OUTA

ORGANISATION UNDOING TAX ABUSE

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OUTA COMMENTS ON THE DRAFT NATIONAL NUCLEAR REGULATOR AMENDMENT BILL

Submission by the Organisation Undoing Tax Abuse to The Department of Minerals and Energy

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1. INTRODUCTION

1.1 The Organisation Undoing Tax Abuse ("OUTA") hereby makes its submission in response to a call for public comment on the National Nuclear Regulator Amendment Bill ("the Bill") by the Department of Minerals and Energy ("DMRE"). OUTA trusts that the inputs reflected in its submission will assist the DMRE by taking cognisance of the implications of the Bill in conjunction with the broader spectrum of the current legislative framework dealing with nuclear energy.

1.2 By way of introduction, OUTA is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. We envision a prosperous country, with an organised, engaged and empowered civil society that ensures responsible use of tax revenues.

1.3 Part and parcel to OUTA's mission is the challenging of legislation and regulatory environment, this includes participating and engaging with government on legislation such as the abovementioned Bill.

1.4 After a review visit to South Africa, the International Atomic Energy Agency ("IAEA") published a report in February 2013, which was explicit on this point:[1]

"The Minister of Energy and the National Nuclear Regulator (NNR) are identified in the two Acts as having regulatory functions over nuclear activities. Considering that the Minister of Energy is also in charge of the promotion of nuclear energy and given that the Minister appoints the NNR Board and CEO, approves NNR's

[1] See http://www.nnr.co.za/wp-content/uploads/2016/11/Approved_INIR_Report_Republic-of-South-Africa.pdf.

budget and promulgates regulations, the INIR team is of the view that the separation between the regulatory functions and the promotional activities is not adequate, thus calling into question the effective independence of the NNR."

1.5 At the point of amending the National Nuclear Regulator Act, 1999 ("NNRA") it would seem to be appropriate to ensure that the highest standards of nuclear governance are adhered to. OUTA therefore recommends that the international standards should be applied.

1.6 At a glance, OUTA's comments will reflect that the following enhancements are required in order to solidify the regulatory impact of the Bill:

1.6.1 greater transparency and accountability measures;

1.6.2 clear measures and assurance relating to the financial liability of nuclear facilities;

1.6.3 Independence in the formulation and enforcement of nuclear safety standards; and

1.6.4 General oversight and legal clarity.

2. GENERAL

2.1. Notwithstanding the role of the IAEA as an industry body, devastating nuclear accidents with long lasting consequences tend to ripple through the industry and negatively impact on any further expansion. Taking into consideration the recommended safety standards as outlined by the IAEA, it remains the responsibility of national government to manage its nuclear activities and ensure that such activities are in line with international best practice and industry standards.

2.2. Such standards and norms are adapted upon any nuclear accident (i.e. Fukushima) to ensure that future accidents of the same nature are prevented and at minimum, the impact thereof is mitigated. It is thus clear that the ever-changing industry of nuclear energy is not static and that the regulatory framework of any government must be up to par as far as technological advancement, safety measures and general administration of nuclear energy is concerned.

2.3. Should the Bill be enacted, it is in the public interests for the nuclear oversight to be improved as the economic loss will be exacerbated by any clean-up operations for decades to come. From a South African perspective, the fallout of a nuclear accident in Cape Town, could diminish exports of fish and wine indefinitely and destroy the tourist industry. An accident at the South African Nuclear Energy Corporation SOC Ltd ("NECSA") in the North-West province could impact on the economic hub of the country, necessitating the evacuation of the entire Gauteng area. OUTA submits that in order to avoid a nuclear catastrophe, priority should be given to the enhancement and enforcement of nuclear safety

3. INTERPRETATION

AD DEFINITION "EXEMPTION"

"…by the insertion after the definition of "enrich" of the following definitions: " 'exemption' means the determination by the Regulator that a source, facility or activity is not subject to some or all aspects of regulatory control, on the basis that the exposure (including potential exposure) due to the facility or activity is too small to warrant the application of those aspects, or that this is the optimum option for protection irrespective of the actual level of the doses or risks;"

3.1. OUTA contends that the proposed amendment raises the risk of one larger exposure being presented as a number of smaller exposures and would seem to undermine the principle of assessing cumulative impacts.

3.2. The possibility that the National Nuclear Regulator ("NNR") might exempt a radioactive activity from regulation on the basis that this is the best way of protection even if it releases a high dose of radiation, appears to undermine the very rationale for existence of the NNR. Such an exemption should only be considered under stringent conditions which must include meaningful public participation.

AD DEFINITION "FACILITY"

'facility' means nuclear facility, irradiation facility, mining and raw material processing facility, radioactive waste management facility, and any other places where radioactive material is produced, processed, used, handled, stored or disposed of, on such a scale that protection and safety is required;"

3.3. OUTA welcomes the introduction of defined facilities, however, the amendment unintentionally suggests that conventional mining facilities (such a gold and platinum) are precluded from the definition with emphasis on nuclear facilities. It is common cause that gold and uranium may be present at the same geographical deposit and that uranium become exposed to the surface once gold and ore is extracted. Following extraction, uranium is discarded with other ore and stored in what we commonly known as mine dumps. Albeit a minor adjustment, OUTA proposes that “mine dumps” be included in the definition for clarity’s sake.

3.4. OUTA notes that the provision of “nuclear facility” expressly excludes *“mining and processing of ore”* which may cause a potential conflict of interpretation between “facility” as referred to above and “nuclear facility”.

AD DEFINITION: “ACTIVITY”

" 'activity' means—

(a) the use, possession, production, storage, enrichment, processing, reprocessing, or disposal of radioactive material;

(b) the import and export of radioactive material for industrial, research and medical treatment;

(c) the transporting, or causing to be transported, of radioactive material;

(d) manufacturing of design packages intended for storage or transport of radioactive material;

(e) the site evaluation, design, manufacturing, construction, commissioning, operation and decommissioning of facilities; and

(f) radioactive waste management activities and site rehabilitation;

3.5. OUTA recommends that the Bill reverts to the definition of "action" as opposed to "activity". Limiting the scope what activity entails as per the definition proposed by the Bill may not make provision for unforeseen nuclear activities of the future. Amendment of the definition at a later stage once we become aware of such activity is counter intuitive and defeats the objects of the principal act. Considering the constant development of nuclear technology, best practice and activities, a broader definition as defined by "action" will make provision for a wide range of nuclear activities that we may not be aware of in this point in time.

3.6. At a minimum, OUTA proposes that the definition of "activity" be expanded to included *"any other activity involving radioactive material".* It is further recommended that *"and"* be deleted from *"…the site evaluation, design, manufacturing, construction, commissioning, operation and decommissioning of facilities; and"* and replaced with "or" to ensure broader interpretation.

AD AMENDMEND OF SECTION 2

"Section 2 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading: "Application of Act, and declaration of nuclear [installation] facilities;";

(b) by the substitution for subsections (1), (2) of the following subsections respectively:

"(1) Subject to subsection (2), this Act applies to—

(a) the site evaluation, design, manufacturing of component parts, construction, operation, extended shutdown, decontamination and decommissioning of any nuclear facility including the closure of any radioactive waste disposal facility;

(b) commercial vessels propelled by nuclear power or having radioactive material on board which is capable of causing nuclear damage;

(c) the decontamination, decommissioning and closure of any of the Republic's National Defence Force facilities, equipment, machinery or scrap, including remediation or rehabilitation of land, which is designated for release for civilian use;

(d) exposure of aircrew to cosmic radiation; and

(e) any other activities involving radiation conducted in the Republic which are capable of causing nuclear damage.

(2) This Act does not apply to—

(a) exposure to cosmic radiation at ground level or to potassium-40 in the body or any other radioactive material or activities not amenable to regulatory control as determined by the Minister, after consultation with the board by notice in the Gazette;

(b) activities involving exposures that have been excluded from regulatory control, through regulations established in terms of section 36; (c) Group IV hazardous substances as defined in section 1 of the Hazardous Substances Act, 1973 (Act No. 15 of 1973)"

3.7. The amendment fails to address section 2(3). In order to bring section 2(3) in line with the amendments and adjustments to the new definitions, OUTA proposes an amendment to section 2(3) as follows:

"(3) For the purposes of this Act, the Minister may, **[after]** in consultation with the board and by notice in the *Gazette*, declare any facility, installation, plant or structure, including a mine or ore-processing facility, to be a [nuclear installation] "facility" as per the definition outlined in section 1 of this Act."

AD AMENDMENT OF SECTION 5

"…by the substitution for paragraphs (f) of the following paragraph:

*(f) ensure that **[provisions]** requirements for nuclear and radiation*

*emergency preparedness and response **[planning]** are in place;"*

3.8. No qualification is given as to what “requirements” and “preparedness and response” entail. OUTA proposes that definitions are inserted in section 1 and submits that the principal is currently defective as far as clarity is concerned on “provisions” and “planning”.

4. GOVERNANCE AND TRANSPARENCY

AD PROPOSED AMENDMENT TO SECTION 8(4)

4.1. In terms of section 8(4)(a)(i) to (iii), the board must consist of one representative of organised business; one representative of organised labour and one person representing communities, which may be affected by nuclear activities. OUTA appreciates the fact that section 8(4)(a)(iii) provides for representation by a member civil society, however, such representation may be regarded as mere compliance with section 8 with little regard to the practical implications of civil society representation.

4.2. In the spirit of transparency, OUTA proposes that the role and functions of such representative(s) be clarified. The fact that the constitution of proper quorum is absent from the proposed amendments of the Bill may imply that the position as member of civil society is overruled more often than not, rendering such position superficial and meaningless.

4.3. OUTA thus proposes that the role of members contemplated in section 8(4)(i) to (iii) be promulgated as regulation and needs not necessarily be reflected as a provision *per se*.

AD AMENDMENT TO SECTION 8(7)(b)

"…by the substitution in subsection (7) for paragraph (b) of the following paragraph:

(b) a panel, appointed by the Minister, which may include representatives of the relevant committees of Parliament, must compile a shortlist of not more than 20 candidates from the persons ***[so]*** *nominated;"*

4.4. OUTA appreciates the inclusion of parliamentary representatives as part of the panel. However, the amendment makes this a discretion on the part of the Minister. In order to ensure transparency and independence in the appointment process (as the Minister is accountable to Parliament), OUTA recommends that *"may"* be deleted from the provision and substituted with *"must"*.

AD AMENDMENT TO SECTION 8(7)(c) AND (d)

4.5. OUTA has *noted* that section 8(7)(c) and (d) has not been amended. In order to ensure transparency, clarity on the process and avoidance of external and/or political interference, OUTA proposes that the appointment should be made strictly in line with the shortlist as formulated in terms of section 8(7)(a). In this regard, OUTA proposes an amendment to section 8(7)(c) as follows:

"…the Minister must, from the shortlist so compiled ***[and from other persons nominated as contemplated in paragraph (a),]*** *appoint persons to the relevant positions on the board; and"*

4.6. The *discretion* imposed by section 8(7)(d) relating to the appointment of an alternate director may create a scenario where proper oversight is compromised in the absence of a director appointed in terms of section 4. In order to circumvent

this possibility, OUTA proposes that *"may"* be deleted and substituted with *"must"* as to ensure that oversight and good governance is present at all times.

AD REPEAL OF SECTIONS 10 AND 11

4.7. OUTA considers the repeal of sections 10 and 11 as material with an impact on the NNR's governance and overall decision making. These sections relate to the minutes and meetings of the board amongst others. Although OUTA is cognisant of the fact that it is the accounting authority's obligation as per the Public Finance Management Act, 1999 ("PFMA") to keep record of all decisions, OUTA submits that the act specifically applicable to the NNR should deal with this obligation in greater detail.

4.8. Furthermore, Section 10(4) states that the majority constitutes a quorum. Bear in mind section 10(6) states that no decision by the board is invalid merely because of a vacancy on the board. Reading of section 10(4) would imply that say for example there are only 3 board members appointed (from a total specified in section 8), the presence of 2 board members will constitute a majority. OUTA is aware of the predicament caused by section 10 as far as a quorum is concerned. However, it is proposed that provision is made that a quorum is constituted when 75% of the board is present.

AD PROPOSED AMENDMENT TO SECTION 21(6)

"(6) (a) A person who may be directly affected by the granting of a nuclear licence, nuclear site licence or nuclear vessel licence pursuant to an application in terms of subsection (1), (2) or (3), may make written representations to the board, relating to health, safety and environmental issues connected with the application,

within 60 days of the date of publication in the Gazette contemplated in subsection (3)(b).”

4.9. Due to the fact that the public will always be affected by any authorisations granted in terms of section 21, public participation ought to be considered as mandatory and given preference above all ancillary administrative procedures.

4.10. OUTA contends that a period of 60 days is not sufficient taking into consideration the technical nature of applications as contemplated in section 21(6). In order to participate meaningfully, the public ought to be afforded at least 90 days to make written representation. Considering the fact that the general public may not reasonably be aware of any public participation process over the festive season, OUTA recommends that a definition of “*days*” be included in the principal act, alternatively that a guideline be issued stating that:

“Where a timeframe is affected by the 15 December to 2 January period, the timeframe must be extended by the number of days falling within the 15 December to 2 January period. Where a timeframe is affected by one or more public holidays, the timeframe must be extended by the number of public holiday days falling within that timeframe.”

4.11. In addition, OUTA has noted that the proposed amendment to section 21(5)(b) provides that the board must direct an applicant to publish the application in question in the government gazette. No provision is made as when such application ought to be published, resulting in public participation being delayed and solely reliant on the conclusion of the NNR’s review of any applications received.

4.12. In this regard, OUTA proposes an amendment to section 21(5)(b) as follows:

"(b) publish a copy of the application in the Gazette and two newspapers circulating in the area of every such municipality, within 30 days from the date on which the application was received by the chief executive officer."

AD AMENDMENT TO SECTION 21(7)

"(7) Subject to the provisions of section 51 of this Act, the requirements for serving and publishing of an application and further public representation may be waived by the chief executive officer with the prior approval of the board."

4.13. OUTA proposes that this amendment should not be included in the principal act as disclosure of documentation within the public interest should not be at the discretion of the chief executive officer. The presence of this provision may render public participation process meaningless, should the chief executive officer elect to withhold such information. In addition, the refusal of such information may result in litigation that may potentially delay or adversely affect the outcome of applications and renewal for nuclear licence, nuclear site licence, nuclear vessel licence or regulatory evaluation of a decision.

AD AMEDNMENT TO SECTION 26(2)

"(2) The holder of a nuclear licence must establish a public safety information forum as prescribed in order to inform the persons living in the municipal area in respect of which an emergency plan has been established in terms of section 38(1) on nuclear safety and radiation safety matters."

4.14. Considering the possibility that a nuclear facility could impact more than one municipality OUTA proposes that "*area"* be amended to *"areas"* in order to make provision for instances where more than one municipality is affected.

5. FINANCIAL IMPLICATIONS

AD INTRODUCTION OF SECTION 26A

"26A. (1) An applicant for, or a holder of an authorisation to construct and operate a nuclear facility shall ensure that adequate financial resources will be available, and shall provide such financial resources, when needed to cover costs associated with safe rehabilitation, or decommissioning, including the management of resulting waste.

(2) The amount of financial resources to be made available for rehabilitation, or decommissioning activities shall be—

(a) commensurate with an activity or facility specific cost estimate;

(b) changed if the cost estimate increases or decreases; and

(c) reviewed as part of the periodic review of the rehabilitation, or decommissioning plan.

(3) For existing activities and facilities for which financial resources for rehabilitation, or decommissioning are not available, provisions for adequate financial resources shall be required within a set time frame as may be determined by the Regulator or prior to authorisation renewal or extension, whichever is applicable."

5.1. OUTA notes that no provision is made for scenarios when financial resources are unavailable due to facilities and/or business becoming insolvent. South Africa has a history of abandoned and ownerless mines which require rehabilitation, the costs of which are more often than not covered by the state. In the case of nuclear energy, the rehabilitation costs may extend over decades or millennia and there is a difficulty of ensuring that the financial resources can be liquidated when needed.

5.2. OUTA proposes that provision be made for cash deposits, guarantees, insurance or an approved trust fund. Moreover, assurance would also need to be aligned with legislation to ensure that trustees must assume liability should the trust be administered in a manner that would result in the trust being unable to meet its obligations.

5.3. OUTA further proposes that provision be made for National Treasury to ensure sufficient financial resources are available to enable the NNR to carry out its mandate. In light of such proposal, the inability of a licensee to cover their expenses should not inhibit NNR to carry out its responsibilities in terms of the NNRA.

5.4. In instances where facilities and/or business are unable to fulfil their financial responsibilities for whichever reason, OUTA proposes that provision be made for the NNR to apply for additional funding in order to address challenge at hand immediately without delay. It is further suggested that in order to service such funding, National Treasury may apply the appropriate measures to recover the funds from the relevant parties, taking into consideration the fact that such parties may already be insolvent.

5.5. OUTA takes cognisance of the fact that the proposed amendment to section 29 allows for the Minister to publish a notice in the government gazette ensuring financial security by a holder. However, OUTA proposes that provision be made in the legislation whereby every applicant and holder of authorisations must annually:

5.5.1. assess his or her environmental liability in a prescribed manner and must increase his or her financial provision to the satisfaction of the NNR;

5.5.2. submit an audit report to the NNR on the adequacy of the financial provision from an independent auditor.

5.6. Should the NNR be of the opinion that the financial security provided is unsatisfactory, it is suggested that provision be made for the NNR to conduct its own assessment and determine the amount of financial security applicable. In this respect and should the NNR subsequently determine that the amount of financial security so determined cannot be fulfilled, the NNR may then proceed to apply for the necessary funding to cover such deficit as suggested in paragraph 5.4 above.

5.7. In this regard, it may be prudent for the DMRE to consider provisions similar to that as contemplated in section 24P of the National Environmental Management Act, 1998 ("NEMA") in order to prevent scenarios of under guaranteeing financial security.

AD AMENDMENT TO SECTION 28(c)

"(c) any work the Regulator may be required to undertake pursuant to the receipt of a notification in terms of sections 20(2) and (3)."

5.8. The addition of section 28(c) covers some of the additional expenses that the NNR board may incur. Notwithstanding, OUTA proposes that provision should be made for the NNR to be compensated for work conducted proactively in safeguarding the public interest. Such instances ought to include work conducted outside of the ordinary scope of granting licences.

6. DECISION MAKING, RECORDS AND TIME FRAMES

AD AMENDMENT TO SECTION 29(3)

"(3) Despite subsection (2), the Minister may, after consultation with the board, for so long is the holder of a nuclear ***[installation]*** *licence may be liable for nuclear damage-*

"

6.1. OUTA contends that the Minister should not be afforded the power to make a decision on financial security after he has consulted the board. OUTA has observed many instances where decisions made after consultation with a board of a state-owned entity, the executive discards any recommendation made by the board.

6.2. It is recommended that provision be made that a decision made by the Minister in terms of section 29 shall only be in force upon publication of such decision, accompanied by the concurrence of the board to such decision.

AD AMENDMENT TO SECTION 34

6.3. OUTA has noted that provision has not been made for the amendment of section 34(1). Considering that the consequences of nuclear fallout may last for thousands of years, OUTA proposes that *"a period of 30 years"* be deleted and substituted with *"a period of not less than 100 years*".

6.4. Furthermore, and in this context, provision should be made that the state bears the liability until such time that the person strictly liable is identified. Should such person not be identified, liability should remain with the state indefinitely.

AD AMENDMENT TO SECTION 39

*"…at or in any nuclear **[installation]** facility in respect of which **[a nuclear installation licence]** an authorisation is no longer in force, is within safety standards contemplated in section 36, it may remove the particulars in connection therewith from that record."*

6.5. In addition to the proposed amendments as reflected in the remainder of section 39, OUTA contends that nuclear information ought not to be destroyed or removed under any circumstances. Nuclear contamination might surface many years later, the details of which may only be analysed from information that would otherwise be destroyed or removed. Thus, OUTA proposes that section 39 be amended to make provision for the archiving of such information.

6.6. Furthermore, it is suggested that provision also be made that such records be made available to the public immediately upon the NNR making a decision for the removal of such information from the record.

AD AMENDMENT TO SECTION 40

"40. Record of nuclear accidents and nuclear or radiation incidents [and access thereto]"

The Regulator must—

(a) keep and maintain a record of the details of every nuclear accident and nuclear or radiation incident;

(b) store that record safely;

(c) retain that record for 40 years from the date of the nuclear accident or nuclear or radiation incident; and

(d) on the request of any person, make that record available to that person."

6.7. In consideration to OUTA's comments relating to the proposes amendment of section 39, OUTA proposes that section 40(c) be amended. In this regard, it is proposed that *"40 years"* be deleted and substituted with *"indefinitely"*. Given the fact that the life of nuclear and/or radioactive material can last for thousands of years, a 40-year cap on retention is insufficient and may cause prejudice to future generations.

6.8. OUTA further contends that section 40(d) be deleted, and that provision be made for the NNR to publish such records for public consumption.

AD AMENDMENT TO SECTION 46

"46 Appeal to High Court against ***[Minister's]*** *board's decision*

(1) Any person adversely affected by a decision of the [Minister] board, either in terms of section 44(3) or in the exercise of any power in terms of this Act, may appeal against that decision to the High Court.

(2) Such appeal must—

(a) be lodged within 60 days from the date on which the decision was made known by the [Minister] board or such later date as the High Court permits; and

(b) set out the grounds for the appeal.

(3) The appeal must be proceeded with as if it were an appeal from a Magistrate's Court to a High Court.".

6.9. OUTA contends that a person affected by a decision taken by the board is prejudiced by section 46(2)(a) in that only 60 days is afforded for such person to approach the court for remedial action. OUTA submits that it is superficial for the legislature to suggest that a decision taken by the board (NNR) is to be construed as an order of a magistrate's court.

6.10. In this regard, it is common cause that any decision taken by the NNR constitutes an administrative action as contemplated in the Promotion of Administrative Justice Act, 2000 ("PAJA"). In this regard, section 46 is superfluous as it attempts to circumvent the remedial action available in terms of PAJA whereby a person aggrieved by an administrative action may approach the court within 180 days to review such decision.

6.11. OUTA contends that the remedial action proposed by section 46, attempts to deprive a person of his or her constitutional right to just administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

7. CONCLUSION

7.1. In reiteration of the comments set out above, OUTA urges the DMRE to have regard to the significance of nuclear energy, including the financial and environmental implication associated with it.

7.2. OUTA believes that transparency is the key to a thriving nuclear industry as the absence of transparency will result in circumvented accountability at the expense not only of the national fiscus, but to the citizens of South Africa.