

Centre for Environmental Rights

Advancing Environmental Rights in South Africa

To: The Portfolio Committee on Environmental Affairs, Parliament of RSA

PUBLIC HEARINGS OF THE PORTFOLIO COMMITTEE ON ENVIRONMENTAL AFFAIRS ON THE CLIMATE CHANGE DISCUSSION DOCUMENT, OUTLINING SOUTH AFRICA'S POSITION TOWARDS THE 21ST SESSION OF THE CONFERENCE OF THE PARTIES (COP21) TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC) IN PARIS, FRANCE, IN DECEMBER 2015.

The Centre for Environmental Rights (CER) is an environmental rights law clinic, and we assist communities to defend their right to a healthy environment, by advocating and litigating for transparency, accountability and compliance with environmental laws. The CER would like to bring four crisp points to these hearings:

1. South Africa's negotiating position at COP 21 should give effect to the Constitutional obligations as expressed in section 24 of the Constitution, with special regard to human health;
2. Taking adequate action to mitigate our contribution to global warming is not only a matter of policy, but a Constitutional obligation;
3. South Africa is currently making long-term decisions that will make it impossible to meet even the proposed targets to combat climate change; and
4. For effective climate change mitigation, we need transparent monitoring and reporting by emitters, and effective compliance monitoring and enforcement.

1. South Africa's negotiating position at COP 21 should give effect to the Constitutional obligations as expressed in section 24 of the Constitution, with special regard to human health.

1.1. The negotiating position adopted by the South African government in the upcoming COP 21 in Paris should give effect to the Constitutional rights to an environment that is not harmful to health or wellbeing and to have the environment protected for the benefit of present and future generations.ⁱ

1.2. We know that climate change will have increasingly detrimental impacts on global temperatures, water and food resources. We also know that it will result in the inevitable rise in sea levels, which will affect how and where people live. However, today we wish to emphasise the significant impacts that climate change will also have on human health.

1.3. Already, our people face significant threats to their healthⁱⁱ as a result of industrial activity, particularly poor water and air quality as a result of mining, coal-fired power generation and collapsing water treatment infrastructure. Much of the costs – health costs, and impaired economic development - are borne by the state, and are borne disproportionately by the poor and vulnerable in South Africa.ⁱⁱⁱ The impacts of climate change will only make this worse.

1.4. Conversely, taking steps to mitigate climate change and to move away from fossil fuel reliant activities can have enormous health benefits – and will therefore simultaneously strengthen efforts by the South African government to realise section 24. A recent report commissioned by the British medical journal *The Lancet* assessed the potential health benefits of tackling climate change, as well as the likely consequences of failing to do so, and concluded that tackling climate change could be the greatest global health opportunity of the 21st century.^{iv} It found that doubling the proportion of renewable energy from its 2010 level of 18 per cent to 36 per cent could, by 2030, save \$230 billion in healthcare costs worldwide, annually.^v

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1.5. In South Africa, the transition to a low-carbon economy – with significantly reduced air and water pollution – will have incalculable benefits for the health and well-being of our people.^{vi}

2. Taking adequate action to mitigate our contribution to global warming is not only a matter of policy, but a Constitutional obligation.

2.1. The State has a duty to uphold and protect the right to an environment not harmful to health or wellbeing. Taking steps to guard against the harmful impacts which climate change has on our environment and human health is required by the obligation to realise the environmental right in our Constitution, as well as the duty of care contained in section 28 of the National Environmental Management Act.

2.2. In the Netherlands, the Hague District Court ruled earlier this year – in the case of *Urgenda v the State of the Netherlands* - that the Dutch government's plans to cut emissions by just 14-17% - compared to 1990 levels - by 2020 were unlawful, given the scale of the threat posed by climate change and the significant potential for damage to Dutch citizens. Article 21 of the Dutch Constitution imposes a duty of care on the state relating to the liveability of the country and the protection and improvement of the living environment.^{vii} The court ordered the Dutch government to cut its emissions by at least 25% within five years, stating that the state has a duty of care to take mitigation measures and that the state's current emission reduction policy, within the agreed EU context, does not meet the standard required to meet the 2°C target.^{viii}

2.3. What this case confirms is that adopting effective and adequate climate change mitigation measures is not just a matter of policy, or a matter to be negotiated with GHG emitters, but in fact a legal – and Constitutional - obligation on the state. It also means that committing to targets that are lower than science requires, does not in any way discharge the state's Constitutional duties to implement those reduction measures.

3. South Africa is currently making long-term decisions that will make it impossible to meet even the proposed targets to combat climate change.

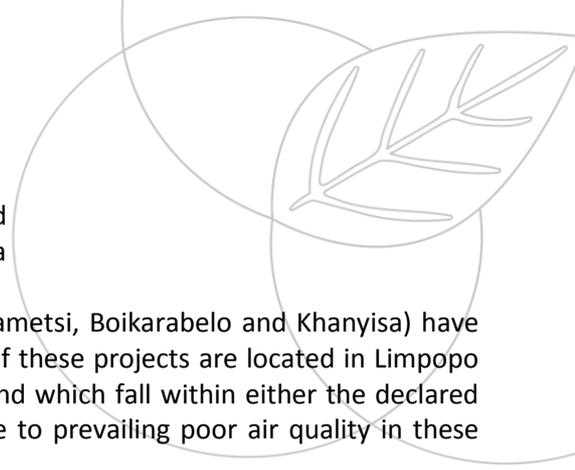
3.1. The National Climate Change Response White Paper (NCCRWP) states that "*Government further recognises that an effective response to climate change requires national policy to ensure a coordinated, coherent, efficient and effective response to the global challenge of climate change.*"^{ix} (own underlining)

3.2. Proceeding with coal-based energy plans directly contradicts the need for an effective response to climate change.^x Coal-fired power generation is also highly water-intensive and impacts significantly on human health, both directly and indirectly. The impacts of climate change will exacerbate water scarcity and have further impacts on human health. Ongoing investment in coal-fired power stations therefore quite obviously contradicts the objectives of mitigation and adaptation contained in national policy such as the NCCRWP and South Africa's negotiating position for COP21.^{xi}

3.3. Notwithstanding this, South Africa is in the process of constructing two enormous coal-fired power stations, Medupi and Kusile. In addition, at least 9 independent power projects are applying for environmental authorisations to build coal-fired power stations in South Africa, as per the Minister of Energy's determination to procure 2500MW of new coal power from independent power producers.

3.4. These projects are:

1. Thabametsi, a proposed power station of 1200MW, near Lephalale in the Limpopo;
2. KiPower, a proposed 600MW power station near Delmas, Mpumalanga;
3. Vedanta, a proposed 600MW power station near Lephalale, Limpopo;
4. Transalloys, a proposed 150MW power station near eMalahleni, Mpumalanga
5. Umbani, a proposed 600MW power station near Kriel, Mpumalanga;
6. Colenso, a proposed 1050MW power station near Colenso, KwaZulu Natal;
7. Waterberg Power Company's proposed 600MW power station near Lephalale, Limpopo;

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8. Boikarabelo, a 260MW power station near Lephalale Limpopo; and
 9. Khanyisa, a 450MW power station near eMalahleni, Mpumalanga

3.5. Environmental authorisations for 3 of these projects (namely Thabametsi, Boikarabelo and Khanyisa) have already been granted, while the others are pending. The majority of these projects are located in Limpopo and Mpumalanga, within areas which are already water-stressed, and which fall within either the declared Highveld Priority Area or the Waterberg-Bojanala Priority Area, due to prevailing poor air quality in these areas.

3.6. Numerous objections have been raised by us, on behalf of our clients, as well as by other stakeholders, based on the severely detrimental health, climate change, water and air quality impacts which these projects will have, not to mention the external health costs and subsidies that will have to be borne by the state as a result of these impacts.^{xii}

3.7. It is clear that South Africa is operating at cross purposes, expressing international and domestic commitments to fight climate change whilst simultaneously adopting policies and making decisions which completely defeat these objectives.^{xiii} In our view, decisions about energy are being made with no regard for constitutional obligations that include: transparency; consultation with affected parties; the right to an environment that is not harmful to health and well-being;^{xiv} and the rights of access to drinking water.^{xv}

3.8. We point out that South Africa is at a critical juncture for assessing its energy options - the decisions we make now will have far-reaching and long-lasting impacts on our ability, as a water-scarce, developing country, to address our significant vulnerability to climate change.^{xvi}

4. For effective climate change mitigation, we need transparent monitoring and reporting by emitters, and effective compliance monitoring and enforcement

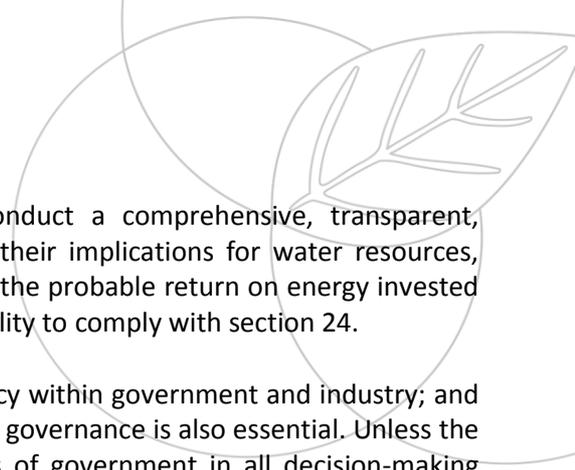
4.1. After Paris, South Africa has to establish effective regulation of GHG emissions. This requires clear and enforceable emission reduction obligations, set by government using science. This is important, because we already see a trend – strongly pushed by industry – towards regulation by negotiation, where industry negotiates its emissions reductions with the state. This is not appropriate, not transparent, and will not result in effective mitigation.

4.2. Upon determination of enforceable emissions reductions, we also need substantial resources to be invested in transparent and effective monitoring and reporting by emitters, and compliance monitoring and enforcement by regulators. Without the mechanisms to monitor GHG emissions and to take steps to enforce compliance by GHG emitters, any commitments made would be redundant.

4.3. The draft National Greenhouse Gas Emission Reporting regulations, published earlier this year for comment, showed very little ambition for transparency of data on GHG emissions. These regulations will require companies to report their total GHG emissions, but there is no requirement for reporting any emissions at facility level, or for the reporting of further operational details of the companies - which is essential for effective compliance-monitoring. Nor are the regulations clear on how open this data will be to the public. Unless this data is totally open and easily available for analysis and scrutiny, it will be impossible for the public to perform their crucial watchdog role and hold companies accountable.

Conclusion

In conclusion, section 24 of the Constitution requires South Africa to take adequate steps to reduce GHG emissions, and to adapt to climate change in a way that protects our environmental rights. This is not a matter of policy, or negotiation, and these Constitutional obligations remain no matter what is proposed or agreed in Paris.



To give effect to these obligations, we call on our government to conduct a comprehensive, transparent, consultative and comparative evaluation of different energy options and their implications for water resources, human health, costs to the state, the distribution of costs and benefits, and the probable return on energy invested – and we need to take decisions now that will not compromise our future ability to comply with section 24.

We also need meaningful, clear obligations to reduce emissions; transparency within government and industry; and strict, well-resourced compliance monitoring and enforcement. Co-operative governance is also essential. Unless the urgency to address climate change is prioritised by all spheres and levels of government in all decision-making processes, we have little hope of curbing the impacts of climate change, or of adapting to climate change in a way that is consistent with our Constitution. We call on this Committee to ensure that government complies with its Constitutional obligations.

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ⁱ S24 Constitution of RSA, 1996.

ⁱⁱ According to the 2015 Lancet Commission Report, ‘Health and Climate Change: Policy Responses to Protect Public Health’ ill health, which is directly or indirectly caused by burning coal, oil and other fuels, kills an estimated 7 million people every year globally. See p12 at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)60854-6/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)60854-6/fulltext). And according to the WHO, 88 per cent of the world’s population breathes air that falls short of quality guidelines – this has led to an epidemic of heart and respiratory disease, see <http://www.who.int/globalchange/mediacentre/news/dr-chan-lancet-commission/en/>.

ⁱⁱⁱ See the International Monetary Fund Report, ‘How Large are Global Energy Subsidies?’ available at <http://www.imf.org/external/pubs/ft/wp/2015/wp15105.pdf> and a 2014 report by the Sustainable Development Solutions Network entitled ‘Pathways to Deep Carbonisation’ available at http://unsdsn.org/wp-content/uploads/2014/09/DDPP_Digit.pdf.

^{iv} P1 The Lancet Commission Report ‘Health and Climate Change: Policy Responses to Protect Public Health’, 2015 Available at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)60854-6/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)60854-6/fulltext).

^v P31 The Lancet Commission Report ‘Health and Climate Change: Policy Responses to Protect Public Health’, 2015 Available at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)60854-6/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)60854-6/fulltext).

^{vi} The Lancet Commission on Health and Climate Change recommends that over the next 5 years, governments protect cardiovascular and respiratory health by ensuring a rapid phase out of coal from the global energy mix. See recommendation 3, p1 [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)60854-6/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)60854-6/fulltext).

^{vii} At para 4.36 <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>.

^{viii} At para 4.65 <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>.

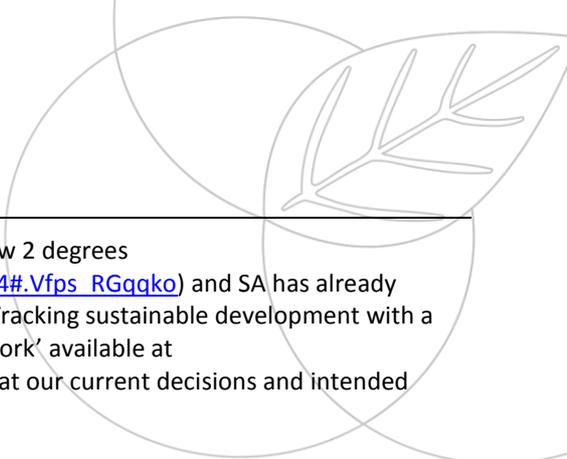
^{ix} P10 NCCRWP.

^x Note also a report by the Organisation for Economic Co-operation and Development (OECD) – an international economic group traditionally pro-fossil fuels – which recommends that countries should stop building new coal-fired power stations. It says that “the lower demand for electricity combined with a rapidly growing share of renewables have made baseload plants much less economical than anticipated”. See p177 ‘Aligning Policies for a Low Carbon Economy’, at http://www.keepeek.com/Digital-Asset-Management/oecd/environment/aligning-policies-for-a-low-carbon-economy_9789264233294-en#page178.

^{xi} P8-9 of ‘Discussion Document: Stakeholder Consultation on SA’s Position towards COP21’ and p5 – 10 of ‘Discussion Document: SA’s Intended Nationally Determined Contribution’

^{xii} Recent research by the International Monetary Fund (IMF) reveals the enormous costs of air pollution (\$5.3 trillion in subsidies for the fossil fuel industry), with coal-fired power stations accounting for the majority of these health impacts. See the 2015 report, entitled ‘How Large are Global Energy Subsidies?’ available at <http://www.imf.org/external/pubs/ft/wp/2015/wp15105.pdf> at pages 7 and 20. See also pages 18, 19, 20, 21, 23, 27, 30 and 31.

^{xiii} The INDC Discussion Document, 1 August 2015 (at p3) and the Discussion Document for South Africa’s negotiating position for COP21 (at p8) confirm that South Africa’s commitment to addressing the challenge of climate change is based on science and that any agreement adopted in Paris must be consistent with science, yet research has shown that South Africa has, in fact,



already overshoot the mark for any commitment to keep the rise in temperatures below 2 degrees (http://www.iol.co.za/capetimes/country-lagging-over-emissions-objective-1.1907054#.Vfps_RGgqko) and SA has already exceeded its environmental boundaries for freshwater use, and climate change (see Tracking sustainable development with a national barometer for South Africa using a downscaled “safe and just space” framework’ available at <http://www.pnas.org/content/111/42/E4399.abstract>.) It therefore cannot be said that our current decisions and intended commitments are consistent with or based on science.

^{xiv} S24 Constitution of RSA, 1996.

^{xv} S27 Constitution of RSA, 1996.

^{xvi} A greater shift towards renewable energy – with SA’s renowned potential for energy sources such as wind and solar - would provide a sustainable, and affordable energy source, which would minimise SA’s GHG emissions and emissions of other harmful pollutants. Research by the Mainstream Renewable Power Company has shown that wind and solar energy could provide a baseload power solution for South Africa. See <http://www.engineeringnews.co.za/article/renewables-group-makes-case-for-combined-wind-solar-baseload-alternative-2015-07-06>. This is also confirmed in a 2014 report by the Sustainable Development Solutions Network entitled ‘Pathways to Deep Carbonisation’ at page 8, available at http://unsdsn.org/wp-content/uploads/2014/09/DDPP_Digit.pdf.