



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

The Director-General
Department of Home Affairs
Attention: Mr Olebogeng Matshediso
By email: omatshediso@environment.gov.za

Our ref: RH
Date: 25 June 2018

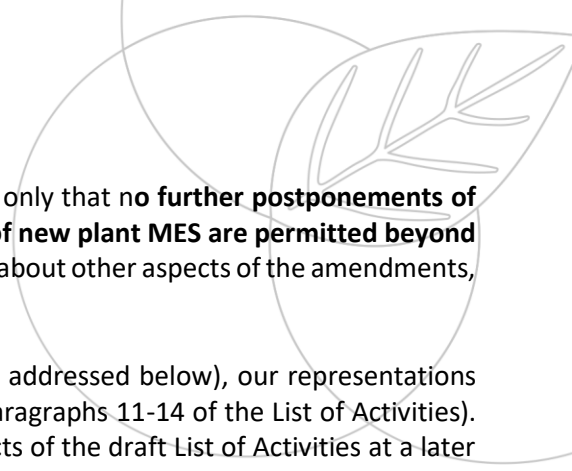
Dear Olebogeng

REPRESENTATIONS ON THE NOTICE OF INTENTION TO AMEND 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

1. We address you on behalf of the Life After Coal/Impilo Ngaphandle Kwamalahlle Campaign (“the Campaign”), made up of the Centre for Environmental Rights, Earthlife Africa, and groundWork. The Campaign aims to discourage investment in new coal-fired power stations and mines; accelerate the retirement of South Africa’s coal infrastructure; and enable a just transition to renewable energy systems for the people.
2. As you are probably aware, we have been integrally involved in the implementation of and amendment to 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 (“the List of Activities”). Upfront, we wish to commend the Department of Environmental Affairs (“the DEA”, or “the Department”) for proposing, through these draft amendments to the List of Activities (“the draft List of Activities”), the following:
 - 2.1. the elimination of any further opportunities to postpone compliance with existing plant minimum emission standards (MES). In this regard, we point out that Eskom has re-applied to postpone existing plant MES for sulphur dioxide (SO₂) for Medupi and Matimba, despite such application having been refused in February 2015. We have submitted that such application is illegal,¹ and are advised that no decision has been made by the National Air Quality Officer (NAQO) on this application to date; and
 - 2.2. the elimination of what Eskom has referred to as “rolling postponements” i.e. re-applying for postponements of compliance every 5 years until eventual decommissioning of its stations. We have consistently argued that these so-called rolling postponements are the equivalent of illegal exemptions from the MES. Only one postponement of new plant MES is permitted, for a maximum of 5 years.

¹ <https://cer.org.za/wp-content/uploads/2016/07/170224-Life-After-Coal-Campaign-submissions.pdf>

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3. The effect of this draft legislation is to confirm, among other things, not only that **no further postponements of existing plant MES are permitted**,² but that **no further postponements of new plant MES are permitted beyond 31 March 2025**. We support these amendments. We have some concerns about other aspects of the amendments, which we address below.
 4. Given the insufficient period provided to make detailed submissions (as addressed below), our representations focus on the proposed amendments to the postponement provisions (paragraphs 11-14 of the List of Activities). We reserve our rights to make additional representations on other aspects of the draft List of Activities at a later stage.
 5. In summary:
 - 5.1. the requirements in paragraph 5.4.3.3 of the 2012 National Framework for Air Quality Management in the Republic of South Africa (“the Framework”) have to be met before an application for postponement (or suspension) can be considered;
 - 5.2. all application documents must be made publicly available for comment; and, in the case of the once-off suspension, this must include a copy of the “clear decommissioning schedule” provided by the applicant;
 - 5.3. in many cases, facilities that seek once-of suspensions are able – and should be required - to meet far stricter emission standards (determined by a health impact assessment) than the existing plant standards. At no stage should emission standards in atmospheric emission licences (AELs) be weakened as a result of an application for a suspension;
 - 5.4. the decommissioning deadline – in the case of a once-off suspension – must be made clear;
 - 5.5. the draft List of Activities must make clear what the role is of the licensing authority in granting and reviewing a once-off suspension – we argue that such decisions should be taken in concurrence with the licensing authority; and
 - 5.6. the decision on an application must be made timeously, so as to ensure that there is sufficient time for an industry whose application is refused to take the necessary steps and make the necessary investments in order to ensure timeous compliance with the MES.
 6. We elaborate on these issues below, and make recommendations for amendments to the draft List of Activities.
 7. Before doing so, we point out South Africa’s National Ambient Air Quality Standards (NAAQS)³ and its MES⁴ are both weak and require review and updating for purposes of making these stricter to provide better protection for human health and well-being. In this regard, both the National Environment Management: Air Quality Act, 2004 (AQA)⁵ and the Framework⁶ require the review of both sets of standards at least every 5 years.

² We propose that paragraph 9 be deleted as it is no longer necessary; alternatively that it be phrased in the past tense – i.e. “(e)xisting plant **was required to [must]** comply with minimum.... specified”.

³ These are weaker than the World Health Organisations outdated 2005 guidelines.

⁴ See below from paragraph 17.

⁵ Sections 7(5)(c)-(d), 9(2), 21(b).

⁶ Paragraphs 5.4.3.2-5.4.3.3.

The Framework's requirements must be met before an application can be made
All application documents (including the decommissioning schedule) must be available for comment

8. The requirements set out in the List of Activities for an application to be made do not match the requirements set out in the Framework. We argue that the "missing" provisions from the Framework should also be incorporated into the List of Activities.
9. Section 5.4.3.3 of the Framework indicates that provisions have been made to postpone compliance with MES *"provided ambient air quality standards are in compliance and will remain in compliance even if the postponement is granted"*. The Framework also requires that the industry demonstrate that its current and proposed air emissions are not causing and will not cause any adverse impacts on the surrounding environment. This is particularly important in relation to the 3 air quality priority areas, all of which are in non-compliance with NAAQS, despite the passage of more than 12 and 10 years since the declaration of the Vaal Triangle and Highveld Priority Areas, respectively. Industries in these areas, and in the Waterberg-Bojanala Priority Area, should not even be permitted to apply for postponement. Granting postponements or suspensions of compliance to such facilities will only exacerbate the high air pollution with its dire on human health, well-being, and the environment, and make it even more difficult for the Priority Areas to meet their goals of ensuring compliance with NAAQS.
10. The Framework also requires that any postponement application must be made at least 1 year before the specified compliance date. As set out in paragraph 24 below, 1 year may be an inadequate period. The Framework also requires compliance with any other requirements specified by the NAQO.
11. Although paragraph 11 makes reference to the Framework, it fails to make clear that its requirements must also be met before any application is made. These requirements from the Framework are not specified in the List of Activities. It is submitted that they should be.
12. It is proposed that paragraph 11 be amended as follows:

"(11) As contemplated... of this Act, and provided that ambient air quality standards in the area are in compliance and will remain in compliance even if the application is granted, an application may be made to the National Air Quality officer by 31 March 2019 for the postponement or suspension of the compliance time frames [in paragraphs (9) and (10)] for an existing plant."
13. In addition, all application documents must be made available for comment to enable interested and affected parties an opportunity to participate meaningfully in the process, with due regard to all relevant documents. In the case of the once-off suspension, these must include the decommissioning schedules provided by the applicant.
14. It is proposed that paragraph 12 be amended as follows:

"(12) The application contemplated in paragraph 11 must include-
(a) an air pollution impact assessment compiled in accordance with the regulations prescribing the format of an Atmospheric Impact Report....in the appropriate category;
(b) a demonstration that the facility's current and proposed air emissions are not causing and will not cause any adverse impacts on the surrounding environment;
[(b)] (c) a detailed justification and reasons for the application, and in the case of a suspension, a copy of the clear decommissioning schedule; [and]
[(c)] (d) a concluded public participation process undertaken as specified in the NEMA Environmental Impact Assessment Regulations, in terms of which the complete application, including all documents referred to in (a)-(c) above, are made available for comment; and
(e) such other requirements as may be specified by the National Air Quality Officer.

15. We must point out that the Atmospheric Impact Report requirements for a health impact study should be substantially more comprehensive, given the dire impacts of air pollution on human health. Currently, these simply state:

“Analysis of Emissions’ Impact on Human Health

In order to assess the atmospheric impact of the facility on human health a dispersion modelling exercise must be undertaken. Any dispersion modelling study undertaken as part of an Atmospheric Impact Report must be done in accordance with the Regulations Regarding Air Dispersion Modelling specified for regulatory purposes - developed in terms of section 53 of AQA. The impact assessment should take the emissions of the facility under consideration as well as prevailing ambient air concentrations into account during this assessment. A compliance assessment must be undertaken using the national ambient air quality standards, specifically in residential areas and other areas where human exposure could occur”.

16. The World Health Organisation has proposed some general principles for such air pollution health risk assessments.⁷ We submit that, at a minimum, the health risk assessment should include: estimates of the population exposure to the relevant pollutants (ambient concentrations and population distribution), including taking cognisance of secondary PM_{2.5} and ozone and the long-range dispersion of pollutants from tall stacks; the estimation of health risks; and the quantification of health impacts as numbers of attributable deaths and disease in the area of impact.

Stricter emission standards than existing plant MES – informed by a health risk assessment - should apply to once-off suspensions

The decommissioning deadline must be made clear

17. As indicated above, South African MES are very weak. Our existing plant MES particularly so. For comparative purposes:⁸

‘Existing Plant’ ratios: SA/ country			‘New Plant’ ratios: SA/ country		
	SO2	PM		SO2	PM
SA/ China	17.5	3.3	SA/ China	14.3	5.0
SA/ Germany	17.5	5.0	SA/ Germany	3.3	5.0
SA/ India	5.8	1.0	SA/ India	5.0	1.7
SA/ Indonesia	4.7	0.7	SA/ Indonesia	0.7	0.5
SA/ Thailand	1.7	0.6	SA/ Thailand	1.0	0.6
SA/ EU IED	17.5	5.0	SA/ EU IED	3.3	5.0

18. Given the significant impacts of air pollution on human health, well-being, the environment, and on section 24 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), it is not reasonable, appropriate, or acceptable to permit facilities seeking a once-off postponement of compliance to emit pollution at concentrations far above new plant standards for up to a decade longer than was envisaged by the new plant standards (i.e. until decommissioning by 2030).

19. The consequences of this would be particularly severe in the air quality priority areas already out of compliance with NAAQS. Ideally, stricter emission standards than existing plant standards – informed by a health risk assessment - should be imposed as a condition of the once-off suspension – by the NAQO in concurrence with the

⁷ http://www.euro.who.int/_data/assets/pdf_file/0006/298482/Health-risk-assessment-air-pollution-General-principles-en.pdf?ua=1

⁸ <https://www.iea-coal.org/library/emission-standards/>

relevant licensing authority⁹ – and the licensing authority, upon its subsequent variation of the facility’s AEL following a successful suspension application, should ideally incorporate stricter emission standards into the AEL. At the very least, when AELs applicable at the time of the application prescribe such stricter emission standards (which are still weaker than the new plant MES), these should be confirmed if a suspension is granted: the facility should not be permitted to weaken current emission standards in its AELs by means of an application for once-off suspension.

20. The once-off suspension provision assumes that the facility will be decommissioned by 2030 at the very latest. The List of Activities must make this clear.

21. We propose that paragraph 11F be amended as follows:

“(11F) An existing facility granted a once-off suspension of compliance timeframes with new plant standards shall **be required to** comply with **stricter emission standards than the** existing plant standards, during the suspension period **and** until the existing plant is decommissioned, **by the date indicated in the 11D decommissioning schedule, which cannot be later than 2030.**”

The decision-making process for suspensions, including the role of the licensing authority in granting and reviewing suspensions, must be made clear

Decision-making must be timeous

22. The draft List of Activities does not propose amendments to paragraphs 13 and 14 of the List of Activities to make clear that these also apply also to once-off suspensions. It is presumed that this was an oversight. In any event, we argue that these two paragraphs, as amended, should also apply to once-off suspensions of compliance.

23. There is no reason why the licensing authority should not also be involved in considering applications to grant suspensions and in considering reviews and possible withdrawals of suspensions (as is the case for postponement applications and reviews). Where NAAQS are out of compliance, and given the serious impacts of air pollution, suspensions – as well as postponements – should be reviewed and potentially withdrawn in order to protect environmental rights.

24. We note that applications for both postponement and suspension of compliance with new plant standards have to be made by 31 March 2019. However, decisions on such applications must be made well in advance of the compliance dates. In this regard, we point out the NAQO’s last round of postponement decisions was announced a mere 5 weeks before facilities were required to comply with the existing plant MES. In most cases, this would clearly not allow sufficient time for timeous planning, investment, and retrofitting where applications were refused. The List of Activities must indicate the deadline for the decision on such applications; which cannot be less than 6 months. If it is not possible for timeous compliance within 6 months, the deadline to make application for both postponements and suspensions should be longer than 1 year, so as to ensure that public participation is not unnecessarily curtailed.

25. We propose the following amendments:

“(13) The National Air Quality Officer... may grant a postponement **or suspension** of the compliance time frames **[in paragraphs (9) and (10)]** for an existing plant **at least six (6) months before the compliance date [for a period not exceeding 5 years per postponement]**.

(14) The National Air Quality Officer... may –

(a) from time to time review any postponement **or suspension** granted; and

(b) on good grounds, withdraw any postponement **or suspension** following –

(i)....; and

⁹ We deal in the next section with the role of the licensing authority.

(ii).... communities”

Other issues

26. The draft List of Activities fails to make clear what happens in the situation where a facility’s postponement application is refused (partially or fully), or where a postponement of less than 5 years was granted and a further postponement (for a cumulative maximum period of 5 years] is sought. It is submitted that it must be made clear that the reference in 11A to a “once-off” postponement means that no facility is permitted: to re-apply for a postponement of new plant standards if a previous postponement was refused (partially or fully); or, assuming a shorter postponement was sought and obtained, to apply for a further postponement (even if such cumulative postponement period is only up to 31 March 2015).

Insufficient opportunity to comment

27. We place on record that we have not had an adequate, fair, and reasonable opportunity to provide full comment on the draft List of Activities. On 25 May 2018, the DEA published the draft List of Activities, the draft Framework, and draft amendments to the Dust Control Regulations, for comment by the same deadline, 25 June 2018. All of these are essential documents for air quality management, and the Life After Coal Campaign has particular expertise and interest in all 3 documents – as the DEA is aware. But the extremely short commenting period for all 3 documents substantially curtailed our ability to make detailed, meaningful input on all 3. In addition, we have only been able to make submissions in relation to the postponement provisions of the draft List of Activities. As will be described in our submissions on the Framework, our request for an extra 30 days to comment on the Framework was refused, and only 4 extra days were afforded. This is unreasonable and unfair.

28. In addition, it is highly regrettable that we were only informed of the 14 June 2018 workshop on the draft List of Activities and the draft Framework on 12 June 2018 (and not by the Department), and that it was not possible for us to attend at such short notice. To date, and despite request, we have not received the minutes of this workshop. It is not understood why the Department does not circulate such notices to stakeholders; and in particular to those such as the Campaign who have been active, vocal participants in air quality processes for many years. In any event, it is essential for the Department to consult with those people worst impacted by the devastating impacts of air pollution – in particular the priority areas - and that those meetings should be held in the areas where these people reside in order to afford them a fair and reasonable opportunity to exercise their rights to be heard. To date, and despite our request, this has not been done. We submit that these are appropriate circumstances for the Minister to use her power in terms of section 57 (3) of AQA, to allow interested persons and communities to present oral representations or objections.

29. In short, we record our objection to this simultaneous process of public consultation, with only 30 days to comment on 3 such important air quality-related documents, and submit that it inconsistent with section 57 of AQA, with the National Environmental Management Act, 1998, and with section 24 of the Constitution.

30. We reserve all of our rights in relation to the public participation process followed.

Conclusion

31. We submit that the amendments set out above should be made, and ask for clarity on the issues we have highlighted.

32. Kindly also advise us of the status of the postponement application described in paragraph 2.1 above. We also ask that you share any schedule of planned postponement and/or suspension applications that you have received, or are still to receive from Eskom or Sasol in order to enable us to plan for these accordingly.

33. We look forward to hearing from you in relation to this amendment process and are available to meet with the Department and to answer any questions on these submissions. We also reiterate our request made to the Department on prior occasions that we be timeously informed, by email, of all air quality-related meetings and documents for comments.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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