



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

Angelique Murphy
Office Manager
G.C.C.L² Management Services (Pty) Ltd
By email: admin@gccl.co.za

Copies to:

Dr Thuli Khumalo
National Air Quality Officer
By email: tkhumalo@environment.gov.za

Derick Makhubele
Department of Environmental Affairs
By email: dmakhubele@environment.gov.za

Our ref: CER/RH
24 February 2017

Dear Madam

SUBMISSIONS ON THE BACKGROUND INFORMATION DOCUMENT FOR ESKOM'S POSTPONEMENT APPLICATION IN RESPECT OF THE 2015 MINIMUM EMISSION STANDARDS (MES) TIMEFRAMES FOR ESKOM'S MEDUPI AND MATIMBA POWER STATIONS

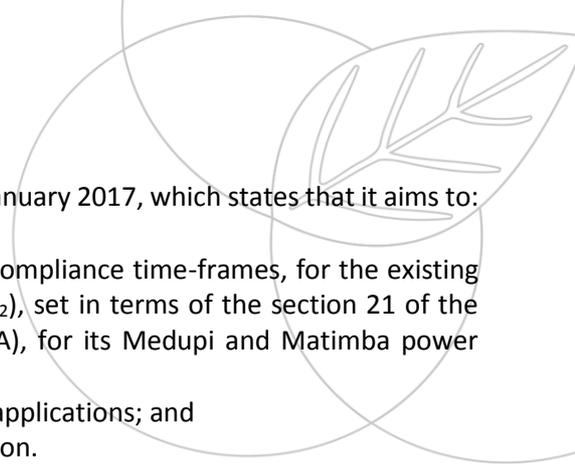
1. We address you as the Life After Coal campaign, a joint campaign by the Centre for Environmental Rights (CER),¹ groundWork (gW),² and Earthlife Africa Johannesburg (ELA),³ that aims to discourage investment in new coal-fired power stations and mines, to accelerate the retirement of South Africa's existing coal infrastructure, and to encourage and enable a just transition to renewable energy systems for the people. Life After Coal, and ELA, in particular, work with a network of communities within the Waterberg District Municipality whose health and well-being has the potential to be detrimentally impacted by industrial developments in the area – such as Eskom's Matimba and Medupi coal-fired power stations.

¹ The CER is a non-profit environmental rights law clinic that helps communities defend their Constitutional right to a healthy environment. Its lawyers help communities and civil society organisations in South Africa realise their Constitutional right to a healthy environment by advocating and litigating for transparency, accountability and environmental justice. See more information at <http://cer.org.za/>.

² GW is a non-profit environmental justice service and developmental organisation working primarily in Southern Africa in the areas of Climate & Energy Justice, Coal, Environmental Health, Global Green and Healthy Hospitals, and Waste. See more information at: <http://www.groundwork.org.za>

³ Earthlife Africa is a non-profit organisation that seeks to encourage and support individuals, businesses and industries to reduce pollution, minimise waste and protect natural resources. See more information at: <http://earthlife.org.za/description/>

2nd Floor, Springtime Studios,
1 Scott Road, Observatory, 7925
Cape Town, South Africa
Tel 021 447 1647, Fax 086 730 9098
Email info@cer.org.za, www.cer.org.za



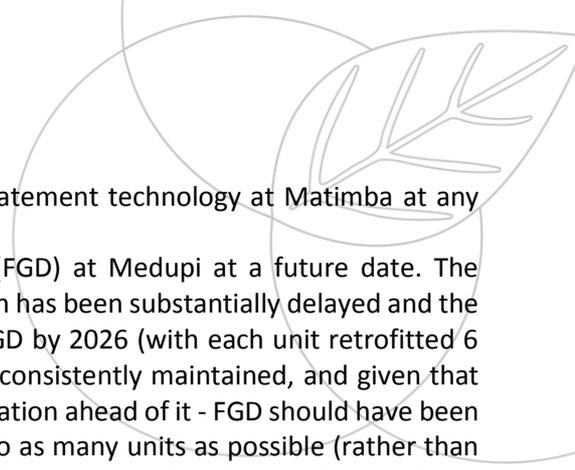
2. We refer to the Background Information Document (BID) published in January 2017, which states that it aims to:
 - 2.1. highlight Eskom's intention to re-apply for postponement of the compliance time-frames, for the existing plant minimum emission standards (MES) for sulphur dioxide (SO₂), set in terms of the section 21 of the National Environmental Management: Air Quality Act, 2004 (AQA), for its Medupi and Matimba power stations;
 - 2.2. present an overview of Eskom's reasoning for the postponement applications; and
 - 2.3. facilitate the public participation process in respect of the application.

3. The BID states, *inter alia*, that:
 - 3.1. in March 2014, Eskom applied for 5 year postponements of the existing plant (2015) and new plant (2020) SO₂ MES, for both Medupi and Matimba power stations;
 - 3.2. the Department of Environmental Affairs (DEA), although granting the applications to postpone new plant SO₂ MES for Medupi and Matimba, rejected Eskom's application to postpone the 2015 existing plant SO₂ MES;
 - 3.3. Eskom intends to re-apply for postponement of the 2015 existing plant SO₂ MES;
 - 3.4. Eskom attributes the excessive SO₂ emissions to inferior coal supplies, from the Grootegeluk mine, which fuel both power stations;
 - 3.5. neither of the plants has installed direct SO₂ emissions abatement technology;
 - 3.6. Eskom will support the application by detailing the constraints that impede its compliance with the existing plant MES; and
 - 3.7. that Eskom will commission independent air quality specialists to prepare Atmospheric Impact Reports (AIRs), which forecast the ambient air quality implications of the delayed implementation of the MES.

4. Life After Coal wholly and unequivocally objects to the applications being brought by Eskom.

5. As the application documents and AIRs have not yet been made available for comment, we reserve our rights to make detailed objections at a later stage. However, we wish to place on record the following general and overall objections to Eskom's applications:
 - 5.1 The MES were initially gazetted on 31 March 2010 in the list of activities which result in atmospheric emissions which have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage,⁴ ("the List of Activities"), following a multi-year, multi-stakeholder process in which Eskom was an active participant. In addition to its involvement in this process, Eskom was aware at least from when AQA commenced in 2005 that it would have to comply with MES. It has had an ample opportunity to take the necessary steps to reduce its emissions and ensure that its power stations, specifically Medupi and Matimba in this instance, were able to comply with the law by 1 April 2015.
 - 5.2 Eskom, through making this application, has conceded that it has knowingly been in breach of the AQA - and specifically the existing plant MES for Medupi and Matimba, for nearly 2 years. This is unacceptable.
 - 5.3 Despite this, Eskom fails to demonstrate its commitment to taking any corrective measures to ensure that it can comply with the existing plant MES for both stations and with the new plant MES for Matimba. To elaborate:
 - 5.3.1 Eskom has provided no information - such as test data - on its efforts to ascertain the maximum sulphur content of the coal supplied to Medupi and Matimba; nor has it indicated what other steps it has taken to enable a consistently-acceptable sulphur content in the coal, such as by washing and/or blending the coal and/or by requiring its coal suppliers to provide coal of an acceptable quality that would enable it to comply with the MES;

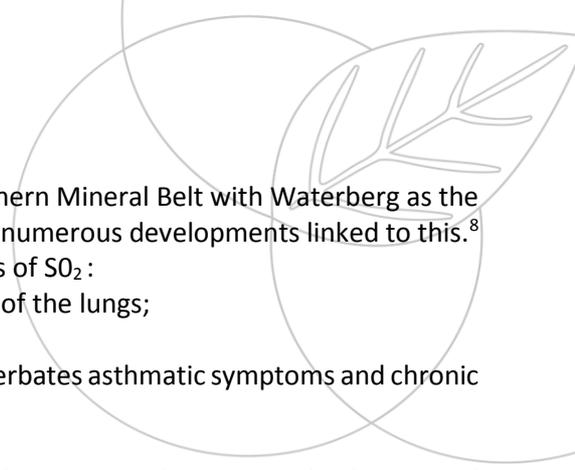
⁴ GN No. 248, GG No. 33064

- 
- 5.3.2 Eskom has no intention of installing any SO₂ emissions abatement technology at Matimba at any stage; and
- 5.3.3 Eskom only intends to install Flue Gas Desulphurisation (FGD) at Medupi at a future date. The environmental authorisation process for the FGD installation has been substantially delayed and the current plans are for Medupi only to be fully fitted with FGD by 2026 (with each unit retrofitted 6 years after it becomes operational). As Life After Coal has consistently maintained, and given that Medupi is a new power station - with some 50 years of operation ahead of it - FGD should have been included in its initial design plan and at least integrated into as many units as possible (rather than retrofitting it 6 years after each becomes operational). We also point out that the installation of FGD for Medupi was a financing condition from Eskom's loan agreement with the World Bank. This agreement envisaged that all FGD units would be installed and fully operational by 31 December 2021. The significant time and cost over-runs at Medupi are well-documented.⁵
- 5.4 It is submitted that Eskom's decision to re-apply for ex post facto postponements, in circumstances where: the MES are already in place and have been for almost 2 years; and its applications for these postponements have already been rejected, constitutes an abuse of process and an attempt to obtain exemption from the existing plant MES.
- 5.4.1 Eskom has previously advised that its intention, in respect of certain MES, is to seek "rolling postponements" until the stations are decommissioned. We maintain that such rolling postponements would effectively amount to unlawful exemptions from the MES.
- 5.4.2 It is not legally permissible for Eskom to apply for these postponements at this stage; and exemptions from the MES are not lawful. The emission standards applied from April 2015, and the 2012 National Framework for Air Quality Management ("the Framework") requires it to have submitted its postponement applications for existing plant MES by March 2014. It did, and they were rejected.
- 5.4.3 Eskom cannot now apply to be effectively exempt from these standards. Its failure to comply with the standards constitutes non-compliance with the MES and AQA and must be addressed accordingly.
- 5.5 Although the BID does not indicate the duration of the postponement sought, if Eskom seeks and obtains the maximum postponement of 5 years, both power stations will be effectively exempt from complying with the existing plant standards for 5 years from the date the postponement is granted (the non-compliance from 1 April 2015 until the date any postponement is granted remains unlawful), and it is only required to comply with the new plant standards from April 2025 (as per Eskom's successful postponement for compliance with the new plant SO₂ MES from 2020 for both stations). It is worth repeating that Eskom does not intend even to meet the postponed new plant SO₂ MES – at all for Matimba – and on time for Medupi. This appears from its Air Quality Improvement Plan 2016. It will therefore again be seeking new plant SO₂ MES postponements; and it may even seek additional existing plant SO₂ postponements. In the case of Matimba, it appears that Eskom will continue to seek postponements until it is eventually decommissioned. This, Life After Coal maintains, amounts to seeking an exemption from MES, which Eskom is aware is not legally permitted.
- 5.6 Life After Coal notes that, as per the previous postponement applications, Eskom once again does not intend to conduct detailed health (or environmental) risk assessments in the AIR. Once again, we strongly object to this approach and submit that it fails to comply with legal requirements. We refer to our detailed objections to Eskom's previous postponement applications,⁶ including the evaluation of the devastating health impacts of Eskom's emissions.⁷ The additional emissions of SO₂ will have significant impacts on the health of people living within the region – particularly when regard is had to cumulative impacts of the numerous existing and new industrial developments proposed for the Waterberg District Municipality, including the Thabametsi power station and its coal mine, and several other mines and coal-fired stations

⁵ See, for example: <https://www.dailymaverick.co.za/article/2016-07-07-medupi-kusile-and-the-massive-costtime-overrun/>

⁶ <https://www.cer.org.za/virtual-library/letters/eskom/eskom-applications-to-delay-compliance-with-aqa-minimum-emissions-standards>

⁷ http://cer.org.za/wp-content/uploads/2014/02/Annexure-5_Health-impacts-of-Eskom-applications-2014-_final.pdf



proposed for the area. We also point out that “unlocking the Northern Mineral Belt with Waterberg as the catalyst” has been identified as a strategic integrated project, with numerous developments linked to this.⁸

- 5.7 The World Health Organisation⁹ sets out the serious health impacts of SO₂:
 - 5.7.1 adverse effects to the respiratory system and the functions of the lungs;
 - 5.7.2 irritation of the eyes;
 - 5.7.3 increased inflammation of the respiratory tract - which exacerbates asthmatic symptoms and chronic bronchitis;
 - 5.7.4 decreased immunity to respiratory tract infections; and
 - 5.7.5 increased hospital admissions for cardiac disease and mortality increase during periods of increased exposure to higher SO₂ levels.
 - 5.8 The World Bank acknowledged these significant risks – that is why it required FGD to be installed at Medupi as a condition of its loan to Eskom.¹⁰
 - 5.9 Continuing to emit SO₂ in exceedance of the existing MES would amount to a breach of the s24 right enshrined in the Constitution, which guarantees everyone the right to an environment which is not harmful to their health or well-being. It would also violate AQA and the National Environmental Management Act, 1998.
6. Life After Coal disputes that Eskom is legally entitled to apply to postpone compliance with the existing plant MES. It fails to explain what steps were (and will be) taken to ensure compliance and why this application is being made at such a late stage. It is submitted that compliance and enforcement action should be taken against it for its non-compliance with the law.
 7. Should Eskom persist in making such applications, we call upon it to ensure full compliance with the legal requirements for such postponement applications, set out in the List of Activities and the Framework. These include that no postponement application can succeed unless ambient air quality standards are in compliance and it is demonstrated “*that the industry’s air emissions are not causing any adverse impacts on the surrounding environment*”.
 8. 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 the Promotion of Administrative Justice Act (PAJA). Eskom is also required, in this regard, to take into account the previous comments we made regarding its atmospheric dispersion modelling.¹¹
 9. In the circumstances, in the light of the significant negative impacts that Eskom’s continued harmful emissions will have on the health, well-being, and environment of already vulnerable communities, Life After Coal opposes, and will continue to oppose, Eskom’s postponement applications. Furthermore, we will call upon the relevant decision-makers to reject such applications in order to protect constitutional rights and the realisation of environmental and social justice in South Africa.
 10. Kindly keep us updated on this process.

⁸ <http://www.gov.za/issues/national-infrastructure-plan>

⁹ <http://www.who.int/mediacentre/factsheets/fs313/en/>

¹⁰ Copies of these documents are in Eskom’s possession, but also available from us on request.

¹¹ Copies of these submissions are in Eskom’s possession, but are also available from us on request

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS



per:

Robyn Hugo

Attorney and Programme: Head of Pollution & Climate Change

Direct email: rhugo@cer.org.za

