



# Centre for Environmental Rights

## Advancing Environmental Rights in South Africa

### Sifiso Mkhize

Acting Director General of Water Affairs and Sanitation  
By email: [Mkhizes@dws.gov.za](mailto:Mkhizes@dws.gov.za)  
[Central@dws.gov.za](mailto:Central@dws.gov.za)

### Isaac Tlagadi

Olifants Catchment Management Agency  
By Email: [Tlagadii@dwa.gov.za](mailto:Tlagadii@dwa.gov.za)  
[vanAswegenJ@dws.gov.za](mailto:vanAswegenJ@dws.gov.za)  
[SiweleS@dws.gov.za](mailto:SiweleS@dws.gov.za)

### Copies to:

#### Vaneshree Pillay

Department of Water and Sanitation  
By email: [pillayv@dws.gov.za](mailto:pillayv@dws.gov.za)

#### Reuben Haydenrych

Environmental Practitioner  
Aurecon  
By email: [Reuben.Heydenrych@aurecongroup.com](mailto:Reuben.Heydenrych@aurecongroup.com)

#### Prabashen Govender

ACWA Power (Pty) Ltd  
By email: [Pgovender@acwapower.com](mailto:Pgovender@acwapower.com)

### The Honourable Mr Gugile Nkwinti

Minister of Water Affairs and Sanitation  
Sedibeng Building  
185 Francis Baard Street  
Pretoria 0001  
By email: [Nkwinti@drdlr.gov.za](mailto:Nkwinti@drdlr.gov.za)  
[thomass@dws.gov.za](mailto:thomass@dws.gov.za)  
[pitsoc@dws.gov.za](mailto:pitsoc@dws.gov.za)

#### Betty Mnguni

Department of Water and Sanitation (Bronkhorstspuit Office)  
By email: [MnguniB@dws.gov.za](mailto:MnguniB@dws.gov.za)

#### Anne-Mari White

Environmental Specialist  
Aurecon  
By email: [Anne-Mari.White@aurecongroup.com](mailto:Anne-Mari.White@aurecongroup.com)

Our ref: CER 54.1 & 3 /RH/MMK  
Your ref: 27/2/1/B611/2/1  
1 March 2018

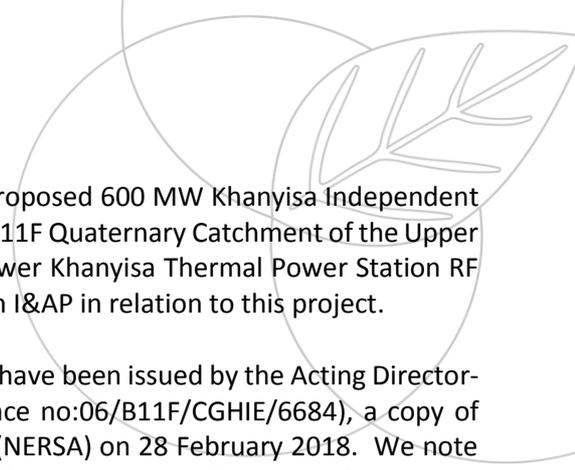
### URGENT

Dear Director-General

### URGENT REQUEST FOR ACCESS TO INFORMATION AND REASONS REGARDING THE WATER USE LICENCE FOR THE PROPOSED KHANYISA INDEPENDENT POWER PRODUCER (IPP) COAL-FIRED POWER STATION (LICENCE NO 06/B11F/CGIHE/6684)

1. We address you on behalf of our client, groundWork (gW), a non-profit environmental justice campaigning organisation working primarily in South Africa, in the areas of Climate and Energy Justice, Coal, Environmental Health, Global Green and Healthy Hospitals, Waste and Environmental Education.

Cape Town: 2<sup>nd</sup> Floor, Springtime Studios, 1 Scott Road, Observatory, 7925, South Africa  
Johannesburg: 9th Floor, Southpoint CNR, 87 De Korte Street, Braamfontein, 2001, South Africa  
Tel 021 447 1647, Fax 086 730 9098  
Email [info@cer.org.za](mailto:info@cer.org.za), [www.cer.org.za](http://www.cer.org.za)

- 
2. Our client is an interested and affected party (I&AP) in relation to the proposed 600 MW Khanyisa Independent Power Producer (IPP) coal-fired power station (Khanyisa) located in the B11F Quaternary Catchment of the Upper Olifants River, in eMalahleni, Mpumalanga. The applicant is ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd (“ACWA”). The Centre for Environmental Rights (CER) is also an I&AP in relation to this project.
  3. We write to you concerning a water use licence (WUL) which appears to have been issued by the Acting Director-General on 7 December 2017 in respect of the Khanyisa project (licence no:06/B11F/CGHIE/6684), a copy of which we received from the National Energy Regulator of South Africa (NERSA) on 28 February 2018. We note that the WUL states that it was issued by the Acting Director-General of the Department of Water and Sanitation (“the Department”), under delegated powers from the Minister. It is not clear why the Director-General issued the licence, as it is our understanding that Olifants Catchment Management Agency (CMA) has been delegated this power and is therefore the correct “responsible authority” to issue licences in terms of the National Water Act, 1998 (NWA). Kindly advise why the licence was issued by the Director-General, as well as the details of the Olifants CMA’s involvement in the decision to issue Khanyisa’s WUL.
  4. On 23 January 2017, our client submitted an objection to ACWA’s application for a WUL. A copy of the email submitted to the Department, is attached.
  5. Although, to date (and contrary to legislative requirements), **neither we nor our client have been advised of the outcome of the WUL application by the Department or ACWA**, we confirm that we were advised by NERSA that ACWA has been issued with a WUL, and we were provided with a copy of a WUL by NERSA on 28 February 2018. As set out below, it appears that this WUL was issued in December 2017.
  6. In this regard, we are also instructed to point out, with great concern, that, despite requests and enquiries to the appointed environmental assessment practitioner (EAP) administering the WUL application process, the EAP (Aurecon) has **refused to disclose whether a WUL has been issued, nor has the WUL or any other requested information in this regard been made available to us**. We have been advised by the EAP that the applicant for the WUL instructed the EAP not to make such information available. Kindly find attached CER’s correspondence and the response thereto from the EAP, dated 12 and 19 February 2018 respectively.
  7. We also note from the WUL that, after the original WUL was submitted by Aurecon in November 2016, an Integrated Water Use Licence application (IWULA) and Integrated Water Management Plan dated 8 June 2017 were submitted. Kindly advise whether a new application was submitted or whether there was an amendment to the licence application in November 2016, as we and our client have not been privy to this document as I&APs.
  8. In addition, we are instructed that, on 27 February 2018, the EAP also refused to give any information to Bobby Peek of gW, our client.
  9. Section 42 of the NWA places the following obligations on the Department:

*“After a responsible authority has reached a decision on a licence application, it must promptly –*  
*(a) notify the applicant and any person who has objected to the application; and*  
*(b) at the request of any person contemplated in paragraph (a), give written reasons for its decision.”*
  10. It appears from the WUL that the licence was issued over 2 months ago on 7 December 2017. As our client has duly objected to the WUL application, there is an obligation on the responsible authority – which appears to be the Department - to promptly notify it (and ourselves, as groundWork’s attorneys) of the issuing of the WUL in terms of s42 of NWA. We therefore reserve our client’s rights in this regard, particularly our client’s right to appeal the WUL in terms of s148(1) of the NWA upon receipt of written reasons.

11. Furthermore, as you are aware, when considering and issuing a WUL, the Department is obliged to adhere to the following legislation, in addition to the NWA: a procedurally fair administrative and public participation process under the Promotion of Administrative Justice Act, 2000 (PAJA), and the National Environmental Management Act, 1998 (NEMA). Throughout the process, the applicant and the appointed EAP are also required to comply with these laws. We point out that EAPs are required to be independent, objective, fair, and also supply all requisite information to I&APs to ensure public participation and transparency in accordance with NEMA.
12. We submit that the EAP's refusal to inform the I&APs – including our client, which objected to the WUL application - of the outcome of the WUL application, and its refusal to provide necessary information in this regard is unlawful and unacceptable, and contravenes our client's rights of access to information and to procedurally fair administrative action. Our client vigorously objects to the lack of transparency, meaningful public participation, and the lack of independence by the EAP, which violates the just administrative process as envisaged by the Constitution, NEMA, PAJA and NWA. All of our client's rights remain reserved in relation to this conduct by Aurecon.
13. In the circumstances, **kindly confirm that a WUL has been issued to the applicant** and, if so, provide us with the following documentation on an **urgent** basis and by 9 March 2018:
- 13.1. proof of notification to our client of the WUL application decision; alternatively, an explanation as to why this was not sent to our client;
  - 13.2. the relevant details of the Government Gazette in which the decision to issue the WUL was published;
  - 13.3. a copy of the WUL; and
  - 13.4. all documentation considered in the application - which includes, but is not limited to:
    - 13.4.1. IWULA dated November 2016 together with accompanying annexures;
    - 13.4.2. IWULA and Integrated Water and Waste Management Application dated 8 June 2017 (with annexures);
    - 13.4.3. Geohydrological Report dated 2011;
    - 13.4.4. Public Participation Report;
    - 13.4.5. Wetland Delineation and Assessment Report dated 26 September 2015, Civil Design Drawings and Report;
    - 13.4.6. all other related documentation and communication (email, letters, verbal, etc);
    - 13.4.7. any annexures and datasets relied upon; and
    - 13.4.8. any other delegation, instruction by the Department to Aurecon and ACWA during the WUL process.
14. In addition, **kindly provide us with full reasons for the decision.**
15. We place on record that, in order to appeal the issued WUL, we require the reasons for the decision as well as the documentation which was considered. We therefore reiterate that we reserve our client's right to appeal the issued WUL **after receipt** of the requested reasons.
16. We look forward to receiving your response to the questions in paragraphs 3, 7 and 13 on **or before 9 March 2018.**

Yours sincerely

**CENTRE FOR ENVIRONMENTAL RIGHTS**

per:



**Robyn Hugo**

**Attorney and Programme Head: Pollution & Climate Change**

Direct email: [rhugo@cer.org.za](mailto:rhugo@cer.org.za)