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Copied to:

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Our reference: TL/RH
5 March 2018

Dear Ms Ngcaba

OPPOSITION TO THE ESTABLISHMENT OF AN EXPERT PANEL ON SULPHUR DIOXIDE (SO₂) ABATEMENT SOLUTIONS

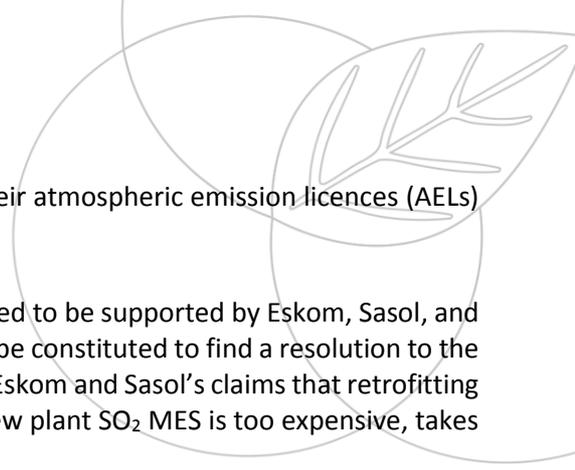
Introduction

1. We address you on behalf of our clients, groundWork (gW), Earthlife Africa Johannesburg (ELA), the Highveld Environmental Justice Network (HEJN), and the Vaal Environmental Justice Alliance (VEJA).
2. We refer to the 26 February 2018 letter submitted to the Director-General of the Department of Environmental Affairs (DEA) regarding the Parliamentary Committee on Environmental Affairs (PCEA) meeting held on 6 February 2018, and the urgent steps needed to address air pollution in the Highveld Priority Area.¹
3. We place on record that Eskom and Sasol, as the country's two biggest polluters, have already received multiple postponements of compliance with the minimum emission standards (MES), and have both made clear that they still intend to make additional applications to postpone compliance. Although Eskom, in particular, intends to make multiple additional postponement applications for a variety of pollutants, both companies have indicated that they do not ever intend to meet the new plant MES for sulphur dioxide (SO₂). In fact, we and our clients argue that, because all of Eskom and Sasol's operations are in priority areas where there is consistent non-

¹ The letter addressed the following items:

1. the oral submissions by the Director-General of DEA at the Parliamentary Committee on Environmental Affairs meeting on 6 February 2018;
2. the DEA's failure to respond to the Broken Promises Report;
3. the issue of "rolling postponements" of compliance with minimum emission standards;
4. the DEA's progress in ensuring compliance with Goal 2 of the Air Quality Management Plan (AQMP) for the Highveld Priority Area; and
5. a call for the publication of the revised or final version of the Mid-Term Review of the AQMP.

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compliance with the national ambient air quality standards (NAAQS), their atmospheric emission licences (AELs) should actually contain stricter emission limits than the MES.

4. During the PCEA meeting, the DEA suggested – which suggestion appeared to be supported by Eskom, Sasol, and the chairperson of the PCEA – that a “technical panel” of experts should be constituted to find a resolution to the issue of compliance with the SO₂ MES. This was apparently as a result of Eskom and Sasol’s claims that retrofitting their plants with flue gas desulphurisation (FGD) in order to meet the new plant SO₂ MES is too expensive, takes up too much space, and results in other negative impacts.
5. We object to the establishment of the proposed expert panel to consider SO₂ abatement solutions. We are unable to understand why an additional expert panel assessment is required at this stage, and, for the reasons that follow, strongly dispute that this is appropriate.

Further delay in implementing SO₂ abatement technology to comply with MES

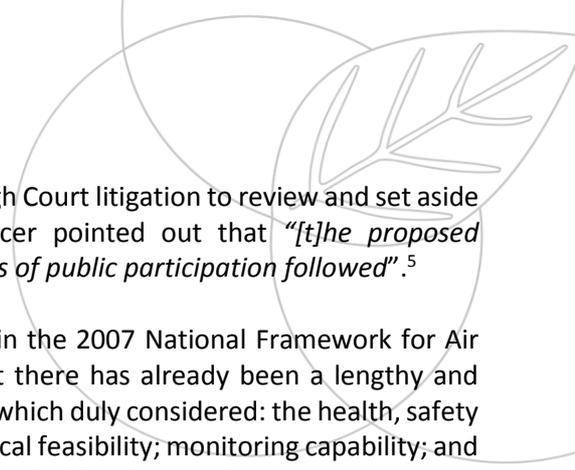
6. Our clients take the position that establishing a panel of experts will only further delay the implementation of the necessary action to achieve compliance with the MES.
7. The necessary action has already been clearly identified: Sasol and Eskom must either retrofit their plants with SO₂ abatement technology or commence an expedited plan to decommission their plants that cannot meet the MES. In the interim, the excess SO₂ emissions from these facilities will continue to have severe impacts on human health and wellbeing.
8. We reiterate our support for the DEA’s position (echoed by the PCEA) that MES compliance postponements were – and remain – intended to be once-off applications, and that “rolling postponements” need to be eliminated. Furthermore, postponements of compliance and issuing of additional AELs will only sustain the state of non-compliance with the NAAQS in the priority areas, in continued breach of section 24 of the Constitution of the Republic of South Africa, 1996.
9. In the circumstances, Eskom and Sasol must be required to either retrofit their plants with SO₂ abatement technology, or commence with expedited plans to decommission their plants that are unable to meet MES. An expert panel would only serve to delay the inevitable costs that Sasol and Eskom must incur in order to comply with the law.

Duplication of the multi-stakeholder participation process in setting the MES

10. Establishing a further panel of experts would duplicate the extensive work that was done in setting the MES.
11. As the DEA is well aware, the development of the Section 21 MES Listing Notice² constituted an extensive multi-stakeholder consultation and participation process over a five year period. The DEA confirmed this in a December 2013 Media Release, stating that “. . . All affected stakeholders (including Eskom) were part of these processes and they made contributions regarding limits that are achievable with the view of upholding the constitutional right of all people in the country to an environment that is not harmful to health and well-being”.³ The Media Release further confirms that “Eskom participated directly in this process, and standards seek to balance the economic, social and environmental imperatives”.

² 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. GN 893 in GG 37054 dated 22 November 2013.

³ Media Statement: The Department of Environmental Affairs clears the air on the atmospheric emission license (sic) for Kriel Power Station available at https://www.environment.gov.za/mediarelease/atmospheric_emissionlicense_krielpowerstation

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12. It was on this basis that the DEA vigorously opposed Sasol's May 2014 High Court litigation to review and set aside the MES.⁴ In the answering affidavit, the National Air Quality Officer pointed out that "[t]he proposed amendments were disclosed to all the role players and an intense process of public participation followed".⁵
13. This is supported by the description of the "standard setting process" in the 2007 National Framework for Air Quality Management in the Republic of South Africa,⁶ and it is evident there has already been a lengthy and comprehensive stakeholder deliberation that preceded setting the MES, which duly considered: the health, safety and environmental protection objectives; analytical methodology; technical feasibility; monitoring capability; and socio-economic consequences.⁷ Importantly, the MES-setting process provided for the establishment of an expert panel for the development of standards, "including but not necessarily limited to representatives from: the national department, affected national departments, provincial and municipal government, industry, business, civil society and the academia".⁸ When the Listing Notice was amended in 2013, a similar process, as prescribed by the 2012 National Framework for Air Quality Management in the Republic of South Africa ("the Framework")⁹ was followed.
14. We are instructed that, although Eskom and Sasol participated throughout the stakeholder process, at no stage did they indicate that they would not be able to meet the new plant SO₂ MES. It is not clear what steps, if any, they have taken since 2010 to ensure that they could comply.
15. In any event, and as addressed in the submission by Prof Eugene Cairncross at the PCEA meeting on 6 February 2018,¹⁰ South African MES are exceptionally weak relative even to other developing countries. Our SO₂ existing plant MES are 17.5 times weaker than those in China, Germany, and the European Union (EU), nearly 6 times weaker than India's, almost 5 times weaker than Indonesia's, and almost double as lax as Thailand's standards. In addition, our SO₂ new plant MES are more than 14 times weaker than those in China, 5 times weaker than those in India, and more than 3 times weaker than those in Germany and the EU.¹¹
16. It is well-known and not disputed that FGD is the Best Available Technology (BAT) required to meet the new plant SO₂ MES. This was clear throughout the multi-stakeholder process, and the cost and other negative impacts (which can, to a significant extent, be mitigated)¹² of FGD were also well-known. Notwithstanding this, the committee set the new plant SO₂ MES at the relatively-weak 500mg/Nm³, as the health impacts and other consequences of not adequately abating SO₂ far outweighed the negative effects of the abatement technology. Sasol itself has confirmed that there are no other means to meet these MES and that "FGD technology is proven".¹³

⁴ <https://cer.org.za/programmes/pollution-climate-change/litigation/sasol-synfuels-pty-ltd-and-others-v-minister-of-environmental-affairs-and-another>.

⁵ See paragraph 47.2 of the National Air Quality Officer's answering affidavit available at <https://cer.org.za/wp-content/uploads/2014/12/Respondents-Answering-Affidavit.pdf>.

⁶ See 'Standard-setting process' on page 48-50 of the National Framework for Air Quality Management in the Republic of South Africa (2007 Framework), 11 September 2007 – please note that the current 2012 version of the Framework is currently under review.

⁷ See Media Statement above and page 48 of the 2007 Framework.

⁸ See page 49 of the 2007 Framework.

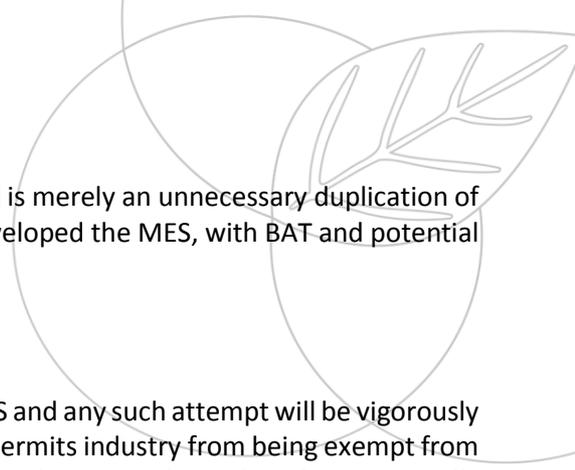
⁹ Available at https://cer.org.za/wp-content/uploads/2013/12/Framework-for-Air-Quality-Management_new.pdf.

¹⁰ Presentation available at <https://cer.org.za/programmes/pollution-climate-change/key-information> under Portfolio Committee on Environmental Affairs (PCEA) section.

¹¹ <https://www.iea-coal.org/emission-standards-and-control-of-pm2-5-from-coal-fired-power-plant-ccc-267/>. Analysis of selected countries' emission standards table.

¹² By way of an example - use of a cooler to reduce water consumption and the sale of gypsum as a by-product to reduce the need for solid waste disposal.

¹³ See PCEA minutes available at <https://pmg.org.za/committee-meeting/25766/>. See also the Sasol presentation at <https://cer.org.za/programmes/pollution-climate-change/key-information>.

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17. We therefore contend that the SO₂ expert panel that has been proposed is merely an unnecessary duplication of the rigorous and inclusive assessment, over a prolonged period, that developed the MES, with BAT and potential consequences duly considered.

Unlawful to weaken the MES

18. There is no legislative provision which entitles the DEA to weaken the MES and any such attempt will be vigorously opposed by our clients. In addition, there is no provision in our law that permits industry from being exempt from compliance with minimum legal requirements, on the basis that compliance is claimed to be “practically infeasible” or “significantly challenging to retrofit on their Brownfields site (sic)”.¹⁴
19. The MES were set in March 2010 and revised in November 2013. If Sasol and Eskom, despite their active involvement in the multi-year process to set the MES, take the view that achieving the MES is “infeasible”, they should have brought an application to review the MES. Although Sasol instituted legal proceedings in May 2014 in an attempt to set aside certain of the MES on the alleged basis that the cost of compliance exceeded the benefits, it withdrew this litigation.
20. We reiterate that the DEA vigorously opposed Sasol’s application. The National Air Quality Officer made the DEA’s position clear:

“ . . . [a]chieving ambient air quality standards (in the sense of bringing ambient air quality down to below the prescribed levels) is not an exercise in economics nor is it a matter for negotiation with the Applicants: that fundamental right [section 24 of the Constitution] may not be infringed by Sasol or any of the other Applicants and their argument or defence, that they are infringing that environmental right because it costs too much to adapt their existing plants and bring them up to standard, must be rejected out of hand. . . ”¹⁵

21. The proposed expert panel is a retreat from the DEA’s firm stance.

Conclusion

22. As a result, we and our clients reject the proposal to constitute a panel of experts to assess ways to achieve compliance with SO₂ new plant MES. We suggest that, should the DEA require expert advice, it engage a technical expert to advise it.
23. However, if such panel is to be constituted, kindly confirm that:
- 23.1 there will be no attempt to weaken any of the MES;
 - 23.2 Sasol and Eskom will not be granted any rolling postponements of MES compliance; and
 - 23.3 this process will not delay the review of the MES and NAAQS to make these both stricter.
24. We look forward to your response.
25. Our clients’ rights are reserved.

¹⁴ PCEA minutes available at <https://pmg.org.za/committee-meeting/25766/> - see the National Air Quality Officers report back on meeting with DEA, Sasol and Eskom held on 17 January 2018 and the briefing by Sasol, respectively.

¹⁵ See paragraph 49.13 of the National Air Quality Officer’s answering affidavit available at <https://cer.org.za/programmes/pollution-climate-change/key-information>

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per:



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