

## Time for industry to comment and prepare for pending regulations to phase out the use of Persistent Organic Pollutants

Author: Michael Vermaak

South Africa is a signatory to the Stockholm Convention on Persistent Organic Pollutants (see <http://chm.pops.int/>). Subject to any exemptions that may apply, Parties to the Convention must take steps to eliminate the production and use of Annex A chemicals, to restrict the production and use of Annex B chemicals and to reduce the unintentional release of Annex C chemicals.<sup>1</sup>

Regulations under the National Environmental Management Act 107 of 1998 (NEMA) relating to phasing out the use of polychlorinated biphenyl (PCB) materials and PCB-contaminated materials have already been promulgated (PCBs are Annex C chemicals).<sup>2</sup> Subject to the further provisions of the PCB Phase-Out Regulations, the phase-out timeframes for PCBs<sup>3</sup> stipulate that no person may:

- use any PCB material<sup>4</sup> or PCB-contaminated materials<sup>5</sup> after 2023; or
- have any PCB materials, PCB-contaminated materials or PCB waste<sup>6</sup> in their possession after 2026, with the exclusion of disposed PCB waste.

Proposed new regulations to phase out the use of Persistent Organic Pollutants (POPs) were published by the Minister of Environmental Affairs on 30 June 2017,<sup>7</sup> inviting members of the public to submit written representations or objections to the Department of Environmental Affairs (DEA) within 60 days of publication of the notice.

The proposed regulations are intended to prescribe the requirements for phasing out the use of certain, predominantly Annex A chemicals, as well as some Annex B chemicals. The proposed regulations relate specifically to the phase-out of the use of the following chemicals and shall “*apply uniformly to all owners of the listed chemicals*”:

- Hexabromobiphenyl
- Pentachlorobenzene
- Perflourooctane Sulfonic Acids, its salts (PFOS) and Perflourooctane Sulfonyl Fluoride
- Hexabromophenyl Ether and Heptabromodiphenyl Ether
- Tetrabromodiphenyl Ether and Pentabromodiphenyl Ether

As a general prohibition contained in the proposed POPs Phase-Out Regulations, it is proposed that the

---

<sup>1</sup> See <http://chm.pops.int/TheConvention/ThePOPs/AllPOPs/tabid/2509/Default.aspx>.

<sup>2</sup> GN R549 of 10 July 2014.

<sup>3</sup> Defined in the PCB Phase-Out Regulations as meaning “one of 209 congeners containing one to ten chlorine atoms attached to the biphenyl group”.

<sup>4</sup> “PCB material” means “oil or articles with PCB concentration greater than 500 mg/kg”, with “articles” being “dielectric fluid, dielectric fluid containers, electrical equipment or other equipment or materials that contain PCBs or came into contact with materials that contain PCBs” (“equipment” is defined as including “capacitors, transformers, electrical motors, circuit breakers, voltage regulators, reclosers, switchgears, switches, electromagnets, rectifier or other equipment that contain a dielectric fluid that contain PCBs”).

<sup>5</sup> “PCB contaminated material” is defined to mean “oil or articles with PCB concentration greater than 51 mg/kg but less than 500 mg/kg”.

<sup>6</sup> “PCB waste” means “waste as defined in the National Environmental Management: Waste Act, 2008 (Act No 59 of 2008), which contains PCB materials or PCB contaminated materials”.

<sup>7</sup> GN R626 of 30 June 2017.

regulations will prescribe that, subject to the provisions of the regulations and unless a person complies with the notification requirements (stipulated in regulation 5) and the phase-out plan requirements (contained in regulation 6) of the regulations, **no person may use, produce, sell, import or export the listed chemicals.**

The phase-out timeframes are stipulated in broad terms for certain formulations of the listed chemicals, i.e. that no person may use, produce, distribute, sell, import or export:

- Hexabromobiphenyl and Hexabromobiphenyl formulations, or have Hexabromobiphenyl-containing wastes in their possession after **31 December 2020**
- Pentachlorobenzene and Pentachlorobenzene formulations, or have Pentachlorobenzene-containing wastes in their possession after **31 December 2019**
- Perflourooctane Sulfonic Acids, its salts (PFOS) and Perflourooctane Sulfonyl Fluoride, PFOS formulations, or have PFOS-containing wastes in their possession after **31 December 2021**
- Hexabromodiphenyl Ether (Hexa-BDEs) and Heptabromodiphenyl Ether (Hepta-BDEs), Hexa-BDEs and Hepta-BDEs formulations, or have Hexa-BDEs and Hepta-BDEs in their possession after **31 December 2020**
- Tetrabromodiphenyl Ether (Tetra-BDEs) and Pentabromodiphenyl Ether (Penta-BDEs), Tetra-BDEs and Penta-BDEs formulations, or have Hexa-BDEs- and Hepta-BDEs- containing wastes in their possession after **31 December 2020.**

The phase-out timeframes stated in the proposed regulations are more stringent than the phase-out periods contained in the PCB Phase-Out Regulations of 2014.

As seems to be a developing trend in registration and notification requirements imposed in regulations made by the Minister of Environmental Affairs,<sup>8</sup> very tight timeframes are proposed to be set in regulation 5(1), which provides that a user, producer, seller, distributor, importer or exporter of a listed chemical must notify the Director-General of the DEA within 30 days of promulgation of the regulations. Our experience indicates that a 30-day period for similar such registration or notification requirements can prove to be problematic for industries that may be caught by surprise when regulations are promulgated in their final form. In our view, at least a 90-day period would be more reasonable (for example in the PCB Phase-Out Regulations a 90-day period was allowed for registration by persons who possessed “articles” that contained PCBs).

The need for sufficient time for a business to properly assess the implications of the final form of the regulations is particularly important when considering the offences and penalties contained in the proposed POPs Phase-Out Regulations, which indicate that failure to comply with the notification requirement, on conviction, potentially attracts a fine not exceeding ZAR10 million or imprisonment for a period not exceeding 10 years, or “*both such fine or such imprisonment*”.<sup>9</sup>

It is advisable for industries that are potentially going to be caught by the notification requirements and other obligations under the proposed POPs Phase-Out Regulations to already at this stage start preparing for a likely notification requirement. This notification obligation probably will be imposed shortly after commencement of

---

<sup>8</sup> See for example, the 30-day registration period set in the Greenhouse Gas Emission Reporting Regulations contained in GN 275 of 3 April 2017, promulgated under the National Environmental Management: Air Quality Act 39 of 2004.

<sup>9</sup> Presumably “and” is intended rather than “or”.

the regulations and preparation should start even before the regulations are promulgated (which may of course ultimately be in a different form from the proposed POPs Phase-Out Regulations).

In terms of regulation 6 of the proposed POPs Phase-Out Regulations, a producer, importer or exporter who has notified the DEA under regulation 5, will be required to develop a phase-out plan for a listed chemical. The phase-out plan must include:

- contact details of the company submitting the plan
- details of the chemical used, produced, imported or exported
- suitable alternatives to the chemical
- the annual reduction target, and
- the date or year in which the use, production, importation and exportation of the chemical will be phased out.

The phase-out plan must be submitted for approval to the Director-General of the DEA within 12 months of promulgation of the POPs Phase-Out Regulations and, after considering the content of the plan, the Director-General must either approve the plan for implementation or otherwise require amendments to be effected. Once approved, the phase-out plan must be implemented and deviations will only be allowed with written approval by the Director-General.

Reporting requirements will also be imposed, including with respect to the quantities of listed chemicals or chemicals used, produced, imported or exported, as well as progress reports on implementation of the approved phase-out plan; ultimately, at the end of the phase-out period, a "*consolidated report*" will be required which reflects the quantities of listed chemical or chemicals produced, imported or exported during the phase-out period.

As mentioned previously, non-compliance with the POPs Phase-Out Regulations could attract heavy penalties, with fines not exceeding ZAR10 million or imprisonment for a period not exceeding 10 years, or both such fine or such imprisonment potentially being imposed on conviction.

Parties affected by the POPs Phase-Out Regulations still have some time in which to comment and it would be advisable for potentially affected industries and businesses to start considering their capacity to meet a 30-day notification period, as well as the implications of the proposed phase-out timeframes for their business.