation of the Regulations to make them more deterrent.	A fine of not more than Ksh. 350,000 or imprisonment for not more than 18 months is, in our view, very lenient and may therefore not encourage people to abide by the law.