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Advancing Environmental Rights in South Africa

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Your ref: RH/NL
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Dear Sirs

SUBMISSIONS ON THE OPERATIONALISATION OF THE POST 2020 MITIGATION SYSTEM

1. We refer to a bilateral meeting of 1 June 2018, with some representatives of civil society and the Department of Environmental Affairs (DEA), to address "the operationalisation of the post 2020 mitigation system", as well as the presentation given by DEA at that meeting. We did not attend the meeting but were advised that DEA requests comment from stakeholders on this subject, and the presentation given at the meeting, by 15 June 2018.

2. We hereby provide you with some brief comments, at this stage, as the Centre for Environmental Rights. We note that our partner organisation groundWork will also be making written submissions on the operationalisation of the 2020 mitigation system and we support those comments.

3. We write to, *inter alia*:

   3.1. reiterate our previous submissions in relation to various relevant DEA draft mitigation plans as well as the carbon tax;

   3.2. provide some brief comments specifically on the operationalisation of the post 2020 mitigation system and, in particular, on the "discussion points" listed in the presentation of 1 June 2018; and

   3.3. bring your attention to a recent report by the Energy Research Centre (ERC) on the implications of two proposed new independent coal-fired power stations for DEA's mitigation plans.

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Reiteration of previous submissions

4. We attach, for your attention and ease of reference, some of our previous and more recent submissions on:

    4.1. the mitigation pathways documents (attached as **annexure A**);

    4.2. the Estimate of the Individual and the Total Effect of Policies and Measures to Reduce Greenhouse Gas (GHG) Emissions and the Socio-Economic Impact of the Response Measures for South Africa policies and measures (PAMs) draft report (attached as **annexure B**);

    4.3. the National GHG Gas Reporting Regulations and Pollution Prevention Plan Regulations (attached as **annexure C**); and

    4.4. the Carbon Tax Bill (attached as **annexure D**).

5. The above documents and our comments are relevant to the issue of the operationalisation of the post 2020 mitigation system, and many of our concerns in relation to the above submissions remain. Some of these are the following:

    5.1. the **need for public access** to GHG emission reporting data and access to pollution prevention plans, and the necessity for reporting of GHG emissions to be per facility, and not at an aggregated company level;

    5.2. the **need for clarity** on how DEA's many climate change plans are going to be **aligned and implemented** to ensure a successful and implementable climate mitigation and adaptation system, and what the envisaged timeframes and deadlines are. We asked DEA for this clarity in a letter of 23 February 2018 (referred to above and attached as annexure A), and have yet to receive a response;

    5.3. why DEA's proposed climate change plans **make provision for new coal-fired power**, including the completion of the remaining units of Eskom's Kusile plant (as per the GHG mitigation pathways report), given that credible modelling[1] shows that **capacity from new coal-fired power is not needed, nor is it least-cost**. In our previous submissions, we have emphasised the staggering and irreversibly high climate impacts of the proposed Thabametsi independent power producer (IPP) coal-fired power station, anticipating that the other proposed coal IPP preferred bidder, Khanyisa will have similarly high climate impacts as it proposes using the same technology as Thabametsi, although no climate change impact assessment has been conducted for Khanyisa – the ERC research referred to below is relevant in this regard;[2]

    5.4. that DEA must – in order to reduce South Africa's GHG emissions most efficiently and at least cost - consider the expedited **decommissioning or other means to reduce GHG emissions** of Eskom coal-fired power stations, and of other very high emitters of GHGs, such as Sasol's refineries. The provision for Sasol to continue with business-as-usual according to the PAMs draft report is highly concerning and unacceptable; and

    5.5. the proposed **carbon tax is insufficient and unlikely to have a meaningful and adequate impact** on reducing South Africa's GHG emissions in that*, inter alia*, the current proposed carbon tax rate is insufficient to compel a change in GHG emitters' behavior and, furthermore, the tax-free thresholds and

[1] In this regard we refer to modelling by the Council for Scientific and Industrial Research, reflected in this report at page v http://meridianeconomics.co.za/wp-content/uploads/2017/11/Eskoms-financial-crisis-and-the-viability-of-coalfired-power-in-SA_ME_20171115.pdf, and to modelling the Energy Research Centre at https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf.

[2] The summary report is available at https://cer.org.za/wp-content/uploads/2016/07/Thabametsi-Final-Summary-Report-Jun17.pdf.

other provisions in the Carbon Tax Bill do not adequately reflect the "polluter pays" principle,[3] or the urgency of the risk posed. This failure contradicts the Constitutional right to an environment not harmful to one's health or well-being, and the duty to take reasonable measures to prevent environmental pollution. We are also strongly opposed to the provision for offset allowances in the Carbon Tax Bill. This must be removed.

6. We stand by the above concerns and submit that they should be taken into account in developing the operationalisation of the post 2020 mitigation system. We continue to await a response to our letter to DEA of 23 February 2018.

7. In particular we wish to **emphasise the necessity of public access to GHG emission data**. Such access is crucial for an effective climate change mitigation system. In a DEA letter of 21 February 2018 responding to our queries regarding the implementation and interpretation of the National GHG Reporting Regulations and the Pollution Prevention Plan Regulations (referred to above and attached as annexure C), DEA advised that the pollution prevention plans of Sasol, Eskom, and ArcelorMittal contain confidential information and therefore DEA cannot share these documents. We placed on record, in our letter of 23 February 2018 also attached as annexure A and referred to above, that this approach is unacceptable, and severely prejudices the constitutional rights of stakeholders to gain access to crucial information, which is in the public interest. If the implementation of GHG mitigation measures is not transparent and open, the entire mitigation system will be severely undermined and compromised.

8. We note that, under a 22 May 2018 Amendment of the National Pollution Prevention Plan Regulations, 2017 (GN 513, GG 41642), the deadline for the submission of pollution prevention plans has been extended to 21 June 2018 – next week. Given the importance of public access to this information, **we again ask DEA to, as soon as possible after 21 June and by no later than 2 July 2018:**

   8.1. **advise <u>how many entities have submitted pollution prevention plans</u>; and**

   8.2. **provide us <u>with a list of the names of the entities</u> that have submitted pollution prevention plans by the stipulated deadline**.

9. What is also highly concerning in this regard is section 8 of the 10 July 2017 "Development of South Africa's Post 2020 Climate Change Mitigation System" report, entitled "Confidentiality of Data". It states, *inter alia*, that:

   "***The information required to estimate and forecasts (sic) emissions and to evaluate the availability, scale and cost-effectiveness of mitigation options is often commercially sensitive****. Not only does it often correlate with levels of output (and thus enable future output levels to be approximated), but it is also linked to the cost structure and competitiveness of producers. For this reason,* ***it is important that carbon budget data remains confidential, and that only high level aggregated sector or sub-sector data is used to inform the size of SETs is published****.*

   Detailed disclosure of information by reporting entities is going to be critical to develop the modelling capabilities *that will be required to set science-based SETs and carbon budgets that also take mitigation potential into consideration in the medium to long term. For entities to provide this data,* ***assurances will need to be provided that entity-specific information will not be accessible by parties other than the Department of Environmental Affairs officials who have signed [non-disclosure agreements]****. In addition, the* ***information must also only be used for purposes of determining SETs, carbon budget allocations and associated processes,***

[3] See section 2(p) of National Environmental Management Act 107 of 1998, which stipulates the following:
"*The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment*."

and that this information will not be released *without, as a minimum, following the prescribed processes for third party notification contained in the Promotion of Access to Information Act*" (emphasis added).[4]

10. We **<u>strongly object</u> to a situation in which the DEA, as an independent regulator which has a compliance monitoring and enforcement inspectorate, has acceded to Non-Disclosure Agreements to withhold information that is clearly in the public interest**. In our submissions on the two iterations of the draft National GHG Reporting Regulations, before their promulgation, of 4 August 2015 and 7 July 2016 (attached as **annexures E** and **F** respectively), we referred to other jurisdictions where **GHG reporting data are made publicly available by default**, these being the USA, EU and Australia, as examples:

    10.1. In the EU, the Environmental Information Directive[5] provides that **public authorities are not allowed to assert business confidentiality as a ground for withholding information on emissions into the environment,[6] and that all grounds for refusal "*shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure*"** (emphasis added).[7] The EU regulation governing monitoring and reporting of GHG emissions states that "***emission reports held by the competent authority shall be made available to the public*** *by that authority subject to national rules adopted pursuant to [the environmental information Directive]*" (emphasis added).[8]

    10.2. GHG emission reporting in the USA is regulated by the Environmental Protection Agency (EPA) under the GHG Reporting Program[9] and is also subject to the provisions of the Clean Air Act. The default position in the USA is that data collected under the GHG Reporting Program (GHGRP) must be available to the public, unless the data qualify for confidential treatment under the Clean Air Act, which unequivocally states that emission records and data, among other information obtained by the EPA through its regulatory activities, "*shall be available to the public*."[10] The only exception is for records, reports, or information, **other than emission data,** which, if made public, "*would divulge methods or processes entitled to protection as trade secrets*". The GHG Reporting Program website has, *inter alia*: mapping features to identify GHGRP facilities by location, name, industry type, and other criteria – and to determine the GHG emissions of each facility; a Multi-Year Data Summary Spreadsheet, as well as a more detailed spreadsheet including reported emissions; and an Envirofacts page, which shows all publicly-available data collected in a searchable, downloadable format for facilities. This website includes GHG data and much of the underlying data facilities used to determine GHG values and other reported data elements.[11]

    10.3. According to Australia's National Greenhouse Gas and Energy Reporting Act,[12] annual publication is required by the regulator, on its website of, *inter alia*, total GHG emissions of registered corporation groups and their net energy consumption, as well as total emissions disclosed in terms of certain reports required by the Act.[13] The default position is that emission data and energy consumption information can be published and it **lies with the corporation to show that it cannot be made publicly available**. The Act also provides a wide list of information which the regulator may publish, such as the total GHGs for each

[4] P58 – 59.
[5] Directive 2003/4/EC of the European Parliament and of the Council on Public Access to Environmental Information, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF.
[6] Art. 4(2)(h).
[7] Art 4(2)(h).
[8] Commission Regulation 601/2012 of 21 June 2012 on the Monitoring and Reporting of Greenhouse Gas Emissions Pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Art. 71, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R0601&from=EN.
[9] See http://www.epa.gov/climate/ghgreporting/index.html.
[10] 42 U.S.C. § 7414(c) available at http://www.law.cornell.edu/uscode/text/42/7414.
[11] See https://www.epa.gov/ghgreporting/ghg-reporting-program-data-sets.
[12] https://www.comlaw.gov.au/Details/C2014C00813.
[13] S24, part 4.

business unit;[14] the methods used to measure the totals for the corporation's group and the totals of energy consumption.[15]

11. If such information can be made available in other jurisdictions, there is no reason why it should be regarded as confidential and prohibited from public disclosure in South Africa, especially where our Constitution and other relevant laws support access to information, and in light of the environmental right. Companies such as Sasol also operate within the USA, and therefore are obliged to make their emissions data publicly available per the USA legal requirements. There is no basis for them to refuse to do so in South Africa.

12. The importance of public access to environmental information for the protection of rights has also been recognised by our courts. In the Supreme Court of Appeal (SCA) judgment in the case of *Company Secretary, ArcelorMittal South Africa (AMSA) v Vaal Environmental Justice Alliance (VEJA)*,[16] which entailed an application by VEJA to compel the disclosure of information requested in terms of the Promotion of Access to Information Act, 2000 (PAIA) from AMSA. The SCA upheld the decision of the South Gauteng High Court, granting judgment in VEJA's favour. The SCA held that, "*[i]t is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative governance in relation to the environment*",[17] and that "*[c]orporations operating within our borders … must be left in* ***no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy*** *and that constitutional values will be enforced*" (emphasis added).[18]

13. In a 2013 European Court case, it was held that that there is a strong public interest in access to information about emissions into the environment that overrides commercial interests. The Court declared that an agency must disclose a document "*where the information requested relates to emissions into the environment,* ***even if such disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person, including that person's intellectual property****, within the meaning of Article 4(2) of the Environmental Information Directive*" (emphasis added).[19]

Operationalisation discussion points

14. In relation to some of the issues set out in the 1 June 2018 presentation, in particular the discussion points set out on slide 38, we set out our comments below.

15. The discussion points – "questions of clarity/debate" - listed in the presentation are:

    15.1. use of the national mitigation trajectory for setting South Africa's mitigation ambition;

    15.2. concerns surrounding the use of historical emissions for setting the carbon budgets for entities/grandfathering;

    15.3. inclusion of scope 2 emissions in carbon budgets;

[14] S 24(1A)(ii)
[15] S 24(1A)(d)
[16] *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA), 26 November 2014.
[17] Paragraph 71.
[18] Paragraph 82.
[19] *Stichting Greenpeace Nederland and Pesticide Action Network Europe v Commission*, Case T-545/11, para. 38, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=142701&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=223010.

15.4. flexibilities for remaining within budgets;

15.5. allocation of the new entrant and discretionary allowance;

15.6. taxation on all emissions (with differential tax rates) versus only taxing emissions above the budgets;

15.7. allocation criteria for adjusting sectoral emission targets (SETs) of the different sub-sectors; and

15.8. inputs on considerations surrounding the Socio-Economic Impact Assessment (SEIA).

Use of the national mitigation trajectory for setting South Africa's mitigation ambition

16. We submit that the **low** peak plateau decline (PPD) trajectory range should be used for setting South Africa's mitigation plans and should serve as the basis for the entire post 2020 mitigation system.

17. South Africa's PPD commitments in the Nationally Determined Contribution (NDC) under the Paris Agreement have been criticised as being "highly insufficient" and are not aligned with the 1.5°C target.[20] At the same time, the NDC confirms that near zero emissions are required in the second half of the century to avoid climate impacts beyond adaptation capability and that a 2°C global temperature increase translates to a 4°C increase for South Africa.[21] Much stricter action is therefore needed in order to protect South Africa from the devastating impacts of climate change.

Concerns surrounding the use of historical emissions for setting the carbon budgets for entities

18. We do not support using a historical percentage contribution of each sector to allocate the available emissions space for the first 5-year period of the SETs. Grandfathering rewards polluters (contrary to the "polluter pays" principle set out in section 2 of the National Environmental Management Act, 1998) and creates space for historical polluters to carry on with business as usual, and should not be entrenched. This approach constrains emissions space to what listed entities says they can do without "unreasonable" cost and creates an assumption that an emitting activity must continue indefinitely.

19. Whilst we acknowledge that steps must be taken to ensure "*capacity is established to gather the data required to ultimately do a differential allocation of carbon budgets*"[22] and that the "*relationship between past emissions and carbon budgets will weaken during the expected plateau and decline phases of the agreed national emissions trajectory*",[23] SETs based on "grandparenting" for the short and medium term allocations fail to properly consider the cumulative contribution of polluters and hence both responsibility and the potential for more rapid mitigation action.

Taxation on all emissions (with differential tax rates) versus only taxing emissions above the budgets

20. We do not support the use of the carbon tax to enforce carbon budgets. The carbon tax and carbon budgets are distinct instruments, which should not be linked, and we reject the proposal in the presentation, which only applies the tax in instances where the carbon budget is exceeded. We thus do not support either Option A (tax emissions in excess of an entity's carbon budget) or Option B (tax all emissions from an entity if emissions exceed the entity's carbon budget, at a reduced rate that could include tax-free allowances). Those options would convert the tax to a penalty when, in fact, penalties should instead apply to instances where the carbon budget is exceeded.

[20] See https://climateactiontracker.org/countries/south-africa/.
[21] P1, NDC.
[22] Pxiv, Development of SA"s Post 2020 Mitigation System report.
[23] FN 35, p31, Development of SA"s Post 2020 Mitigation System report.

21. Rather, we support a model whereby all scheduled entities are liable for taxation on all emissions according to the Carbon Tax Bill, and entities that exceed their carbon budgets are liable for an appropriate fine that would encourage compliance. This **would not amount to a double penalty** - as mentioned, a tax is not a penalty for non-compliance. We refer again to our previous submissions on the carbon tax, in particular that the tax rate is woefully low and the tax-free allowances proposed would render the carbon tax highly ineffective. Our suggested approach would require developing a schedule of fines that are meaningful for the purpose of enforcing and incentivising listed entities to remain within carbon budgets, and penalising entities that fail to do so. This would further require proper institutional capacity to enable compliance monitoring and enforcement.

Flexibility mechanisms

22. Based on the above, we do not support the use of flexibility mechanisms such as carbon offsets, carbon trading, and ceiling prices to support entities to remain within their carbon budgets. This would mean, in effect, if Option A is applied, listed entities would only be liable to pay a carbon tax to the extent that they exceed their carbon budgets, at a very low tax rate, with tax-free allowances, and thereafter may use carbon offsets (up to 10% of carbon budget) and carbon trading mechanisms, rather than taking steps to remain within their carbon budgets. Such an approach would render the post-2020 mitigation system completely ineffective in intentions to reduce emissions of listed entities.

Socio-economic impact assessments (SEIAs)

23. It is uncertain to what extent the SEIAS for the post-2020 mitigation system will align and integrate with the SEIAS that are required for all the separate components of the system such as the carbon tax. Alignment among the SEIAs is crucial and must be clarified.

ERC report

24. The report by the ERC[24] available here, and attached as **annexure G**, models several scenarios for an assessment of the effects of building the two coal IPP preferred bidders – Thabametsi (at 557MW) and Khanyisa (at 300MW) – (collectively referred to as the "coal IPPs") compared to a future electricity build plan that excludes them. The modelling investigates: supply security; the cost implications of the inclusion of the coal IPPs on the system relative to cheaper alternatives; the emission 'lock-in' from the plants; and the effects this has on South Africa meeting its long-term climate change commitments. According to the report, since a least-cost electricity build plan for South Africa **does not include new coal plants**, in each scenario, the coal IPPs had to be forced into the model in order to compare the effects on the system.

25. The report finds, *inter alia*, that:

    25.1. the coal IPPs would **increase GHG emissions by 205,7Mt CO2eq** over the 30 year period of the power purchase agreements (PPA), and negate most of the government's emission mitigation plans;

    25.2. the coal IPPs are not needed to meet South Africa's medium-term electricity demand. Where future capacity is needed, this is met more cheaply by other electricity sources such as wind, solar PV, and flexible gas generation; and

    25.3. the coal IPPs would cost South Africa an additional R19.68 billion compared to a least-cost energy system.

26. In short, the ERC report finds that the inclusion of the coal IPPs in South Africa's electricity build plan raises the total system costs compared to a scenario without the coal IPPs. **Similarly, in all scenarios, the coal IPPs increase GHG emissions**. These increases, both in costs and in GHG emissions, are significant.

[24] https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf

27. ERC concludes that "*the implications of these findings are clear. South Africa is currently facing a large surplus in generation capacity, in particular inflexible base supply capacity. Eskom is facing a financial crisis and rising electricity prices will drive consumers away from the utility. Investments that unnecessarily increase costs in the electricity sector should be avoided*."

28. The coal IPPs will have significant impacts for Eskom, Treasury and the people of South Africa – they are not in the public interest. Given their extremely high GHG emissions and pollution impacts for air and water, DEA, in particular, should be opposed to these projects given its mandate to protect the people's rights to a healthy environment and to have the environment protected for present and future generations.

29. The environmental authorisations for both Thabametsi and Khanyisa are currently being challenged with review proceedings in the High Court. The additional licences and authorisations required by these two coal IPPs are disputed and will continue to be met with public opposition.

Conclusion

30. We trust that you will give due consideration to these submissions, and we would be happy to meet with you to discuss any of this further. Please let us know if you would be amenable to a meeting and if so, when.

31. We continue to await your response to our letter of 23 February 2018 and now also await your response to our request for the list of entities which have submitted pollution prevention plans (as set out in paragraph 8 above) by no later than **2 July 2018**.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per:

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