



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

The Honourable Minister Edna Molewa
Minister of Water and Environmental Affairs
By email: raganyag@dwa.gov.za; skhosanan@dwa.gov.za

Dr. Thuli N. Mdluli
National Air Quality Officer
Chief Director: Air Quality Management
Department of Environmental Affairs
By email: tnmdluli@environment.gov.za

Our ref: CER/33.5/RH
Date: 8 October 2013

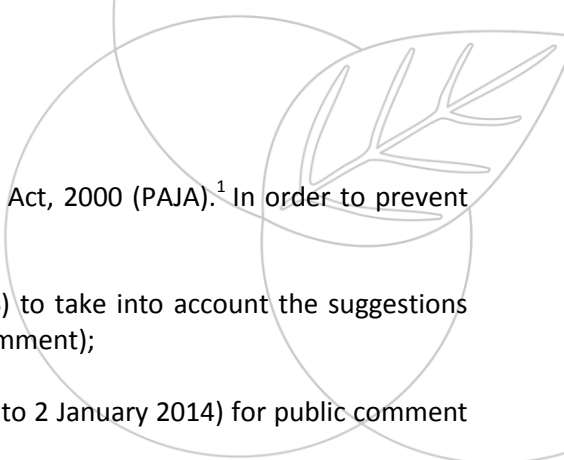
URGENT

Dear Minister Molewa and Dr Mdluli

ESKOM SOC HOLDINGS LTD'S (ESKOM) APPLICATION TO POSTPONE COMPLIANCE WITH AND/OR BE EXEMPT FROM MINIMUM EMISSION STANDARDS FOR SULPHUR DIOXIDE (SO₂), NITROGEN OXIDES (NO_x), AND PARTICULATE MATTER (PM) FOR ITS POWER STATIONS

1. We act for groundWork, Earthlife Africa Johannesburg (ELA), the Vaal Environmental Justice Alliance, and the following community groups: Middelburg Environmental Justice Network; Greater Middelburg Residents' Association; Guqa Community Service Centre; Southern Africa Green Revolutionary Council; Greater Delmas Civic Movement; and Schoongesicht Community Movement. Our clients are interested and affected parties in Eskom's applications for postponement of and/or exemption from the compliance time-frames for the minimum emission standards (MES) published in terms of section 21 of the National Environmental Management: Air Quality Act, 2004 (AQA).
2. As you are no doubt aware, Eskom has sought postponement of and/or exemption from the MES for the following stations: Medupi, Majuba, Matimba, Kendal, Lethabo, Duvha U1-3 and U4-6, Matla, Tutuka, Kriel, Arnot, Hendrina, Camden, Grootvlei, Komati, Port Rex and Acacia. This appears also from the Background Information Document (BID) attached as annexure 1.
3. The purpose of this letter is to alert you, as the relevant decision-makers on the exemption and postponement applications, respectively, to our clients' concerns that you will not have all relevant information before you when you make your decisions on Eskom's applications, and that any decision you make may therefore be

223 Lower Main Road,
Observatory, 7925
Cape Town, South Africa
Tel 021 447 1647, Fax 086 730 9098
Email info@cer.org.za, www.cer.org.za



subject to judicial review under the Promotion of Administrative Justice Act, 2000 (PAJA).¹ In order to prevent this, we are instructed to request that you require Eskom:

- 3.1. to amend the atmospheric dispersion modelling Plan of Study (PoS) to take into account the suggestions made on our clients' behalf (and to recirculate that PoS for public comment);
 - 3.2. to conduct detailed health risk assessments; and
 - 3.3. to provide at least 90 days (excluding the period 15 December 2013 to 2 January 2014) for public comment on the atmospheric impact reports and applications.
4. Next, we provide some background to Eskom's applications and the process followed to date. Thereafter, we elaborate on our clients' requests set out above.

Eskom's applications

5. There is provision in both the section 21 List of Activities (published in terms of AQA),² and the 2007 National Framework for Air Quality Management (Framework)³ to apply to postpone MES compliance dates. An Atmospheric Impact Report (AIR) is required to be prepared in support of such application and submitted to the Department of Environmental Affairs (DEA) at least one year before the compliance date (i.e. by 30 March 2014). A detailed justification must be provided for the application. The Framework provides that it must also be demonstrated that the industry's atmospheric emissions are not causing any adverse impacts on the surrounding environment, and that ambient air quality standards (AAQS) in the areas are in compliance with the legislated standards.
6. The AQA's definition of "this Act" includes the Framework.⁴ The Framework binds all organs of state in all spheres of government;⁵ and an organ of state must give effect to the Framework when exercising a power or performing a duty in terms of AQA or any other legislation regulating air quality management.⁶ Compliance with the Framework is therefore required in order for the relevant decision-maker to evaluate Eskom's applications.
7. As appears from our clients' response to the BID (annexure 2), it is disputed that AAQS are in compliance in the relevant areas and that Eskom's atmospheric emissions are not causing any adverse impacts on the surrounding environment. Section C of annexure 2 deals with the AAQS non-compliance.
8. In its BID, Eskom also indicates that "power station emissions do not harm human health". The BID states that this allegation will be re-examined in the AIRs. Section E of annexure 2 address the health impacts of coal-fired power stations, and section F deals with Medupi in particular; including the findings of the World Bank Inspection Panel. As is apparent from these submissions, our clients strongly dispute the allegation that power station emissions are not harmful to health. This is not borne out by the medical research and evidence. It is also not supported by the Panel's findings. We have requested proof that AAQS are in compliance and to support Eskom's allegation in the BID that power stations do not harm human health. This has not yet been forthcoming.
9. In circumstances where, according to the BID, "*it is not intended to conduct detailed health or environmental risk assessments in the [Atmospheric Impact Reports], only to ascertain how the AAQS will be affected by the proposed delay in meeting the MES or not meeting the MES at all*", it is submitted that it is unlikely that an adequate investigation will be done regarding the potential adverse impacts of the application.

¹ s.6.

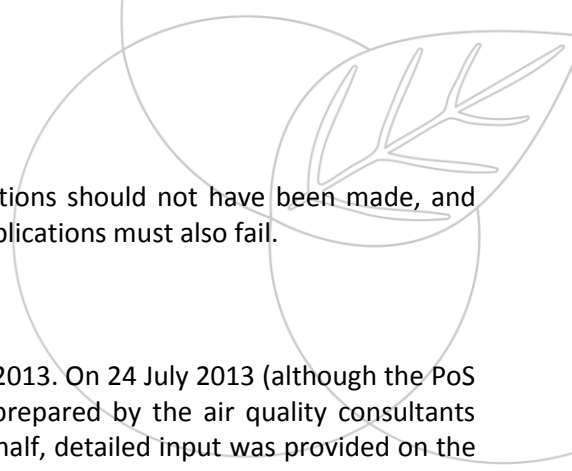
² s.6.

³ s.5.4.3.5.

⁴ s.1.

⁵ s.7(3).

⁶ s.7(4).

- 
10. In the circumstances, our clients argue that the postponement applications should not have been made, and cannot succeed. It is clear that the effect of this is that the exemption applications must also fail.

The process

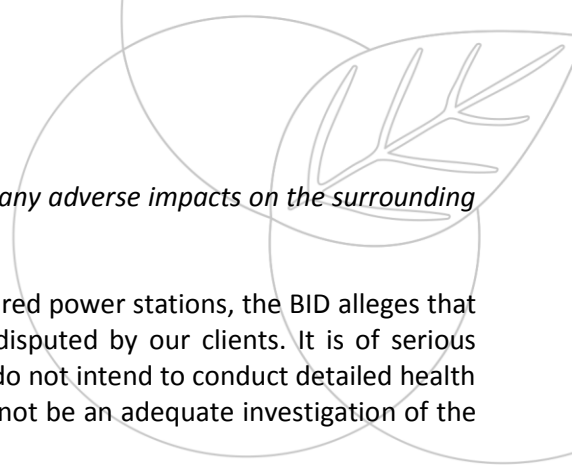
11. On 12 June 2013, the BID was made available for comment until 19 July 2013. On 24 July 2013 (although the PoS was dated May 2013), comments were invited on the proposed PoS prepared by the air quality consultants appointed by Eskom (annexure 3) by 23 August 2013. On our clients' behalf, detailed input was provided on the PoS on 23 August 2013 (annexure 4).
12. According to the BID, Eskom will commission the preparation of AIRs, as required. The AIRs will be made available for comment, together with copies of Eskom's applications for postponement and/or exemption. However, it is apparently not intended to provide detailed health or environmental risk assessments in the AIRs. As is elaborated on in annexure 2, the failure to do so would be wholly inappropriate and it is unacceptable to our clients.
13. At a meeting attended by the writer and our clients with Eskom and Iliso on 19 September 2013, Iliso advised that the applications and AIRs will be prepared per station. In this regard, it is not clear whether there will be two applications and two AIRs for Duvha. This means that there will be 17 (or 16 if there is only one for Duvha) applications and 17 (or 16) AIRs. At this meeting, Iliso indicated that it was envisaged that only 30 days would be made available for comment on all of the AIRs and applications. When we pointed out in this meeting that this period would be woefully inadequate, it was indicated that Eskom and Iliso would look at their schedule and determine whether a longer comment period would be provided.
14. Next, we elaborate on our clients' requests set out in paragraph 3.1 above.

The need to amend the PoS

15. As is apparent from annexure 4, our clients proposed substantive amendments to the proposed PoS. It is submitted that such amendments are essential to ensure more accurate and robust dispersion modelling, and that the modelling results (outputs) should be in a format that enables a detailed health risk assessment. In fact, at the 19 September 2013 meeting, a representative of Eskom acknowledged that the proposals made in annexure 4 were good, and ideally should be implemented. The concern expressed was that there was insufficient time to make such amendments.
16. It is submitted that it should be clear that it is more important to conduct a detailed assessment which properly takes relevant factors into account than to rush the process. This is particularly so in the current circumstances where there are serious concerns about the impact of Eskom's applications on human health. A failure to implement the changes proposed in the PoS would, our clients argue, mean that the decision-makers will not be in a position to take all relevant considerations into account as is required by PAJA, which means that any decisions so taken may be subject to judicial review under PAJA.
17. In any event, we point out that Eskom still has six months before it is required to submit its applications.
18. In the circumstances, we request that Eskom be required to amend the PoS to take our inputs into account, and thereafter recirculate the PoS for public comment.

The need for more detailed health risk assessments

19. As set out above, the BID provides that detailed health and environmental assessments will not be conducted. In this regard, we again reiterate that no postponement application can succeed unless AAQS are in compliance



and it is demonstrated “that the industry’s air emissions are not causing any adverse impacts on the surrounding environment”.

20. Despite the wealth of research as to the serious health impacts of coal-fired power stations, the BID alleges that power station emissions do not harm human health. This is strongly disputed by our clients. It is of serious concern that Eskom and its consultants work from this assumption, and do not intend to conduct detailed health assessments. Without more detailed health risk assessments, there will not be an adequate investigation of the potential negative impacts of granting Eskom’s applications.
21. In the context of Specialist Air Quality Impact Assessments, the Framework provides that the level of detail required for an assessment of potential health impact depends on the nature and extent of atmospheric emissions and could range from a simple comparative assessment of predicted ambient air quality levels with AAQS through to a full health risk assessment.⁷
22. Regard should be had to a recognised health risk assessment methodology - for instance the approach of the United States Environmental Protection Agency. The assessment should include estimates of the health risks associated with exposure – at different concentration levels - to air pollutants for both the general population and vulnerable or sensitive groups within the exposed population. The vulnerable groups would include: children under six years of age, people with pre-existing diseases like asthma, cardio-vascular and respiratory diseases, and older people. This would require the identification of facilities within the impacted areas such as crèches, hospitals and old age homes and the collation of demographic data on impacted communities (such as age distribution, presence of pre-schools, primary schools, poverty levels (as surrogate to nutritional and health status), and the prevalence of asthma, cardiovascular and respiratory disease).
23. It is submitted that a failure to conduct detailed health risk assessments would result in the decision-maker not having all relevant considerations before her when she determines whether or not to grant the applications, which means that the decision will fall foul of the requirements set out in PAJA.
24. In the circumstances, we request that Eskom be required to conduct more detailed health risk assessments in the AIRs.

The need for a reasonable opportunity to comment

25. As set out above, it is apparently intended only to provide 30 days for comment on 17 applications and 17 AIRs. This is completely inadequate and would deprive our clients of their right to have a reasonable opportunity to comment. Given the technical nature of the applications, our clients require expert scientific and legal assistance. The CER and its clients are all non-profit organisations with resource and capacity constraints. Even with additional time, it is extremely unlikely that our clients will be in a position to comment individually on the 17 applications and AIRs. However, they require a reasonable opportunity to peruse these documents and take expert advice on them.
26. Our clients are entitled to administrative action that is lawful, reasonable and procedurally fair,⁸ and PAJA was enacted to give effect to this right. Procedurally fair administrative action requires, amongst other things, that our clients be given adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations.⁹ It is submitted that depriving our clients of a reasonable opportunity to make submissions on the AIRs and applications would be procedurally unfair and therefore subject to judicial review.

⁷ s.5.5.3.1.

⁸ s.33(1) of Constitution of the Republic of South Africa, 1996.

⁹ s.3 PAJA.

27. The National Environmental Management Act, 1998 (NEMA) requires that: the participation of all interested and affected parties in environmental governance be promoted, all people have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and that participation by vulnerable and disadvantaged persons must be ensured.¹⁰ NEMA also requires that decisions take into account the interests, needs and values of all interested and affected parties.¹¹ A failure to provide our clients (and other interested and affected parties) with an adequate and fair opportunity to comment will also mean that there has not been compliance with NEMA.

28. In the circumstances, we request that Eskom be required to provide a commenting period of at least 90 days on the AIRs and applications, and that the period between 15 December 2013 and 2 January 2014 be excluded from this calculation.

29. Should you require further information, please do not hesitate to contact us.

30. We look forward to your response.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per:



Robyn Hugo

Attorney

Direct email: rhugo@cer.org.za

¹⁰ s.2(4)(f) NEMA.

¹¹ s.2(4)(g) NEMA.