



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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By Email: amodise@environment.gov.za

Date: 19 January 2018

Dear Dr Khumalo and Mr Senene

OUTCOMES OF THE MEETING WITH NGOs ON THE IMPLEMENTATION OF THE HIGHVELD PRIORITY AREA HELD ON 12 DECEMBER 2017

1. We address you on behalf of our clients, groundWork (gW),¹ Earthlife Africa Johannesburg (ELA),² the Highveld Environmental Justice Alliance Network (HEJN),³ and the Vaal Environmental Justice Alliance (VEJA).⁴ For the purposes of this letter, all four of these organisations are deeply concerned, in the public interest, with the effective administration and implementation of priority areas in South Africa, declared in accordance with section 18 of the National Environmental Management: Air Quality Act 39 of 2004 ("AQA").

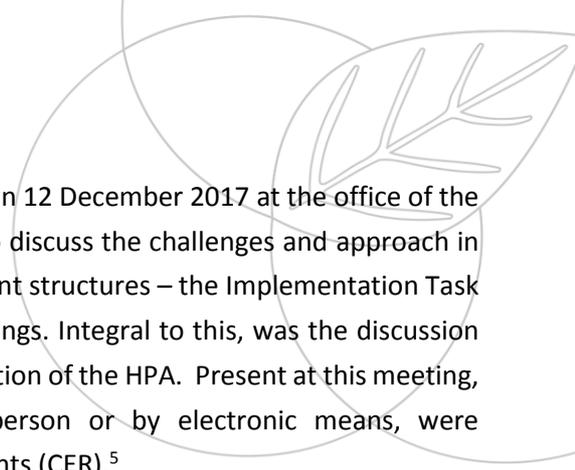
¹ gW is a non-profit environmental justice service and developmental organization working primarily in Southern Africa in the areas of Climate & Energy Justice, Coal, Environmental Health, Global Green and Healthy Hospitals, and Waste. See more information at www.groundwork.org.za.

² ELA is a non-profit organization that seeks to encourage and support individuals, businesses and industries to reduce pollution, minimise waste and protect natural resources. See more information at: www.earthlife.org.za.

³ HEJN is a community organisation aimed at raising awareness on key health and environmental issues within the Highveld region and improving the quality of life of vulnerable people living in the Highveld.

⁴ VEJA is a non-profit organisation that advocates for environmental justice, through the promotion of environmental awareness; education; active engagement with role-players; assistance to vulnerable and previously disadvantaged communities; and through advocating for a healthy environment and sustainable development within the Vaal Triangle.

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2. We refer to the Highveld Priority Area (HPA) NGOs' Meeting held on 12 December 2017 at the office of the Nkangala District Municipality. The purpose of the meeting was to discuss the challenges and approach in the implementation of the HPA and the prescribed HPA engagement structures – the Implementation Task Team (ITT) and Multi-Stakeholder Reference Group (MSRG) meetings. Integral to this, was the discussion regarding the roles and responsibilities of NGOs in the implementation of the HPA. Present at this meeting, in accordance with their organisational mandate, either in person or by electronic means, were representatives of HEJN, gW and the Centre for Environmental Rights (CER).⁵
 3. This NGO meeting was apparently scheduled in response to the outcomes of the 'Highveld Priority Area Authorities Report' held on 27 November 2017 at the Department of Environmental Affairs (DEA) Conference Centre. The minutes of this meeting were made available to us by the DEA and specific "Items and Discussions" and "Action Items" in the minutes of this meeting are also addressed in this letter, where necessary. Importantly, we reiterate that the commitments and action items recorded in this letter are not only applicable to the HPA, but also apply to the Vaal Triangle Air-shed Priority Area and the Waterberg Priority Area, hence the inclusion of VEJA and ELA, respectively. Moreover, we note that suggestions to improve the effectiveness of the HPA meetings have been repeated on a number of previous occasions.⁶

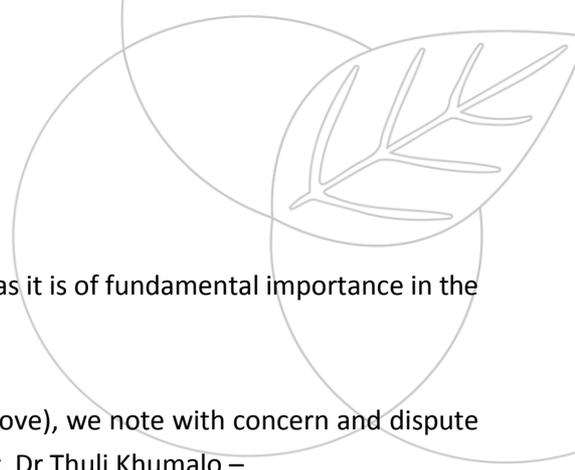
Key Outcomes and Commitments from the Meeting

1) Deadline for response to the *Broken Promises* Report - 30 January 2018

4. In the NGOs meeting, the Chairperson, Mr Vumile Senene (Mr Senene), confirmed, on behalf of the DEA, that a comprehensive written response to the "substantive" demands listed in the *Broken Promises* Report would be provided by 30 January 2018. For the purposes of clarity and monitoring, CER requested that the DEA also provide approximate timeframes for completion of the necessary actions to address the critical issues set out in the Report.
5. It was further placed on record at the meeting, and we do so again here, that on receipt of the *Broken Promises* Memorandum of Demands on 2 October 2017, Mr Modise, in his capacity as spokesperson for the DEA, committed to a response within seven (7) working days, i.e. by Wednesday 11 October 2017. However, to date, there has been no response to the Report. We are instructed to record that, assuming a comprehensive response is forthcoming on 30 January 2018, it will be approximately 67 *working* days after the initial response date, as agreed between community representatives and the DEA.
6. We look forward to receiving the response by the new promised deadline.

⁵ The CER is a non-profit organisation (registration number 2009/020736/08), established to advance the realisation of environmental rights as guaranteed in the South African Constitution by providing support and legal representation to civil society organisations and communities who wish to protect their environmental rights, and by engaging in legal research, advocacy and litigation to achieve strategic change.

⁶ See page 77 of the Broken Promises Report available at https://cer.org.za/wp-content/uploads/2017/09/Broken-Promises-full-report_final.pdf



2) NGOs' Roles and Community Representation

7. We deal with this point of issue ahead of the remaining outcomes as it is of fundamental importance in the context of this letter and the *Broken Promises* Report.
8. With reference to the HPA Authorities Report (see paragraph 3 above), we note with concern and dispute the following remarks attributed to the National Air Quality Officer, Dr Thuli Khumalo –

“She specified that it was articulated during the portfolio committee meeting that the NGOs expressed that are not representing community but respective organization [sic], Dr Khumalo said she used to think that the NGOs represents the communities. She further said that it was clarified that the information discussed in the meetings is not shared with the communities.”

9. We are not aware of any submissions during the Portfolio Committee meeting (or elsewhere) through presentations, or verbally, in which this was “articulated” or can even be construed. For clarity sake, the purpose and objectives of each non-profit organisation cited in this letter are set out in the footnotes above. The common theme is that these NGOs were established to protect and promote environmental and health rights, through advocacy, research and litigation in the public interest, and in doing so, provide support to vulnerable and disadvantaged communities in South Africa that are willing to engage on such issues. We exist for the empowerment of others and the advancement of their interests and constitutional rights.⁷
10. This being said, we certainly do not have the resources and/or mandate to directly represent the interests, needs and constitutional rights of every individual and community across the numerous district and local municipalities in the HPA jurisdiction. Nor do the organisations purport to represent all such interested and affected parties.⁸ Where these NGOs do have a relationship with communities and community organisations, relevant information and activities are frequently shared, and no action is taken in their name without their consensus. In this regard, we point out that there remain a large portion of the affected communities resident in the HPA who do not have the resources and support to make direct representations at the HPA meetings.

⁷ Section 38 of the Constitution reads as follows:

Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

⁸ During the HPA meeting, groundWork provided a presentation on its method of engaging with communities.

3) Licensing Authority (Nkangala District Municipality) to maintain updated Atmospheric Emission Licences on record

11. Mr Senene acknowledged the importance of making Atmospheric Emission Licences (AELs) accessible to the public, especially interested and affected communities. It was accepted that to date, it has been inexplicably difficult for communities and community organisations to obtain AELs, despite legislation such as the Promotion of Access to Information Act 2 of 2000 (PAIA) and Regulation 26(h) of the Environmental Impact Assessment Regulations, 2014, which requires that records like environmental authorisations and compliance monitoring reports be made available for inspection at the site of the authorised activity, or on a publicly accessible website. Mr Senene indicated that the public should be able to request AELs directly from the office of the competent Licensing Authority, and updated versions should be readily available.
12. We are instructed to confirm that our clients are in full support of the availability of updated AELs on request. To ensure greater transparency about regulation, monitoring, and compliance in the HPA, the *Broken Promises* Report calls for exactly this and, in addition, annual emission reports submitted to the Licensing Authority should also be publicly available in order to assess the state of compliance.⁹

4) Industry Compliance Reporting - Operators to report compliance performance with AELs prior to MSRГ meetings

13. Mr Senene observed during the HPA meeting that there is clearly an issue regarding listed operators not reporting their respective state of compliance at MSRГ meetings, for consideration by the DEA and affected communities. Mr Senene confirmed that the “Regulator” needs to address this and should be more active in its communication on the issue of compliance with AELs.
14. Our clients endorse this requirement in preparation for MSRГ meetings and the *Broken Promises* Report recommends the following in this regard –

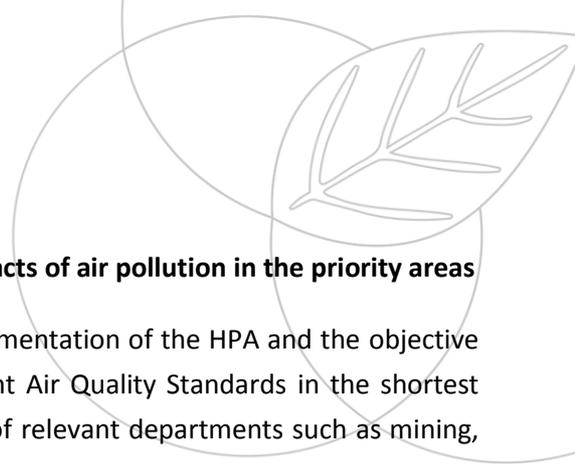
“two weeks before every MSRГ meeting, the DEA must require all industries to submit evidence of their compliance with obligations in terms of their AELs and their obligations in terms of the [Air Quality Management Plan] over the previous six months, so that non-compliance is understood by all, and that accountability to the MSRГ is put into practice”.¹⁰

15. Further to this point, we strongly disagree with the proposal that the DEA conduct separate MSRГ meetings with industry and affected communities. By design, these are meant to be “multi-stakeholder” meetings. With respect, this is not the participatory structure as envisaged in the Air Quality Management Plan (AQMP) and we submit that such an approach will not assist in addressing the current state of non-compliance. Our clients continue to advocate for a review and amendment of the Terms of Reference for MSRГ meetings, and we refer to the comments previously submitted in this regard.¹¹

⁹ See page 81 of the Report.

¹⁰ See page 77 of the Report.

¹¹ <https://cer.org.za/wp-content/uploads/2016/07/CER-Final-Comments-on-the-ToR-for-the-Implementation-of-the-HPA-MSRГ-AQMP-11-Dec-2015.pdf>



5) DEA to engage with Department of Health due to adverse health impacts of air pollution in the priority areas

16. During the meeting, it was acknowledged that the effective implementation of the HPA and the objective of the AQMP is to achieve compliance with the National Ambient Air Quality Standards in the shortest timeframe, and that this is also dependent on the participation of relevant departments such as mining, energy and health.

17. We agree that this is fundamentally important and, once again, the same is highlighted in the *Broken Promises* Report requiring a response from the DEA.¹²

Conclusion

18. The outcomes/commitments identified above should not be interpreted as the only issues requiring a “comprehensive” response. As the DEA has undertaken, we expect a response to all of the substantive concerns and corresponding demands set out in the *Broken Promises* Report. As stated in the Report, we regard the suggested measures as reasonable and the minimum required in order for the DEA to meet its constitutional obligations under section 24 (the environmental right) and for all authorities to meet their obligations under AQA.

19. Our clients eagerly await receipt of the DEA’s full response to the *Broken Promises* Report by 30 January 2018, as promised.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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Attorney**

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¹² See page 81 of the Report.