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Our ref: CER 54.3 /RH/MMK
WUL ref: 06/B11F/CGIHE/6684

12 October 2018

URGENT

Dear Honourable Minister

APPEAL AGAINST WATER USE LICENCE ISSUED FOR THE PROPOSED KHANYISA INDEPENDENT POWER PRODUCER COAL-FIRED POWER STATION (LICENCE NO 06/B11F/CGIHE/6684): REPRESENTATIONS BY GROUNDWORK TRUST IN OPPOSITION OF APPLICATION TO UPLIFT THE SUSPENSION OF WATER USE LICENCE

1. We address you on behalf of the groundWork Trust[1] ("groundWork") in its appeal against the grant of water use licence no 06/B11F/CGIHE/6684 (the "WUL") to ACWA Power Khanyisa Thermal Power RF (Pty) Ltd ("ACWA") for the proposed Khanyisa Independent Power Producer (IPP) coal-fired power station to be located in eMalahleni, Mpumalanga (the "Appeal" against the "Khanyisa Project" in respect of the "Decision").

2. In the usual course, and as provided for by section 148(2)(b) of the National Water Act, 1998 (the "NWA"), a water use licence (WUL) is suspended pending the finalisation of an appeal against the grant thereof.

[1] groundWork is a non-profit environmental justice campaigning organisation working primarily in South Africa, in the areas of Climate & Energy Justice, Coal, Environmental Health, Global Green and Healthy Hospitals, and Waste.

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3. On 7 September 2018, ACWA delivered an application for the upliftment of the suspension of the WUL on an "urgent" basis (the "Upliftment Application" in respect of the "Suspension").

4. As set out below, groundWork opposes the Upliftment Application: it is groundWork's case that upliftment of the Suspension would be unjust and inequitable in the circumstances and comprise the exercise of discretion by the Minister of Water Affairs and Sanitation (the "Minister") in a manner that is unlawful, irrational, and entails the consideration of irrelevant considerations and the failure to consider relevant considerations.

5. In any event, the urgency of ACWA's Upliftment Application is undermined because there is no certainty as to whether the Khanyisa Project is to be included as 'new coal capacity' under the revised Integrated Resource Plan for Electricity ("IRP") of the Department of Energy ("DOE"):

    5.1. The draft revised IRP was published for comment on 27 August 2018 and is currently subject to public consultation.

    5.2. Whilst the presumed reference to the Khanyisa Project in the draft IRP entails that as one of "*already procured and announced projects*",[2] as set out below, the procurement of the Khanyisa Project is some way from being finalised.

    5.3. Sound academic studies and international studies have shown that no new coal is needed for the future South African energy supply and as such, the draft IRP is heavily and strongly contested by civil society and various organisations locally and internationally.

    5.4. The Minister of Energy was quoted in an article on 1 October 2018, stating that consumers would pay R1.90/kWh on top of the projected electricity tariff hike of R1.19 by 2030 if the two projects presumed to comprise 'new coal capacity' were to go ahead, with a total cumulative cost of R23 billion.[3] In addition, he stated that "*[i]n the case of the two projects, they are expected to raise approximately R40-billion to build the power plants, which will be paid for by the consumer through the tariff.*"[4]

6. It may therefore not be the best use of resources or time for the Minister to spend government resources to conduct any further work or begin to consider the Upliftment Application until after the DOE has finalised the revised IRP.

7. In these representations, groundWork will address the following:

    A. Lawful exercise of discretion by the Minister in terms of section 148(2)(b) of the NWA;
    B. Factors to be taken into account by the decision-maker;
    C. The Khanyisa Project;
    D. Risks to water resources;
    E. Delay;
    F. Reasonable prospects of success in the Appeal;
    G. Balance of prejudice;
    H. Response to the Minister's Proposed Criteria;
    I. ACWA's Submissions in its Upliftment Application;
    J. Conclusion.

[2] P39, draft IRP 2018.
[3] http://m.engineeringnews.co.za/article/radebe-outlines-additional-cost-of-coal-ipps-to-consumers-2018-10-01/rep_id:4433.
[4] http://www.miningweekly.com/article/radebe-outlines-additional-cost-of-coal-ipps-to-consumers-2018-10-01/rep_id:3650

A. LAWFUL EXERCISE OF DISCRETION IN TERMS OF SECTION 148(2)(B)

i. *Automatic suspension in terms of section 148(2) of the NWA*

8. In terms of section 148(2)(b) of the NWA, unless the Minister directs otherwise, the lodging of an appeal with the Water Tribunal has the effect of suspending the "*relevant decision, direction, requirement, limitation, prohibition or allocation pending the disposal of the appeal, unless the Minister directs otherwise.*"[5]

9. Accordingly, the legislature intended the norm pending an appeal to be the suspension of the relevant WUL pending the outcome of an appeal. Compelling reasons will have to exist to uplift the Suspension and, simultaneously, to vary the *status quo* as set out at section 148(2)(b).

10. The rationale for such an automatic suspension provision is similar to that of an interim interdict. Its effect is to 'freeze' the position until the appeal authority decides where the right lies. It is aimed at ensuring, as far as it is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief and, correlatively, that permitting the exercise of the right subject to appeal does not cause undue prejudice and/or irreparable harm prior to the resolution of the appeal process.

11. The default position protected by section 148(2)(b) is analogous to the suspension of a judgment pending appeal under the common law (and prior to the more burdensome test for a case for upliftment introduced by section 18 of the Superior Courts Act). As set out by Corbett JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd:*

> *" the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application.... The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other matter appropriate to the nature of the judgment appealed from (Reid's case, supra, at p. 513). The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; Ruby's Cash Store (Pty.) Ltd. Estate Marks and Another, supra, at p.127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. Fismer v Thornton, 1929 AD 17 at p. 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all circumstances ... .'*[6] (Own emphasis)

ii. *The decision-maker*

12. The Minister considers the justice and equitability of uplifting the Suspension, and hence varying the legislated *status quo*, in an official capacity and in accordance with the provisions of, and the duties and custodianship bestowed under, the NWA, the Constitution of the Republic of South Africa, 1996 (the "Constitution") and related environmental legislation.

a. National Water *Act*

[5] Except, as set out in section 148(2)(a) of the NWA, certain directives aimed at preventing pollution or degradation of water resources or rectifying contraventions of this act.

[6] 1977 (3) SA 534 (A) at 544H–545A.

13. The primary purpose of the NWA is to ensure the protection and sustainable use of and equitable access to water resources.[7]

14. The preamble to the NWA recognises that water is a "*natural resource that belongs to all people, and that discriminatory laws and practices of the past have prevented equal access to water and the use of water resources*"; that it is a "*scarce and unevenly distributed national resource*"; "*the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users*"; and "*the protection of the quality of water resources is necessary to ensure sustainability of the nation's water resources in the interests of all water users*".

15. The preamble to chapter 1 of the NWA provides that:

> *"This Chapter sets out the fundamental principles of the Act. Sustainability and equity are identified as central guiding principles in the protection, use, development, conservation, management and control of water resources. These guiding principles recognise the basic human needs of present and future generations, the need to protect water resources, the need to share some water resources with other countries, the need to promote social and economic development through the use of water and the need to establish suitable institutions in order to achieve the purpose of the Act. National Government, acting through the Minister, is responsible for the achievement of these fundamental principles in accordance with the Constitutional mandate for water reform. Being empowered to act on behalf of the nation, the Minister has the ultimate responsibility to fulfil certain obligations relating to the use, allocation and protection of and access to water resources."* (Own emphasis)

16. Chapter 1, Section 2 of the NWA stipulates the purpose of the act as to " *ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled*" in ways which take into account factors that include:

    16.1. meeting the basic human needs of present and future generations;

    16.2. redressing the results of past racial and gender discrimination;

    16.3. promoting the efficient, sustainable and beneficial use of water in the public interest;

    16.4. protecting aquatic and associated ecosystems and their biological diversity;

    16.5. preventing pollution and degradation of water resources; and

    16.6. promoting dam safety.

17. In terms of chapter 1, section 3 of the NWA, the Minister is the public trustee of South Africa's water resources:[8]

> "(1)…*the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.*
>
> *(2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values."*

[7] Section 2 of the NWA and preamble.
[8] Section 3 of the NWA

18. The NWA establishes the Water Tribunal (the "Tribunal") as an independent body that hears appeals against certain decisions made by various authorities under the NWA.[9] Appeals to the Tribunal are wide and take the form of a rehearing of the issues placed before the authority that made the decision which is the subject of the appeal.[10] Members of the Tribunal must have knowledge in "*law, engineering, water resource management or related fields of knowledge*".[11]

19. The independence of the Tribunal is inevitably compromised should the Minister allow for the exercise of the right subject to an appeal prior to the decision of the Tribunal in this regard: the Tribunal may be forced or more inclined to accept as a *fait accompli* an existing water use which is already underway.

b. The Constitution

20. The Minister's "*constitutional mandate*" (see paragraph 155 and 17 above with reference *inter alia* to section 3(1) of the NWA) and duty, as an officer of the state, to *"respect, protect, promote and fulfil the rights in the Bill of Rights"*[12] includes the upholding of the constitutional rights to: an environment that is not harmful to health and well-being,[13] access to water[14], just administrative action that is lawful, reasonable and procedurally fair[15]; and written reasons for those who have been negatively affected by an administrative action.[16]

21. Section 24 of the Constitution (the "Environmental Right") guarantees everyone the right:

> *"(a) to an environment that is not harmful to their health or well-being; and*
> *(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -*
> *(i) prevent pollution and ecological degradation;*
> *(ii) promote conservation; and*
> *(ii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

c. National Environmental Management Act

22. The National Environmental Management Act No 107 of 1998 ("NEMA") is the over-arching legislation which gives effect to the Environmental Right.

23. Section 2 of NEMA sets out the principles which are to apply throughout the Republic alongside "*all other appropriate and relevant considerations*", "*serve as guidelines by reference to which <u>any organ of state</u> must exercise any function <u>when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment</u>"* and "*<u>guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment</u>*" (the "Section 2 NEMA Principles"). (Own emphasis)

[9] The preamble to Chapter 15 of the NWA
[10] Item 6(3) of Schedule 6 to the NWA
[11] NWA section 146(4).
[12] Constitution section 7(2).
[13] Constitution Section 24.
[14] Constitution Section 27.
[15] Constitution Section 33(1).
[16] Constitution Section 33(2).

24. The Section 2 NEMA Principles include that:

    24.1. "*a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions*"[17]; (the "Precautionary Principle") and

    24.2. "*sensitive, vulnerable, highly dynamic or stressed ecosystems, such as … wetlands … require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure*"[18].

25. Section 28 of NEMA places a duty of care on every person who "*causes, has caused or may cause significant pollution or degradation of the environment [to] take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.*"[21]

B. FACTORS TO BE CONSIDERED BY THE MINISTER

i. Interests of Justice and Equitability

26. As set out above, the assessment of the Upliftment Application, following consideration of the relevant factors, is an assessment of whether the upliftment of the Suspension is just and equitable in light of the reasons for the legislated Suspension, the nature of the suspended right and the mandate of the Minister.

27. Accordingly, the Minister's consideration of the Upliftment Application must include the following factors:

    27.1. the risk of harm to water resources and the surrounding environment should ACWA be allowed to proceed despite the pending appeal are significant;

    27.2. the risk of harm to ACWA should the Suspension be maintained pending the Tribunal's decision on the Appeal;

    27.3. the irreparable nature of the above harm;

    27.4. the prejudice to ACWA in maintaining the suspension weighed against the prejudice to groundwork and its represented interests (including the general Environmental Right) of granting the Upliftment Application;

    27.5. the detailed substantive and procedural nature of the Appeal and its ultimate consideration by the Tribunal as an independent body with specific knowledge of the relevant fields including law, engineering and water resource management;

    27.6. the potential to undermine the independence of the Tribunal in granting the Upliftment Application;

    27.7. the prospects of success in the Appeal; and

[17] Section 2(4)(a)(vii) of NEMA
[18] Section 2(4)(r) of NEMA

27.8. the mandate of the Minister as trustee of water resources and his obligations to give effect to the Constitution as well as to uphold the Section 2 NEMA Principles, including but not limited to the Precautionary Principle, when making any decision that affects the environment.

28. The Upliftment Application being one for the variation of the default legislated position, and hence of the legislated *status quo*, the onus is on ACWA to prove that its case is favourable on a balance of probabilities and, correlatively, that the balance of prejudice favours the granting of the Upliftment Application.

29. Should the Minister make a decision in respect of the Upliftment Application, in a manner which unlawful, irrational, and/or entails the consideration of irrelevant considerations or the failure to consider relevant considerations, this decision would fall subject to review as administrative action under the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA").

ii. Criteria proposed by the Department of Water Affairs and Sanitation

30. As appears from the attached "Internal Question Paper No.26 (question no, 2305) the Minister's response to the question of Mr T Rawula of the Economic Freedom Fighters [on 14 August 2017] ("Annexure A") in respect of the factors considered when uplifting a Suspension was as follows:

> "*The Minister of the Department of Water and Sanitation lifts a suspension of a license pending the outcome of the appeal made to the Water Tribunal when a petition is made indicating any of the following:*
>
> *a) that the granting of all authorisations or a water use licence followed all relevant due processes;*
> *b) that the suspension is highly prejudicial and detrimental to a lawfully obtained authorisations;*
> *c) that the suspension will derail the entire project timelines and create uncertainties;*
> *d) that the suspension will put hundreds of millions of investments at risks as well as forego much needed jobs and community development projects;*
> *e) that the issues raised by the Appellant in the appeal should be decided upon by the Water Tribunal, and the Appellant will not be prejudiced by the lifting of the suspension; and*
> f) *if the reasons provided by the person who is affected by the suspension are persuasive*." (Own emphasis)
>
> (the "Minister's Proposed Criteria")

31. We note that this response was provided in an *ad-hoc* manner and has not been formalised and/or legislated.

32. It is clear that the factors which are to be considered so as to ensure the reaching of a just and equitable decision, as set out above, entail:

32.1. a balancing exercise of weighing the prejudice to one party against that of the other in the context of the Khanyisa Project, the role of the Tribunal, and the mandate of the Minister; and

32.2. a process in which ACWA bears the burden of proof.

33. Accordingly, the Minister's decision with regard to the Upliftment Application cannot follow the "*indication*" of "*any*" one factor as communicated in the Minister's Proposed Criteria.

34. Further, and particularly on the premise that any one of the Minister's Proposed Criteria suffices to uplift the Suspension, these internal criteria are heavily weighted in favour of the licence-holder (only one of the six criteria entailing the consideration of prejudice to the appellant), and do not entail any direct consideration of the effect

of the upliftment of the Suspension on the water resources, environment, climate, or the health of or other impacts on the communities.

35. In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* (the "Fuel Retailers Case"),[19] and as further set out below, the Constitutional Court has already made clear that an assessment of sustainable development can not only entail an assessment of economic considerations: economic, social and environmental factors must be considered together in a manner which upholds the Environmental Right and Section 2 NEMA Principles in accordance with the relevant decision-making process.

36. The unlawfulness of Minister's approach, as set out above, is underscored by not a single application for uplifting the Suspension having been refused as at 30 June 2017.

iii. Sustainable development

37. In the Fuel Retailers Case, the Constitutional Court considered the obligation of state organs when making decisions that may have a substantial impact on the environment, with particular focus on the nature and scope of the obligation to consider socio-economic conditions. The court held that:

    37.1. environmental concerns do not commence and end once the proposed development is approved. It is a continuing concern. The environmental legislation imposes a continuing, and thus necessarily evolving, obligation to ensure the sustainability of the development and to protect the environment;[20]

    37.2. the decision-maker has a duty to consider the matter afresh and apply the NEMA principles, even if a prior authorisation may have considered these provisions.[21] This is because different authorities have their specialist field or lens from which the environmental impact is considered, and also it recognises that significant changes may occur in the environment after the authorisation is granted;[22]

    37.3. it is insufficient for the authorities to state that the developer must ensure that there is no pollution of water and that there must be monitoring as proposed in the report and in accordance with the regulations; [23]

    37.4. the Constitution and environmental legislation introduce a new criterion for considering future developments. Pure economic factors are no longer decisive;[24]

    37.5. Section 2 NEMA principles must be adhered to;[25]

    37.6. NEMA requires "a risk averse and cautious approach" to be applied by decision-makers**.** This approach entails taking into account the limitation on present knowledge about the consequences of an environmental decision. An increase in the risk of contamination of underground water and soil, and visual intrusion and light, for example, are some of the significant cumulative impacts that could result from the proliferation of a project.[26] In such circumstances, the authorities should conduct a thorough investigation

[19] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC).
[20] Fuel Retailers Case, para 78.
[21] Fuel retailers Case, paras 78, 92-97.
[22] Fuel Retailers Case, para 86-96.
[23] Fuel Retailers Case, para 99.
[24] Fuel Retailers Case, para 79.
[25] Fuel Retailers Case, para 67.
[26] Fuel Retailers Case, paras 81, 98 & 99.

into the possible impact of the proposed project to the water resource [or air quality, as the case may be] in light of the existence of other such similar projects in the vicinity, especially if there is a proliferation of such projects;[27]

37.7. it is insufficient to focus on the needs of the developer while the needs of the society are neglected;[28]

37.8. NEMA requires that, authorities must consider, assess and evaluate the impact of a proposed activity on existing socio-economic conditions, including existing developments in the area and *vice versa*. This includes investigation of the potential impacts - including cumulative effects of the activity and alternatives - on socio-economic conditions, and assessment of the significance of that potential impact;[29]

37.9. it is necessary to identify and predict the actual or potential impact on socio-economic conditions and consider ways of minimising negative impact while maximising benefit; which includes the requirement to consider the impact of a proposed development on socio-economic conditions, including the impact on existing developments; and[30]

37.10. authorities must consider and assess the impact on the environment of the proliferation of the project as well as the impact of project on existing ones. Further, there is an obligation to assess the cumulative impact on the environment of the proposed development.[31]

C. THE KHANYISA PROJECT

i. The Khanyisa Project

38. The Khanyisa Project, according to its amended environmental authorisation ("EA"), is a 600MW coal-fired power station which would remain operational for at least 30-50 years.

39. The location of this project is eMalahleni, Mpumalanga, in the degraded airshed and declared air pollution priority area, the Highveld Priority Area ("HPA"), and along the polluted upper Olifants River Catchment.

40. The Khanyisa Project will use a technology that is extremely greenhouse gas ("GHG")-emission-intensive – in particular as a result of the nitrous oxide (N_2O) emissions of circulating fluidised bed boilers.

41. Whilst the figures are not consistent in different applications and reports, it appears that the proposed power station would be on a 21 hectare (0.21km^2) site and its toxic ash dump (which would rise to 40 metres) would be located on top of an unstable 140 hectare (1.4km^2) rehabilitated open cast mine, and next to the toxic ash dump will be a coal washing plant. The capacity of the ash dump is only 5 years; whilst the Khanyisa Project is expected to operate for at least 30 years, and the WUL has been issued for 20 years.[32]

42. The WUL authorises the following water uses in respect of the proposed Khanyisa Project, among others (not all are listed):

42.1. impeding or diverting the flow of water in a watercourse (section 21(c) of the NWA) and altering the bed, banks, course or characteristics of a watercourse (section 21(i) of the NWA) pursuant to the construction and operation of the coal-fired power station and associated infrastructure, including, amongst others:

[27] Fuel Retailers Case, paras 81, 98 & 99.
[28] Fuel Retailers Case, paras 44 & 76.
[29] Fuel Retailers Case, para 77.
[30] Fuel Retailers Case, para 80.
[31] Fuel Retailers Case, paras 77 & 82.
[32] 2017 IWULA and IWWMP, section 2.2.

42.1.1. destruction of wetlands due to construction of 5km long bulk water supply system traversing the Noupoourt river underground and within Hillslope wetland 6 and 500 m of Hillslope seepage wetland;

42.1.2. road realignment 525m in length crossing Hillslope Seeepage wetlands 1 and 6 and within 500 m of Hillslope Seepage Wetland 5;

42.1.3. 1.25km of ash conveyor crossing the Hillslope seepage wetland 1 and within 500m of unchannelled valley bottom 4;

42.1.4. part of the Power Station crossing Killslope seepage wetland 1 and within 500m of Killside Seepage wetland 5;

42.1.5. dirty Stormwater Pond 7 (out of 11) approximately 12900m3 will be within 500m of Unchanelled Valley Bottom Wetland;

42.1.6. dirty Stormwater 8 (out of 11) approximately 12900m3 will be within 500m of an unchanelled Valley Bottom Wetland;

42.1.7. ash conveyor 1.2km in length, building a power station, building 11 dirty stormwater pond,

42.1.8. 140ha of ash disposal site will be within 500m of pans and unchannelled valley bottom wetland; and

42.1.9. 400kv substation, will be within 250m of a Seepage wetland; all or most of which will occur on and/or within 500 m of various wetlands;

42.2. discharging of waste in a manner which may detrimentally impact on a water resource (section 21(g) of the NWA)- whilst ACWA only lists one ash dump as a waste source to have impact on water resource in terms of section 21 (g) of NWA (as well as an unsubstantiated claim that the Department of Water and Sanitation (DWS) has put in place mitigation and monitoring measures to ensure that polluted water will not spread off its premises) this water use applies not only to the ash disposal but also to the following discharges:

42.2.1. disposing toxic ash over 140ha which will be within 500m of pans and channelled valley bottom wetland;

42.2.2. 11 separate dirty stormwater facilities to collect the leachate from the ash disposal facility, and the lining or lack thereof of the facility has not been disclosed in any of the WUL applications;

42.2.3. disposal of sludge in a 200m^3 evaporation pond that contain coal fines – the lining of this sludge evaporation pond is unknown;

42.2.4. reclaimed water recovery basin to store industrial waste water at the 300m^3 Reclaimed Water Recovery Basin;

42.2.5. 500m^3 dirty water recovery facility, to dispose dirty runoff from the plant; and

42.2.6. industrial effluent with dust and contaminated oily water will be collected in the dirty water collection facility and transferred to Dirty Water Recovery pit; and

42.3. disposing in any manner of water which contains waste from or which was been heated in any industrial or power generation process (section 21(h)).

43. Irrespective of any abatement measures proposed (the abatement technologies only lessening and not eradicating pollution from the Khanyisa Project), neither the HPA nor the Olifants River Catchment are able to bear additional air and water polluting activities, no matter how small the footprint is claimed to be.

44. The Upper Olifants River Catchment is the main stem of the general Olifants River Catchment which provides water for ten million people and is vital to the economy and environment of South Africa and Mozambique. The Upper Olifants River Catchment is located primarily within in the Gauteng and Mpumalanga Provinces, covering an area of 11 461 km^2, and includes the towns of Bronkhorstspruit, Delmas, Douglas, Kriel, Kinross, Ogies, Evander, Secunda, Bethal, eMalahleni, and Steve Tshwete. The Upper Olifants River Catchment is the most urbanised of the four sub-catchments, with a population of approximately 940 000 people, with the majority of the urban population located in eMalahleni and Steve Tshwete. Many rural communities living in the area of the Olifants River Catchment rely on the river for subsistence fishing, drinking, washing, and domestic small-scale irrigation.[33]

45. Many people and towns are reliant on the upper and general Olifants River Catchment, which is also one of the most polluted catchments in South Africa and is facing a water quality crisis both from a water quantity and quality perspective.[34] The upper Olifants River Catchment is heavily-dominated by coal mining, with an estimated 680 former and existing coal mines, and is also home to several power plants and commercial and smallholder agricultural farms.[35] Many coal-fired power stations and mines have a Zero Liquid Effluent Discharge ("ZLED") design, meaning that they are not supposed to discharge any polluted water in the area; however, despite this, the Olifants River Catchment, and especially the upper Olifants River Catchment, has extremely poor water quality.

46. Toxic metals and other pollutants in the Olifants River are already harming communities and wildlife that depend on it. A CSIR study on the Lower Olifants in 2014 found, *inter alia*, that the health risks predicted from the (very low) daily consumption of one litre of water in the Lower Olifants is anticipated to be in the order of 64 times that considered to be safe for a life-time exposure in South African study sites. In one South African study site, arsenic in water samples was found at levels considered to be responsible for a 1 in 1 000 chance of developing cancer, again based on the consumption of one litre of water per day. This is 100 times higher than the 1 in 100 000 acceptable risk recommended by the World Health Organisation.[36]

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[33] *See, e.g*., A Addo-Bediako, et al., Human health risk assessment for silver catfish *Schilbe intermedius* Rüppell, 1832, from two impoundments in the Olifants River, Limpopo, South Africa, Water SA, Vol 40 No 4 (2014) ; Sipho Kings, *A river of shit, chemicals, metals flows through our land*, Mail and Guardian, April 2017, https://mg.co.za/article/2017-04-13-00-a-river-of-shit-chemicals-metals-flows-through-our-land; J. Lebepe, et al., Metal contamination of human health risk associated with the consumption of *Labeo rosae* from the Olifants River system, South Africa, African Journal of Aquatic Sciences 2016, 41(2): 161-170.

[34] 2017 IWULA & IMMP, section 4.6.2, p. 49; *see*, *also*, 2012 FEIR, Surface Water Quality Impact Assessment, p. 14; J. Lebepe et al., *Metal contamination and human health risk associated with the consumption of* Labeo rosae *from the Olifants River system, South Africa*, African Journal of Aquatic Science 2016, 41(2): (Lebepe 2016 Study), p. 161, https://cer.org.za/wp-content/uploads/2017/09/Annexure-H-Lebepe-Marr-and-Luus-Powell-Metal-contamination-and-human-health-risk-associated-with-the-consumption-of-Labeo-rosae-from-the-Olifants-River-System.pdf; CSIR, Risk Assessment of Pollution in Surface Waters of the Upper Olifants River System: Implications for Aquatic Ecosystem Health and the Health of Human Users of the Water Summary Report: 2009 to 2013, J.M. Dabrowski (Editor), August 2013 (CSIR 2013 Risk of Surface Water Pollution Report), p. 1..

[35] G.K. Nkhonjera, *Understanding the Impacts of climate change on the dwindling water resources of South Africa, focusing mainly on Olifants River basin: A review*, Environmental Science & Policy 71, 20 (May 2017), http://www.sciencedirect.com/science/article/pii/S1462901116306608?via%3Dihub.

[36] https://cer.org.za/wp-content/uploads/2017/09/Annexure-J-Final_Report_Lower_Olifants_31March2014_FINAL.pdf. The Vaal River is also currently experiencing severe pollution issues, which is currently being investigated by the Human Rights Commission. To give an indication of the economic implications of cleaning up the pollution, it was estimated by an expert that cleaning up the Vaal pollution would cost the government between R800 billion and R1 trillion. It is clear therefore that to take

47. The Khanyisa Project is located in the HPA, declared a priority almost eleven years ago due to the significantly-polluted air in the area. The air quality however, has not improved since the declaration of the HPA, and pollution from various industries and coal-fired power stations continues, mostly unabated.[37] Aside from the proposed Khanyisa Project, the HPA is proliferated with twelve Eskom power stations (including Kusile, which is still under construction), Sasol's Synfuels operation, and many hundreds of mines. Some of the pollutants emitted by coal-fired power stations include: particulate matter (PM); sulphur dioxide (SO_2); nitrogen oxides (NOx); mercury (Hg); and carbon dioxide (CO_2); which are all harmful to human health, and are the cause or major contributor of several types of illnesses, some of which can be fatal.[38]

48. The Department of Environmental Affairs ("DEA")'s 2017 State of the Air report states that "*many South Africans may be breathing air that is harmful to their health and well-being especially in the priority areas"*.[39] Power generation, followed by mining haul roads and mines (some of which supply the power generating plants) are by far the largest contributor to air pollution in the Highveld. The DEA's HPA Air Quality Management Midterm Review indicates that "*industrial sources in total are by far the largest contributor of SO_2 and NOx in the HPA, accounting for approximately, 99.57 % of SO_2 and 95.97% of NOx, while mining is the largest contributor of PM_{10} emissions*";[40] and "*there has not been a significant decrease in emissions of industrial and mining sources… Nonetheless, industrial sources are still the largest contributors of SO2 and NOx in the HPA with mining being the main contributor of $PM_{10.}$*"[41] In addition health impact studies indicate that the proliferation of coal fired power station in the area already result in devastating health impacts at enormous cost. It is clear that an additional coal fired power station would add to this burden. [42]

49. The effects of climate change are predicted to worsen the degradation of the Olifants River Catchment and surrounding areas: "*Given all of these results, South African water and infrastructure planners and government should prepare for significant Olifants River flow reductions and refrain from actions that will increase the risks of undesired outcomes. Maladaptive actions would include increasing the demands on these already over-allocated water systems, and contributing to additional warming by increasing emissions of greenhouse gasses through the construction of long-lasting, new coal-fired power plants*."[43] (This notwithstanding, the climate change impacts of the proposed Khanyisa Project, on the other hand, have not been addressed by ACWA – which failure is the subject of proposed High Court review proceedings.)

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preventative measures would likely be more beneficial then to take action after pollution has occurred. The enormous cost and burden to remediate the ORC would ultimately fall on the government and the public (https://www.thesouthafrican.com/dr-anthony-turton-vaal-river-fix-r800bn-r1tn/).

[37] https://cer.org.za/news/broken-promises-the-failure-of-south-africas-priority-areas-for-air-pollution-time-for-action

[38] Munawer, 2018, Human health and environmental impacts of coal combustion and post-combustion wastes, https://reader.elsevier.com/reader/sd/pii/S2300396017300551?token=67F47FF71D116F647BE7A6AF1CAAC79C90A21F77F22A52375B07C053B4332FC818CD2FE06BA4274E622EB57E2528C81; https://cer.org.za/wp-content/uploads/2017/04/Annexure-Health-impacts-of-coal-fired-generation-in-South-Africa-310317.pdf **;** https://cer.org.za/wp-content/uploads/2017/09/CER_HPA-Infographic-web.pdf

[39] http://www.airqualitylekgotla.co.za/assets/2017_1.3-state-of-air-report-and-naqi.pdf.

[40] Pg 2.

[41] Pg 85.

[42] Needless to say, the air pollution in the HPA from industrial facilities, including Sasol, mines, and coal power stations are significant, and there are dire health implications for those living in the HPA. Economic losses borne by government (and ultimately the public) are also significant. A 2017 study by Dr Mike Holland (who has conducted similar studies for the World Bank, European Union and many other well-renowned institutions) estimates that PM2.5 emissions from Eskom coal power stations alone are responsible for some 2 239 deaths a year, 94 680 days of asthma symptoms, 9 533 cases of bronchitis in children, 996 628 lost working days, nearly four million days of restricted activity, and a cost of $2.3 billion annually. (https://cer.org.za/wp-content/uploads/2017/04/Annexure-Health-impacts-of-coal-fired-generation-in-South-Africa-310317.pdf **;** https://cer.org.za/wp-content/uploads/2017/09/CER_HPA-Infographic-web.pdf) The economic and health implications as result of proliferation of coal-fired power stations in the HPA are already high, and these costs are borne by the public, and public institutions such as public hospitals.

[43] Udall, 21st Century Climate Change Impacts on the Olifants River, pg 31

ii. *The Khanyisa Project's status under the Coal Baseload Independent Power Producer Procurement Project*

50. The Khanyisa Project is one of two preferred bidders under the DOE's Coal Baseload Independent Power Producer Procurement Project ("CBIPPP"). However, the procurement of the Khanyisa Project under the CBIPPP is far from certain: At no stage is the DOE obliged to sign any agreement or to continue with the project, even after the preferred bidder is appointed or where expenditure has been incurred, and the risk of the bidding process falls solely on the bidder's shoulders. For instance, the Request for Proposals ("RFP") of the CBIPPP makes clear that:

    50.1. The DOE reserves the rights to a*mend, modify or withdraw 1) the RFP or any part of it,*[44]*; 2) terminate or amend the procedures, procurement processes or requirements detailed in this RFP during the conduct of the Coal Baseload IPP Procurement Programme;*[45] *or 3) terminate or amend the Coal Baseload IPP Procurement Programme.*[46]

    50.2. These rights can be exercised *"at any time without prior notice and without liability compensate or reimburse any person pursuant to such amendment, modification, withdrawal or termination",*[47] *and without liability to compensate or reimburse any person pursuant thereto.*[48] *"no bidder, its members, contractors, or its lenders shall have any claim against the Department …"*[49]

51. Preferred bidders must reach commercial[50] and financial close[51] within 6 months after the announcement of the preferred bidder status. However, although the Khanyisa Project was announced a preferred bidder on 6 October 2016, it has yet to reach commercial and financial close, largely because of the significant number of outstanding authorisations in respect of the project: In order to complete the process and reach commercial and financial close (a condition precedent to the signing of a power purchase agreement ("PPA")), the bidder must at least one month before the scheduled commercial close, provide the DOE with the approval of all outstanding environmental consents such as a WUL, environmental authorisation ("EA"), provisional atmospheric emission licence ("PAEL");[52] a generation licence from the National Energy Regulator of South Africa ("NERSA");[53] and proof of the resolution or settlement of any appeals and/or reviews which may have been lodged or instituted against a decision to grant any environmental consent for the project.[54]

52. In addition, before a PPA is concluded, the DOE must ensure that it is "*value for money*", as required in terms of regulation 9(1) and (2) Electricity Regulation on New Generation Capacity, 2011.[55] Significantly, Eskom does not agree with the draft PPAs in respect of the Khanyisa Project, nor has it received the proposed value for money assessment.[56]

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[44] RFP Part A, P10, clause 1.3.
[45] RFP Part A,p10, clause 1.3.
[46] RFP Part A, p10 clause 1.3, 1.4.
[47] RFP Part A, p10, clause 1.3.
[48] RFP Part A, p10 clause 1.3, 1.4.
[49] RFP Part A, p11, clause 1.8.
[50] "Commercial Close" is defined in the Request for Proposals, Part A as "the Effective Date as defined in the Implementation Agreement", p18. The Implementation Agreement is the agreement to be entered into between the Seller and the DOE, p28.
[51] "Financial Close" is defined in the Request for Proposals, Part A as "…the date on which the Seller, as the Borrower under the Financing Agreements, has received confirmation that all suspensive conditions to the Financing Agreements have either been met to the relevant Lender's satisfaction or have been appropriately waived by the Lenders", p27.
[52] section 5.2.2, volume 2, part 5, Request for Proposals.
[53] section 5.5.8, volume 2, part 5, Request for Proposals.
[54] section 5.2.3, volume 2, part 5, Request for Proposals.
[55] Government Notice R399 in Government Gazette 34262, dated 4 May 2011, as amended.
[56] https://cer.org.za/wp-content/uploads/2018/09/Coal-baseload-Independent-Procedures-Status-of-the-Power-Purchase-Agre....pdf

53. Currently, in addition to its WUL being the subject of the Appeal, the Khanyisa Project's disputed authorisations include the review of its environmental authorisation; its PAEL transfer is the subject of an appeal; and its NERSA electricity generation licence is opposed and has not been granted. In brief, the bases of these further challenges are as follows:

    53.1. Khanyisa EA Review: Khanyisa's EA was authorised without a thorough climate change impact assessment ("CCIA"). From a water perspective, climate change impacts would include increased drought and flood events both in terms of frequency and severity. Severe droughts would likely affect the water availability and would also mean that the Olifants River would not have the capacity to tolerate further pollution.[57] Severe floods would also impact Khanyisa's clean and dirty water management system beyond the norms, thus increasing the potential of polluted water being discharged off of Khanyisa's operations (despite it being a claimed ZLED facility) into the Olifants River Catchment, and in turn, the Witbank dam. The CCIA would – and should - have considered the robustness of any mitigation measures proposed in terms of storm and dirty water containment, and water availability. However, the Khanyisa Project had not conducted such an assessment. The courts have yet to decide on the validity of the EA. Currently, the decision-maker is being required to submit all papers and reasons it considered in refusing the Appeal.

    53.2. Khanyisa's PAEL transfer: Anglo Operations (Pty) Ltd (the initial developer of the Kipower Project) applied for a PAEL for a 450MW plant, and authorisation has since not been updated to reflect the full 600MW plant which now comprises the Khanyisa Project. The licence was allegedly transferred to ACWA, but a material alteration had taken place to the PAEL, going beyond that of an ordinary transfer. The delegation of powers were also faulty, and therefore the licence should not have been transferred. The appeal was submitted on 13 November 2017, within the legally-prescribed timeframe, and supplemented subsequently, after new information were provided on 9 March 2018 by the municipality which was relevant to the decision-making process and delegation of powers. The current status is that pre-appeal hearing has been set by the Nkangala District Municipality (NDM) for 25 October 2018, with ACWA now disputing that the matter should be heard by an internal appeal process at all.

    53.3. Khanyisa's NERSA licence: in order to obtain an electricity generation licence, the applicant has to show among others, that it would be in the public interest to grant such licence. The objections highlighted that Khanyisa's electricity is not required, and were it to be built, unnecessary electricity would be produced at the expense of significant air and water pollution which would impact the health of those living in the area. South Africa currently has excess electricity capacity, of at least 5 600MW at peak.[58] A November 2017 report by Meridian Economics,[59] relying on modelling by the CSIR, finds that in a 34 year, least-cost optimised, power system operation and expansion plan, no new coal-fired power capacity is built after Eskom's Kusile power station. It states, "*new coal and nuclear plants are simply no longer competitive. When new capacity is required, demand is met at lowest cost primarily from new solar PV and wind*" (emphasis added).[60] The demand can be met at least cost without <u>any</u> new coal. Accordingly, the Khanyisa Project would mean unnecessary and expensive electricity generation, at the same time negatively impacting on the health and well-being of those living in the area, and therefore would not be in the public interest. Eskom also opposed the granting of the generation licence and NERSA has yet to decide on the application.

54. Accordingly, there are numerous legal challenges preventing ACWA from reaching commercial and financial close, and thereafter signing a PPA.

[57] Udall, 21st Century Climate Change Impacts on the Olifants River, pg 31

[58] See http://www.eskom.co.za/news/Pages/Jann24.aspx.

[59] Available at http://meridianeconomics.co.za/wp-content/uploads/2017/11/Eskoms-financial-crisis-and-the-viability-of-coalfired-power-in-SA_ME_20171115.pdf.

[60] P3, Executive Summary, Meridian Report.

55. The failure of the Khanyisa Project to reach commercial and financial close underscores the uncertainty of the inclusion of the project in any 'new coal capacity' under the revised IRP. In line with paragraphs 5 and 6 above, the presumed reference to the Khanyisa Project in the draft IRP entails that it is one of the "*already procured and announced projects*".[61] For the reasons set out above, it is not yet procured. In addition, it is not certain that it will remain in the final IRP to be published at the conclusion of the public participation and other processes.

D. RISK TO WATER RESOURCES UPON GRANT OF UPLIFTMENT APPLICATION

56. ACWA indicates that if the Suspension is uplifted, it intends constructing and levelling ground which would trigger section 21(c) and (i) activities.[62]

57. Khanyisa's use of water as authorised by its WUL is likely to pollute the already-degraded Olifants River Catchment, and negatively impact the users downstream, including those who rely on the Witbank dam, irrespective of its ZLED design. This is because the site on which Khanyisa's ash will be stored is an unstable rehabilitated mine: If this mine collapses, it will pierce through the liner underneath the coal ash dam and compromise the seal. Accordingly, and regardless of ACWA's proposed mitigation measures, the leachate from the toxic coal ash is likely to leak through to the groundwater and spread to the Olifants River Catchment and subsequently the Witbank Dam.

58. As set out in Khanyisa's November 2016 Integrated Water Use Licence Application and Integrated Water and Waste Management Plan (the "November 2016 IWULA"):

> "*From a hydrogeological viewpoint, this figure depicts quite a complicated situation. … the hydraulic conductivity of rehabilitated opencast areas is very high and pump tests will barely result in measurable drawdown, even at maximum practical extraction rates. In addition, the opencast areas are directly connected to the remaining underground mine voids; with extremely high conductance, comparable with large diameter pipes rather than typical aquifer material. The ash itself is expected to be of intermediate hydraulic conductivity, somewhat between the bedrock and the backfilled opencast material, probably closer to the bedrock."*[63]

59. According to the DWS geohydrologist who reviewed the Khanyisa materials, *"…pillars are still to be mined out which will cause subsidence and can damage the liner at a later stage*."[64]

60. According to the DWS Civil Design Comments and Recommendations regarding the proposed ash dump:

> "*The ash disposal site is to be located on rehabilitated ground, which was formally an opencast site. The compaction during backfilling cannot be confirmed, therefore the suitability of the rehabilitated area as disposal site is uncertain, which could compromise the integrity of the barrier system below the ash dump*."[65]

61. The DWS geohydrologists have stated the location of the ash dump to be a fatal flaw, and withheld recommendation of the Khanyisa Project, since the land may collapse, making any mitigation measures such as liners meaningless, as these will be perforated:

> "*Ash Dam 3 need to be relocated to an area which is not undermined and not located on top of a rehabilitated open cast mine…although aquifer had been classified as a minor aquifer the DWA see this*

[61] P39, draft IRP 2018.
[62] Upliftment Application para 2.2.3.
[63] November 2016 IWULA p55 section 4.7.4.
[64] Groenewald, M. 2012. Memo re: Khanyisa Coal Fired Power Station License Application. Geohydrologist, Department of Water Affairs Directorate of Resource Protection and Waste, Sub-directorate of Source Coordination. November 27, p.v.
[65] Bhebhe, G. 2017. Civil Design Comments (2) and Recommendations. July 18.

as an important aquifer as the baseflow feeds into the Olifants River Catchment which is already stressed…The Olifants River will be polluted .due to leachate…The Olifants River Catchment is already stressed therefore the groundwater forms an important recharge mechanism to the baseflow of this system and cannot further be contaminated cumulatively therefore any material that is stored on surface must be contained in such a manner that it cannot leach into the groundwater system…<u>The site locality is regarded as a fatal flaw"</u>[66]

62. The applicant modelled the likely impact of pollution from the ash dump, should the mitigation measures fail, and produced maps of pollution plumes. These plumes confirm that pollution will travel approximately four kilometres from the coal ash dump to the southeast after 20 years. "*After 20 years the plume is expected to impact the Olifants River.*"[67]

63. Further ACWA's Geohydrological Evaluation[68] reveals that:

"*based on the modelling results which depict the worst case scenario of a leaking liner, it is interesting to note that the pollutants from all ash dams, and even the power plant site, will eventually end up in the south-eastern opencast, designated 2A at this stage. This opencast is directly upstream of the Olifants River and unless mitigated, will seep into the river as either surface or base flow. As the Olifants River feeds directly into the Witbank Dam, the impact would thus be environmentally unacceptable*."[69]

64. ACWA claims that its ZLED design will minimise pollution. However, not only does this claim fail to account for the instability of the ground underlying the proposed site for the ash dam, it also fails to follow any assessment of whether the whole dirty and clean water system is designed to withstand heavy storms and other effects of climate change. As ACWA has not submitted a CCIA to assess the strength of the system against increased severe flood events, it is not clear whether the Khanyisa Project's ZLED can withstand such events. Further, ACWA has also not conducted a proper socio-economic impact assessment, including: (1) the cost of externalities (such as health impacts, loss of enjoyment of the use of the river, and the cost of not being able to use clean water by vulnerable groups and all those that rely on the Olifants River Catchment, for example) associated with all those that rely on the Olifants River Catchment; (2) the cumulative impact of Khanyisa's operation on this catchment; and (3) the cumulative impact of all coal-fired power stations in the vicinity of the Olifants River Catchment.

65. In addition, and despite ACWA's indication that only one (largely-modified) wetland will be affected by the activities, as apparently supported by the May 2017 Wetland Impact Assessment report (the "Wetland Specialist Study"),[70] the Wetland Specialist Study in fact indicates significant further impacts as a result of the Khanyisa Project. This report was not made available during the WUL application process, nor was it made available for public comment, and was only obtained by groundwork as part of the June 2017 WUL application, in late June 2018.

66. The assessments of the Wetland Specialist Study include the following:

66.1. The activities of the Khanyisa Project will affect six wetlands. It is only two out of the five that "will not be impacted by the proposed project".[71] The probability of the others are uncertain.

[66] DWS Geohydroplogist internal memo, November 2012

[67] Aurecon 2011a. Anglo American Khanyisa Power Station Project: EIA, Geohydrological Evaluation for the Environmental Impact Assessment. August. (the "Geohydrological Evaluation"), p. 50.

[68] See above.

[69] Geohydrological Evaluation, p. xiii-xiv, emphasis in original.

[70] Upliftment Application para 9.1.1.

[71] Wetland Specialist Report, 22-27.

66.2. In relation to the construction of the plant and ash disposal site (when ZLED designs have not yet been constructed), "*approximately 2.6 ha of wetland habitat will be directly affected*" which will result in loss and disturbance of the wetland habitat.[72]

66.3. Stripping the vegetation will increase volumes and velocities of surface runoff, increasing erosion risk in the downslope receiving wetlands. Therefore "*a construction stormwater management plan must be developed and implemented prior to the commencement of large scale vegetation activies or construction activities and be maintained until the end of the construction phase. Such a plan should aim to minimise the transport of sediment off site as well as prevent the discharge of high velocity flows into downslope wetlands…..*" As far as we are aware, no such 'construction stormwater management plan' has been submitted, and the construction will be unmitigated, resulting in unnecessary impacts.[73]

66.4. "*During the construction phase, as activities are taking place within and in close proximity to wetlands, there is a possibility that water quality can be impaired*".[74]

66.5. During the operational phase "*Contaminated surface water runoff from the ash dam or water seeping out of the ash dam or the pollution control dams will result in water quality deterioration in receiving water resources. Overflow of pollution control dams could also occur and impact on water quality within receiving systems, which will ultimately be the Olifants River*."[75]

66.6. The most significant impacts to wetlands expected from the Khanyisa Project include: "*Water quality deterioration due to seepage of contaminants out of the ash dam entering adjacent watercourse and being transported downstream to the Olifants River*."[76]

67. Further, the effects of the volume of water to be used by the Khanyisa Project have not been adequately assessed. ACWA claims that the Khanyisa Project will not abstract any water for use as it will rely only on treated mine water treated by the eMalahleni Water Reclamation Plant ("EWRP".) However, ACWA has provided no substantiation for this water use in either the Upliftment Application or in the WUL applications. This is particularly necessary because, whilst ACWA itself may not abstract water, EWRP can abstract water from the Olifants River Catchment. ACWA has not provided details with respect to *inter alia*: (1) how much EWRP abstracts from the ORC; (2) other users in competition for the EWRP's treated mine water; (3) if the other users are being supplied the required quantity; and (4) if EWRP can indeed meet all of Khanyisa's supply (in addition to those it already supplies) on treated mine water alone. Currently, eMalahleni does not have sufficient clean water for its own residents, and vulnerable and previously-disadvantaged groups are affected.

68. Accordingly, and despite ACWA's submissions to the contrary, there is a significant risk of irreparable harm to water resources should ACWA be allowed to exercise its rights in terms of the WUL pending the outcome of the Appeal. This is in particular because of the significant risk of the ash dump leaking as it is located on top of an unstable rehabilitated ground, the location of the Khanyisa Project in a significantly polluted yet hydrologically important catchment and in close proximity to water resources, and the absence of a construction stormwater management plan.

69. The Minister, as trustee of water resources and in light of his obligations to give effect to the Constitution as well as to uphold the Section 2 NEMA Principles, is required to apply the Precautionary Principle when assessing this risk (see in particular paragraphs 24.1 and 27.8 above) and, hence, to uphold "*a risk-averse and cautious approach*

[72] Wetland Specialist Report, 37.
[73] Wetland Specialist Report, 38.
[74] Wetland Specialist Report, 39.
[75] Wetland Specialist Report, 41.
[76] Wetland Specialist Report, 56.

is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions".[77]

E. DELAY

70. The prejudice claimed by ACWA is largely based on the delays to the Khanyisa Project allegedly caused by the WUL Suspension.

71. ACWA submits that the Khanyisa Project cannot continue with development without the WUL, and the PPA to be signed with the Khanyisa Project as part of the CBIPPP will be delayed as a result of the Suspension.[78]

72. These claims are misleading and inaccurate. As further detailed below, the WUL Suspension causes no undue prejudice to the Khanyisa Project because:

    72.1. ACWA's failure to sign a PPA is a direct result of ACWA's inability to reach commercial and financial close in light of pending litigation (and other disputed authorisations) and ACWA's failure to obtain a NERSA licence, as well as a lack of agreement in respect of the draft PPAs (including the required "*value for money*" assessment).

    72.2. It is the failure of ACWA and the DWS to provide the documentation on which the grant of the WUL was based that has significantly delayed groundWork's ability to proceed with the Appeal.

    72.3. There is no certainty as to whether the Khanyisa Project will be included in the 'new coal capacity' of the final revised IRP.

73. Further, according to the WUL condition 1.13, *"construction activities must be scheduled to take place during the dry seasons when flows are lowest".* Dry seasons in Mpumalanga are March to September and wet seasons October to February, and therefore construction – presuming all factors such as commercial and financial close were in place at the time, which is currently not the case - can only begin construction in March 2019, as Mpumalanga will now be moving into the wet season. If ACWA were to begin construction 'imminently', as the Upliftment Application intimates, it would be doing so in violation of its WUL condition.

i. Status of PPA

74. As indicated above, in order to complete the process and reach commercial and financial close (a condition precedent to the signing of a PPA), the bidder must at least one month before the scheduled commercial close, provide the DOE with the approval of all outstanding environmental authorisations;[79] a generation licence from NERSA;[80] and proof of the resolution or settlement of any appeals and/or reviews which may have been lodged or instituted against a decision to grant any environmental consent for the project.[81]

75. Accordingly, the upliftment of the Suspension is not sufficient for the reaching of commercial and financial close- the existence of disputes in respect of the necessary environmental consents, regardless of the intermittent suspension of the underlying licences, and the absence of a NERSA generation licence remain obstacles to the completion of this process.

[77] Section 2(4)(a)(vii) of NEMA
[78] Upliftment Application para 2.2.
[79] section 5.2.2, volume 2, part 5, Request for Proposals.
[80] section 5.5.8, volume 2, part 5, Request for Proposals.
[81] section 5.2.3, volume 2, part 5, Request for Proposals.

76. On 7 September 2018, Eskom stated that, as it had indicated at a NERSA hearing in March 2018, it has not agreed to sign the PPA, due to certain conditions not being agreed upon. Furthermore, Eskom has not received and is still awaiting a "value for money" assessment (this is a requirement under legislation to complete the PPA process).[82]

77. In response to a Parliamentary question regarding the IPPs, of June 2018, the Minister of Public Enterprises advised that:

> "*Eskom has not approved the signing of the coal independent power producers (IPPs) agreements. No approval nor instruction has been given by the Department of Public Enterprises to Eskom to sign such agreements. Eskom understands that all future IPP programmes are on hold until such time as the Integrated Resource Plan (IRP) has been concluded. Eskom provided these IPPs with budget quotations for connection to the grid as is required by the Eskom transmission license (sic), but has made no other allowances for these IPPs in the Eskom production plans and price applications*."[83]

78. As set out at paragraph 5 above, there is no certainty as to whether the Khanyisa Project is to be included as 'new coal capacity' under the revised final IRP. The draft revised IRP, which was published for comment on 27 August 2018 and is currently subject to public consultation also indicates that "*no contracts are signed*" in respect of the CBIPPP, including the Khanyisa Project.[84]

ii. *Dilatory provision of Appeal documentation*

79. An appellant is required to lodge an appeal against a WUL within 30 days of either: (1) notice of the decision is sent to the Appellant, or (2) reasons for the decision having been given, whichever occurs last.[85]

80. As set out below, full reasons for the Decision to grant the WUL have yet to be provided to groundWork. Nevertheless, and in order to expedite proceedings in so far as this is possible, the groundWork Appeal was lodged (with full reservation of rights) on 8 August 2018, which Appeal is to be supplemented as soon as groundWork has the documents necessary to do so: all parties to the Appeal, including the Tribunal, are currently awaiting the full records and reasons which was considered by the DWS in reaching its decision to issue the WUL (the Centre for Environmental Rights (CER)'s most recent correspondence to the Tribunal and DWS in this regard, dated 25 September 2018 (the "CER's 25 September Correspondence"), is attached marked as "Annexure B").

81. Throughout the WUL application process, and particularly during 2017, ACWA's environmental assessment practitioner ("EAP") refused to provide the CER and/or groundWork with material information pertaining to the WUL application, including whether or not the WUL had been granted to ACWA. Despite groundWork having

[82] Regulation 9 of the New Generation Regulations states that:
"(1) A power purchase agreement between the buyer and an IPP must meet the following requirements –
(a) value for money;
(b) appropriate technical, operational and financial risk transfer to the generator;
(c) effective mechanisms for implementation, management, enforcement and monitoring of the power purchase agreement; and
(d) satisfactory due diligence in respect of the buyer's representative and the proposed generator in relation to matters of their respective competence and capacity to enter into the power purchase agreement.
(2) Before the buyer concludes a power purchase agreement, the buyer or the procurer [DoE] must, subject to any approvals required in terms of the PFMA (Public Finance Management Act, 1999) –
(a) ensure that the power purchase agreement meets the requirements set out in sub-regulation (1)…"

[83] Document can be made available on request.

[84] Draft 2018 IRP, page 60.

[85] Section 148(3) of the NWA; Rule 4(1) of the Tribunal Rules.

submitted timeous objections to the WUL application on 23 January 2017, the EAP advised that it did not have ACWA's instructions to release such information.

82. ACWA's February and June 2017 applications provide evidence of this erroneous public participation process- they state that the WUL was never advertised, and no response to groundWork's submission in respect of November 2016 application was provided.

83. Upon being informed by a third party, on 28 February 2018, that the WUL had been issued to ACWA, groundWork promptly sought the information necessary for the Appeal from the DWS, including further applications and reports mentioned in the WUL and the full reasons for the Decision.

84. It became apparent from the WUL (and information subsequently provided by DWS), that, in addition to the November 2016 WUL application to which groundWork had objected, there were additional WUL applications made in 2017 with new reports and annexures of which groundWork had not been aware and, accordingly, in respect of which groundwork had not had the opportunity to comment.

85. Some 8000 pages, ostensibly comprising the record of the Decision, were made available to groundWork for the first time on 21 June 2018, including the February and June 2017 WUL applications, attachments, and annexures that apparently formed the basis of DWS's decision to issue the WUL.

86. Many of the documents comprising the reasons for the Decision, including the Record of Reasons ("RoR"), were made available to groundWork in a piecemeal, incomplete, and delayed fashion (the numerous correspondence in this regard dates from 1 March 2018 - all relevant correspondence will be attached to groundWork's detailed amplified appeal grounds, and can also be made available to the Tribunal and DWS upon request):

    86.1. On 19 June 2018, only one page of the RoR (which consisted of one paragraph on a page) was provided.

    86.2. After numerous requests, further pages were provided on 3 and 4 July 2018, with the last missing page being confirmed by DWS to be blank on 9 July 2018.

    86.3. The RoR refers to another record of reasons dated 31 October 2017, as well as numerous recommendations by various environmental officers of the DWS material to the grant of the WUL, which yet to be provided by the DWS.

    86.4. DWS provided documents to the Tribunal during September 2018, which purporting to the full documents considered for the WUL application. These constituted the partial June 2017 WUL application, and partial reasons. Should this indeed be the record of the Decision, the only document to which groundWork had access as part of the public participation process, the November 2016 application, apparently did not form part of DWS's consideration in issuing the WUL.

87. Accordingly, what purports to the record of the Decision as provided by the DWS to groundWork (the "Record"), is incomplete. Paragraph 5 of the CER's 25 September Correspondence lists the documents missing from the Record and which are relevant to the three WUL applications.

88. As set out in the CER's 25 September Correspondence, the absence of these document is highly prejudicial to groundWork as it is unable to proceed with the Appeal without the full documents and reasons considered by the DWS, which are in the possession of the other respondents.

89. It follows that the 30-day timeframe for the Appeal in terms of s148(3) has not yet commenced, and this will only commence once full reasons for the Decision to issue the WUL are received.

90. Whilst DWS advised recently - on 9 July 2018 - that some of the requested documents and recommendations are "confidential" (without providing any explanation as to why this might be the case and which documents these comprise), groundWork disputes this contention and notes that, in terms of Promotion of Access to Information Act 2 of 2000, a third party does not have to provide permission before the requested records are made available. Nevertheless, and in order to expedite the process, in the CER's 25 September Correspondence, an offer was made to negotiate an appropriate confidentiality regime to protect any genuinely confidential documents. No response has been received in this regard.

91. groundWork's inability to proceed with the Appeal based on a complete Record of the Decision, and despite its numerous attempts to obtain the full documents and reasons considered by the DWS, cannot be subverted by ACWA as an attempt to unduly delay the appeal process to ACWA's prejudice. The time period for the supplementation of the Appeal will be triggered as soon as groundWork has received the complete Record- the numerous correspondence sent on behalf of groundWork in this regard underscores its attempts to obtain this documentation and proceed expeditiously.

F. REASONABLE PROSPECTS OF SUCCESS IN THE APPEAL

92. groundWork's appeal is based on a number of flawed and unlawful processes. These include:

    92.1. ACWA's failure to conduct the requisite public participation processes during the WUL application stage.

    92.2. The inadequacy of the conditions and mitigation measures proposed in light of the risks associated with the collapse of the ash dump site atop unstable rehabilitated ground, and the highly-permeable nature of the soil and aquifer. Accordingly, pollution from the site would significantly threaten the Olifants River, which is operating under extreme stress due to existing pollution and cannot afford to absorb additional pollutants.

    92.3. The unreasonable, irrational and/or incomplete account of relevant factors for granting a WUL in terms of section 27 of the NWA; including but not limited to: (1) the potential impact of existing lawful water uses in the area, and their cumulative impact; (2) the need to redress the results of past racial and gender discrimination in light of the negative impacts of the Khanyisa Project; (3) the efficient and beneficial use of water in the public interest; (4) applicable catchment management strategies and plans; (5) the impact of the water uses on the water resource and on other water users; (6) the investments already made and to be made by the water user in respect of the water use in question; (7) the quality of water in the water resource which may be required for the Reserve; and (8) the probable duration for any undertaking for which a water use is to be authorised.

    92.4. The DWS's failure to adequately consider its duties to give effect to the Reserve in terms of section 18 of the NWA.

93. Further to these numerous flawed and unlawful processes underlying the Decision, groundWork has at least reasonable prospects of success in the setting aside of the WUL by the Tribunal, an independent body with expertise in the fields necessary for the making of such an appeal decision.[86]

94. As set out above, groundWork's Appeal will be supplemented as soon as it has received the full records and reasons which was considered by the DWS in reaching its decision to issue the WUL, as have been repeatedly requested from the DWS.

[86] NWA section 146(4) provides that the Tribunal must have knowledge in "*law, engineering, water resource management or related fields of knowledge*".

G. BALANCE OF PREJUDICE

95. The just and equitable assessment of the Upliftment Application must weigh the risk of prejudice to ACWA in maintaining the Suspension against the risk of prejudice to groundWork and its represented interests (including the general Environmental Right) in granting the Upliftment Application, taking into account requisite NEMA principles - including the Precautionary Principle.

96. As set out above, because the Upliftment Application is an application for the variation of the default legislated position, and hence of the legislated *status quo*, the onus is on ACWA to prove that its case is favourable on a balance of probabilities and, correlatively, that the balance of prejudice favours the granting of the Upliftment Application.

i. *Prejudice to groundWork*

97. Paragraphs 566 to 69 detail the significant risk of irreparable harm to water resources should ACWA be allowed to exercise its rights in terms of the WUL pending the outcome of the Appeal. This is in particular because of the significant risk of the ash dump leaking as it is located on top of an unstable rehabilitated mine, the location of the Khanyisa Project in a significantly polluted yet hydrologically important catchment and in close proximity to water resources, its impact on wetland ecosystems and the absence of a construction stormwater management plan.

98. Evidence of this risk, and the unsuitability of the rehabilitated mine as an ash disposal site, is supported by the DWS' scientists, as well as in terms of the ACWA's own modelling and Geohydrological Evaluation.[87]

99. This risk is particularly significant because the Khanyisa Project is to be located in the HPA and Olifants River Catchment, neither of which are able to bear additional air and water polluting activities, no matter how small the footprint is claimed to be, and irrespective of the abatement measures proposed.

ii *Lack of prejudice to ACWA*

100. ACWA's submissions as to the prejudice afforded by the Suspension are based on the delays to the Khanyisa Project allegedly caused by the WUL Suspension. ACWA submits that the Suspension:

100.1. has caused the delay of development in the Khanyisa Project;[88]

100.2. has prevented the signing of the PPA to be signed with the Khanyisa Project as a CBIPPP;[89]

100.3. will negatively affect energy supply;[90]

100.4. has the potential to eradicate socio-economic benefits;[91]

100.5. has the potential to destroy foreign direct investment in South Africa.[92]

[87] See paragraphs 56-69.
[88] Upliftment Application paras 2.2.1. and 2.2.3.
[89] Upliftment Application para 2.2.2.
[90] Upliftment Application para 2.2.4.
[91] Upliftment Application para 2.2.5.
[92] Upliftment Application para 2.2.5.

101. These submissions are inaccurate, as set out below.

a. Lack of prejudice to development of project and signing of PPA

102. Further to Section E ("Delay"), the granting of the WUL Suspension will not enable the commencement of development in respect of the Khanyisa Project, in particular because:

102.1. ACWA's failure to sign a PPA is a direct result of ACWA's inability to reach commercial and financial close in light of pending litigation (and other disputed authorisations), and ACWA's failure to obtain a NERSA licence as well as a lack of agreement in respect of the draft PPA (including the "*value for money*" assessment entailed).

102.2. It is the failure of ACWA and the DWA to provide the documentation on which the grant of the WUL was based that has significantly delayed groundWork's ability to proceed with the Appeal.

102.3. There is no certainty as to whether the Khanyisa Project will be included in the 'new coal capacity' of the final revised IRP.

103. It is premature for ACWA to commence construction until litigation is finalised, all authorisation is obtained, commercial and financial close reached, and a PPA signed. ACWA is far from reaching this stage, since its NERSA licence is outstanding, and its WUL, PAEL transfer, and EA are at various stages of appeal or review and its PPA (notwithstanding the pending litigation) subject to both ongoing negotiation and as well as reservations in light of the inconclusive nature – and draft status - of the IRP.

104. In any event, ACWA's construction schedule according to its NERSA application (which was to begin in March 2017, to be completed in 2020) has changed. This delay is an inevitable result of ACWA's inability to reach commercial and financial close and sign a PPA, regardless of the Suspension.

b. Lack of prejudice to South African energy supply

105. ACWA's submissions in respect of the effects of the Suspension on energy supply are inaccurate and misplaced. Delays to the completion of the Khanyisa Project will not negatively affect energy supply - as recognised by the DOE in the draft IRP and reflected in contemporaneous research, there is excess electricity supply in electricity which will continue for some time:

105.1. A May 2018 study by the University of Cape Town's Energy Research Centre (the "IPP Report" by the "ERC") has clarified that Khanyisa would contribute significant GHG emissions for up to 50 years at a time when South Africa and the rest of the world must take urgent measures to tackle climate change- in all modelling scenarios, new coal is not needed to meet energy demand at lowest cost.[93] The findings of the IPP Report include the following:

[93] Energy Resource Centre, "An assessment of new coal plants in South Africa's electricity future The cost, emissions, and supply security implications of the coal IPP programme" (May 2018), https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf (the "IPP Report").

105.1.1. The IPP Report sought "*to quantify the effects of the inclusion of the coal IPPs* [Thabametsi and Khanyisa] *in South Africa's electricity system over the period from 2015 to 2052*";[94]

105.1.2. This study concluded that "[*t]he result of the assessment of new coal IPPs has shown that these plants are not necessary to meet demand, and, further, that their inclusion in South Africa's electricity system will substantially raise costs in the electricity sector, and substantially increase GHG emissions over their lifetimes.*"[95]

105.1.3. "(*T)he 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.*"[96]

105.1.4. Completion of the two IPPs would cost the consumers additional costs of between R16.4 billion and R 27.99 billion.[97] The Khanyisa Project alone would add additional cost of R5.72 billion to the R12.56 billion.[98]

105.1.5. *"Not only are the coal IPPs not required to meet demand, and not only do they raise costs, and increase emissions, but they also result in increasing pressure on Eskom. Building new coal plants in a situation of low demand means reducing the output of Eskom's fleet, potentially accelerating the 'utility death spiral' in which Eskom already finds itself and putting the electricity supply industry – and thus the South African economy – at risk."*[99]

105.1.6. "*When the coal IPPs are forced into the electricity build plan, this results in decreased use of existing coal plants (which are also cheaper than the coal IPPs), which puts raises (sic) costs overall and puts Eskom at risk.*"[100]

105.1.7. "*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.*"[101]

105.2. Minister of Energy, Jeff Radebe, was quoted in an article on 1 October 2018, stating that consumers would pay R1.90/kWh on top of the projected electricity tariff hike of R1.19 by 2030 if the two IPPs (Khanyisa and Thabametsi) were to go ahead, with a total cumulative cost of R23 billion- "*In the case of the two projects [i.e. Khanyisa And Thabametsi], they are expected to raise approximately R40-billion to build the power plants, which will be paid for by the consumer through the tariff.*"[102]

[94] Energy Resource Centre, "An assessment of new coal plants in South Africa's electricity future The cost, emissions, and supply security implications of the coal IPP programme" (ERC Report), (May 2018), https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf. ERC IPP Study, p. 3.
[95] ERC IPP Report, p. 37.
[96] ERC IPP Report, p. 5.
[97] ERC Coal IPP Report, page 4. https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf
[98] ERC Coal IPP Report, page 4
[99] ERC Coal IPP Report, p.8.
[100] ERC Coal IPP Report, p. 17.
[101] ERC Coal IPP Report, p.5.
[102] http://www.miningweekly.com/article/radebe-outlines-additional-cost-of-coal-ipps-to-consumers-2018-10-01/rep_id:3650

105.3. The draft 2018 IRP insofar as it caters for the two IPP projects, had to force them into the system as a "*policy adjustment*".[103]

105.4. Studies conducted by the Council for Scientific and Industrial Research and Meridian Economics conclude that further coal-fired power is unnecessary to meet the South African energy demand and much more expensive than alternatives; particularly renewable energy. [104]

105.5. In September 2018, ERC published a study into a just energy transition, which includes decommissioning of Eskom's stations (the "Coal Transition Report").[105] The Coal Transition Report considers the cost and decommissioning of Eskom's fleet. It details the cost to consumers in electricity as a result of the two IPPs - including Khanyisa - going ahead, and also the cost of not adequately transitioning from coal, and concludes *inter alia* that coal transitions are affordable for energy consumers because the transition away from coal is now the least-cost option for South Africa.

c. Lack of prejudice to socio-economic benefits

106. In its submissions, ACWA proposes unsubstantiated and inflated job figures and only the so-called positive socio-economic development that the Khanyisa project will bring.[106] Most of these submissions are unsubstantiated and/or contradict current facts and reports. For instance in ACWA's own Social Impact Assessment submitted with the June 2017 WUL, "*it is estimated that at peak construction time (a period of six to eight months) approximately 1200 people will be employed, with approximately 900 people for the construction period. During operation approximately 120 people will be employed*".[107] This is in contrast with the references to in excess of 3 000 jobs at peak construction time with an average employment of 700 as set out in the Upliftment Application.[108]

107. Significantly, ACWA does not put forward any of the many negative socio-economic impacts of the Khanyisa Project. In line with the principles established in the Fuel Retailers Case (see above), considerations of sustainable development entail social, economic, and environmental factors and must include consideration of the potential impact including cumulative effects of the activity and its alternatives on socio-economic conditions, the significance of that potential impact, and the impact on the environment of the proliferation of the project, as well as the impact of the project on existing projects.

108. The negative factors to be taken into account in a comprehensive sustainable development assessment include the negative health, well-being, environmental, and climate as well as the escalating cost of electricity (see above) that will result from the Khanyisa Project, particularly in the context of the proliferation of coal-fired power stations and other mines and industries in the area, which will be detrimental to many more people than those benefiting from any employment advantages.

109. *A*CWA's claims that it will absorb the job loss impacts resulting from ESKOM decommissioning, based on the draft IRP, is incorrect for the following reasons:

[103] Draft IRP p.39.
[104] The 2017 study by Meridian Economics, based on modelling by the Council for Scientific and Industrial Research , is titled "Eskom's Financial Crisis and the Viability of Coal-Fired Power in South Africa" (Available at http://meridianeconomics.co.za/wp-content/uploads/2017/11/Eskoms-financial-crisis-and-the-viability-of-coalfired-power-in-SA_ME_20171115.pdf).
[105] Available at https://coaltransitions.files.wordpress.com/2018/09/coal_synthesis_final.pdf.
[106] Upliftment Application para 5.
[107] Social Impact Assessment, September 2011, pg 45.
[108] Upliftment Application para 5.16.

109.1. Whilst the draft IRP 2018 does refer to the coal IPPs minimising the job losses from the decommissioning of Eskom power stations, this is in the context that "*the full impact of decommissioning the existing Eskom fleet was not fully studied in the IRP updates*", and that further studies should be undertaken.[109]

109.2. In any event, in accordance with ACWA's envisaged timeline, any construction or permanent jobs for Khanyisa would likely have been filled or no longer required by the time of Eskom's decommissioning.

109.3. The ERC's Coal Transitions Report (as well as its IPP Report) clarifies that the move away from coal has been underway for some time, and government should be putting plans in place to support workers and diversify the economy towards labour-intensive sectors, to cater for the job losses. It states that "*early anticipation and preparation of the transition is vital to achieve the best results*",[110] and finds that:

109.3.1. Coal transitions are affordable for energy consumers because the transition away from coal is now the least-cost option for South Africa;[111]

109.3.2. "*[U]niversal electricity access – and economic growth – can be ensured in … developing countries (i.e. South Africa and India) while also phasing down thermal coal in the power sector … Universal electricity access to consumers can … be provided more cheaply and reliably without coal*.";[112]

109.3.3. Coal transitions can strengthen global climate action and deliver other social and economic objectives – for example "*in South Africa, diversification from coal in the power sector would help reduce the cost of supplying electricity, while limiting the risk of cross-subsidisation of the power sector by the coal export sector*";[113]

109.3.4. A "*just transition for workers is not an abstract or utopian concept. Rather, it is something that can be implemented, that has been implemented and that is being implemented in some places around the world today. Examples include the Netherlands (Limburg in the 1960s), Canada (Alberta today), Germany (Ruhr in the 1960s and today), and, to some extent, Australia (CFMEU, 2017)*";[114]

109.3.5. Governments should finance the transition, for example by establishing just transition funds into which companies pay and/or ensuring companies have adequate financial resources to pay for the transition of their labour force;[115] and

109.3.6. "*[P]itfalls from past transitions include a propensity to "lock-in" to the incumbent industry to block the arrival of economic diversification. This can often lead to actors trying to "hang on" to a dying industry, neglecting the future only to finally start economic diversification too late … structural economic change still takes significant time, resources, and a process of trial and error. Beginning the process of economic diversification is therefore a matter of urgency for all coal-and fossil-fuel intensive regions that wish to survive and provide equivalent or better economic opportunities for the next generations*."[116]

[109] ERC IPP Study, p. 3.
[110] P6, Coal Transitions Report.
[111] P6, Coal Transitions Report.
[112] P23, Coal Transitions Report.
[113] Coal Transitions Report, p7.
[114] Coal Transitions Report, p27.
[115] Coal Transitions Report, p30
[116] Coal Transitions Report, p32.

109.4. Renewable energy also has opportunities for creating jobs, and the capacity to address socio-economic issues in South Africa. Existing and potential jobs in the renewable energy sector should be recognised and supported; including those created and to be created through the Renewable IPP Programme.[102] The DOE's own study[103] finds that 30% more permanent direct jobs per unit of energy are created with the renewable energy mix than with coal.[104] Modelling done by CSIR highlights that a decarbonised scenario (95% decarbonisation by 2050) would create the most jobs, with between 112 000 - 144 000 jobs by 2030, reaching up to 331 000 by 2050.[105] These are also likely to be more resilient than coal jobs - which will become increasingly vulnerable in a world on the decarbonisation path. In any event, the legally-required decommissioning of Eskom's power plants and rehabilitation of coal mines and land impacted by coal mining, would result in extensive employment opportunities, particularly for ex-mine and power station workers.

110. Accordingly, transitioning away from coal is not only favorable, but affordable, achievable, and least cost. The Coal Transitions Report makes it clear that building new coal plants, and locking South Africa into expensive, dying infrastructure would be contrary to sustainable socio-economic development. It will also negatively affect the coal workers and unemployed not to swiftly transition towards sustainable energy systems and to support them in doing so: Rather than subsidising a dying and polluting coal industry, support should go to the workers to assist the transition.

111. Khanyisa's so called socio-economic benefits (such as the unsubstantiated number of job creation, and upliftment of previously disadvantaged groups) will be completely negated and overshadowed by the extremely negative socio-economic impact which will be borne by all South Africans. These include the increase in the cost to the energy system of some R20 billion (for both IPPs); which will be passed on to the consumers – despite the Khanyisa Project providing electricity that is not needed. In addition: (1) public healthcare costs will be borne by taxpayers as a result of the Khanyisa Project's air and water pollution; (2) additional pollution as a result of coal-fired power generation is likely to result in diminished well-being and quality of life for those in the HPA and reliant on the Olifants River Catchment, due to polluted air and water; (3) there may be a loss of livelihood by all those that are reliant on the Olifants River Catchment to make a living; (4) building the coal IPPs will make it much more difficult for South African to meet its international commitments to reduce GHGs- increased climate change will result in costs, burdens, and impacts of extreme weather events such as droughts, destruction of property and houses from flooding and extreme weather events; and (5) building the Khanyisa Project will delay the urgent need for South Africa to transition to cleaner technologies and associated job creation.

d. Lack of prejudice to investment

112. ACWA has not yet commenced construction of the Khanyisa Project. Accordingly, its current investment risk is the normal risk taken by all IPP bidders, of which ACWA was aware before going through the bidding process. This is also made clear in the RFP.

113. In any event, should the Upliftment Application be granted, the accrued investment risk will remain because, due to other factors preventing the reaching the commercial and financial close and the signing of a PPA (as set out above), the construction of the Khanyisa Project will remain impermissible.

114. If the Khanyisa Project does ultimately proceed, any investment will be paid for by the consumers through the electricity tariffs- as set out above, this investment and project are not needed, are unnecessarily expensive compared to other electricity supply options, and will negatively impact on the economy, environment, climate, Eskom, and the people of South Africa.

115. Should ACWA be able to commence limited peripheral construction prior to reaching commercial and financial close and concluding the PPA, at its own risk and cost, the Suspension in fact protects ACWA from prematurely

starting construction after the suspension is uplifted, and spending funds which ACWA cannot recover if the PPA were not to be signed. As mentioned previously, according to the RFP, the DOE has the right to withdraw or *terminate the Coal Baseload IPP Procurement Programme, at any time without liability compensate or reimburse any person pursuant to termination"*[117]

H. Response to the Minister's Proposed Criteria

116. Further to paragraphs 300 to 366 above, the factors which are to be considered so as to ensure the reaching of a just and equitable decision, cannot follow the "indication" of "any" one factor, in particular those heavily weighted in favour of the licence-holder, as communicated in the Minister's Proposed Criteria.

117. Nevertheless, and in line with the submissions above, a brief response to the Minister's Proposed Criteria is set out below.

i. DWS criterion 1: The granting of all authorisations or a WUL did not follow all relevant due processes

118. Due process was not followed during the WUL application process and thereafter because of ACWA's failure to provide for compliant public participation processes (or in some cases any at all)[118] and the DWS's subsequent failure to provide groundWork with the complete Record on which to base its Appeal.

119. As set out from paragraph 790 *et seq*, it is because full reasons for the Decision to grant the WUL have yet to be provided to groundWork that the Appeal remains to be supplemented (despite the incomplete Record, the groundWork Appeal was lodged (with full reservation of rights) on 8 August 2018 in order to expedite proceedings in so far as this is possible).

120. Despite requests during the WUL application process in 2017, the EAP refused to disclose any information, without its "client" ACWA's consent, despite the EAP being required (in terms of NEMA and the EIA Regulations) to be independent in these processes, and to ensure and promote reasonable public participation. groundWork therefore could not obtain vital information, did not comment, and was not aware of: the February 2017 and June 2017 applications, the accompanying new water uses, specialist reports, co-ordinates, maps, and technical designs. These were only made available by DWS in late June 2018, some six months after the WUL was granted. Furthermore, whilst the obligations of the DWS to notify groundWork that WUL was granted in December 2017, this information only became available in March 2018, through a third party.

[117] RFP Part A, p10, clause 1.3.

[118] As far as we are able to ascertain, there were three applications submitted by ACWA, namely a November 2016, a February 2017, and a June 2017 application. In the June 2017 WUL application, it states that "no newspaper advertisements were placed for the WULA process, however, this was done as part of the EA amendment and BA [basic assessment] process notifying the public of the availability of the reports" (our emphasis); implying that public participation conducted through the 2010 Environmental Impact Assessment (EIA) process was sufficient for the 2016-2017 WUL application. The public participation referred to is in respect of the EIA Basic Assessment process in 2010, where a newspaper advertisement in relation to the EIA stated, in one line, that there would be water uses in respect of section 21 (a), (f), (g) and (h) activities, without further details as to which specific aspect of the project or construction would result in the various section 21 activities. The newspaper advertisement does not refer to section (b), (c) or (i) applications contained in the June 2017 application which ACWA submitted. The June 2017 application also revealed that a new application was submitted in November 2016 (as opposed to a continuous one from 2010 EIA process), and since the EIA process in 2010 preceded the November 2016, February 2017, and June 2017 WUL applications, there was no public participation through newspaper advertisement and notices in respect to the three applications. The three WUL applications on which the WUL was based, were therefore never available for public comment during the EIA process, as claimed by ACWA in its submissions. Furthermore, whilst our client, groundwork had access to November 2016 application through an email notification (no newspaper advisement or site notices were placed), the June 2017 application differed markedly from the November 2016 that groundWork commented on.

121. Some of the examples of new water uses, technical drawings, and specialist studies not submitted with the November 2016 application, and some of which were also not included during the EIA process in 2010, and made available through the June 2017 Application (the "New Water Use Activities and Reports"), include:

    121.1. At least 11 new water use activities under section 21(a),(b),(c),(g) and (i);[119] and

    121.2. Nine additional Specialist Studies under Appendix E, and numerous Technical Reports and Drawings under Annexure H, new maps and co-ordinates.

122. The further developments mentioned in paragraph 5.10 and 9 of ACWA's submission entail the water uses in terms of section 21 (c) and (i) of the NWA and the impacts reflected in the Wetland Specialist Report, of which groundWork was first aware in the New Water Use Activities and Reports and, accordingly, in respect of which groundWork was not afforded the opportunity to comment prior to the grant of the WULA.

123. One of the important aspects of the WUL application is public participation, and according to DWS's own policy, iterated in relation to the proposed Colenso coal-fired power station, "*the documentation that will be submitted as a WULA [WUL application] must be the same documentation that will be made available for public comment.*" As outlined above, only the November 2016 WUL was made available, and this application differed significantly from the February and/or June 2017 application. It means that the two 2017 applications, accompanying new water uses, technical designs and specialist reports - on which WUL was granted, and on which ACWA is relying to uplift the suspension - were never made available to the public through the WUL application process.

124. Whilst the DWS can use its discretion to issue a directive to the applicant to conduct a public participation in terms of s41(4) of the NWA, the WUL application must also adhere to public participation and transparency and fair administrative decision-making processes described in the Constitution, NEMA, PAJA, and PAIA.[120]

125. The DWS indeed expressed concern that public participation conducted in 2010 did not contain the same water uses as the 2016-2017 WUL application. During 2017 ACWA was also directed by DWS to conduct public participation. Moreover, the DWS also requested ACWA to respond to groundWork's objections to the November 2016 application, and include its response in the comments and responses section. However, as

[119] June 2017 IWULA and IWWMP, p. 5-9 read with November 2016 IWULA & IWWMP, p.4-5. New water uses included s21a activity for Rainwater harvesting; s21b activity for the Clean Stormwater Basin; 6 new water uses for s21c (impeding or diverting the flow of water in a watercourse) and s21(i) (altering the bed banks and course or characteristics of a watercourse) activities for the proposed road crossing of a hillslope seepage wetland, Ash conveyor crossing wetland, ash disposal site, proposed power plant within a hillslope wetland, eleven stormwater pond/attenuation ponds, and power plant within 500m buffer of wetlands; s21(g) activities (i.e disposing of water that detrimentally affect the water resource) for various activities including for 11 separate stormwater ponds /attenuation ponds around the ash disposal area, with specified capacities for each; s21(e) activity (engaged in controlled activity) for irrigation of land with treated sanitary effluent.

[120] In the Water Tribunal judgment of *Werda Handel v DG: DWS and Thedza Mining Resources (*9 February 2017, WT25/03/2015), only the EIA was subject to public participation and no public participation took place in respect of the WUL application or the amendments. The case also confirmed that, whilst the obligation to issue a directive to conduct public participation of the NWA is discretionary, NWA is a specific environmental management act subject to Section 2 of NEMA, which provides that public participation of all interested and affected parties in environmental governance must be promoted, that the decision must take into account the interests, needs and values of all interested and affected parties, and decision must be taken in an open and transparent manner, and access to information must be provided in accordance with the law. Further, S2(1) of NEMA serves as a guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of NEMA or any statutory provision concerning the protection of the environment. Interpreting the NWA in this manner is consistent with section 24 and 33 of the Constitution. The judgment further confirmed the High Court decision of *Escarpment protection Group v DWS* JDR 2700 (GNP), that the responsible authority in terms of NWA is bound by procedurally fair administrative action of s3 of PAJA and s33 of the Constitution, which state that administrator must give a person who is materially affected by an administrative action a reasonable opportunity to make representations, and to present and dispute information and arguments. It made explicit that "*the process of calling for objections and considering objection is critical for the ensuring effective prevention of water pollution or degradation of the country's water resources*" (Werda Handel case paras 24-25 & 57).

apparent from the 2017 WUL application, ACWA failed to comply, for the reasons that the comments were submitted to DWS and not the EAP. This is despite the fact that EAP advised the I&APs to submit comment to DWS, and groundWork complied with their request, also copying in the EAP.

126. This lack of public participation and violation of rights were reported to the DWS in March 2018 as soon as groundWork was informed of the grant of the WUL (which revealed subsequent licence applications after November 2016 of which groundWork, as an I&AP, was not made aware).

127. Therefore, as indicated above, ACWA's submission that its EAP "*conducted extensive public participation*" and groundWork was provided "*numerous opportunities to participate in the process, and in fact, did so*" is misleading. The February and June 2017 WUL applications, containing new water uses, technical designs, and reports were never made available to the public, and all enquiries related to the WUL applications were refused by the EAP (presumably under ACWA's direction); thus actively hindering the public participation process. This alone should be grounds for refusing the suspension application, as this is a violation of the public participation envisaged by the Constitution, PAJA, NEMA, and NWA, and due process was not followed.

128. In terms of Khanyisa's other authorisations, the EA is the subject of a High Court review application as a comprehensive CCIA of the Khanyisa project was not submitted by ACWA as part of the EIA process, as the law requires. This failure by ACWA to conduct a CCIA meant that the Minister was prevented from making a full and informed decision to issue a WUL. Case law confirms that a CCIA is a legal requirement before granting an EA.[121] Such an assessment would have dealt with whether or not climate change effects of increased frequency and severity of flood events would have impacted on the designs and mitigation measures proposed by ACWA, and whether these measures were sufficient to tolerate such events, and prevent pollution from occurring in the Olifants River Catchment. The transfer of the PAEL from Aurecon to ACWA is also procedurally flawed, in that only a transfer was applied for; but, in the process, the licence was altered materially. Such an alteration necessitates a variation, or submission of a new licence application; however, ACWA did not so – instead using the wrong process. Furthermore, there is an issue with the delegation of powers related to the transfer in that persons who issued the licence and/or transfer acted *ultra vires*. No NERSA licence has been granted either. The PAEL transfer and EA licences therefore also did not follow proper procedure or due process.

129. It appears that, in many instances where public participation is required, it is avoided as in the case of WUL application described above. In respect of the PAEL, it was transferred from Anglo to ACWA, but not varied - even though the information in the original licence and transferred licence was materially and unlawfully altered during the transfer. ACWA did not conduct the public participation required for a variation and the licence was materially altered and transferred.

130. It appears that ACWA's various licence applications may be missing information, including document pages which pertain to "fatal flaws" or "significant impacts", or pages which reveal information on water abstraction and quantities by its water supplier, for instance. Also the contents page is extremely vague and does not reveal which or how many reports were actually attached to each application. Further, negative socio-economic impacts health impacts, externalities from coal-fired power stations, and a CCIA were either completely omitted, or although discussed in the appended reports, omitted from the main discussion of the WUL application.

131. Accordingly, ACWA has failed to follow due process and conduct a proper public participation procedure, which has had a material effect on the WUL application procedure as well as the procedures in respect of ACWA's other licence applications.

[121] Earthlife Acrica v Minister of Environmental Affair and Others (65662/16) [2017] ZAGPPHC 58 accessible at https://cer.org.za/wp-content/uploads/2017/03/Judgment-Earthlife-Thabametsi-Final-06-03-2017.pdf

132. ACWA's allegations in respect of groundWork improperly delaying the Appeal are irrelevant, misleading and inaccurate: The 30-day timeframe for the Appeal in terms of s148(3) has not yet commenced, and will only commence once full reasons for the Decision to issue the WUL are received.

ii. DWS criterion 2:The suspension is highly prejudicial and detrimental to a lawfully obtained authorisation

133. It is groundWork's case that the WUL was not lawfully obtained.

134. This notwithstanding, and as set out at paragraph 1022 *et seq* above, the maintenance of the Suspension affords no significant prejudice to ACWA.

135. The granting of the Upliftment Application will not enable the commencement of development in respect of the Khanyisa Project, in particular because:

135.1. ACWA's failure to sign a PPA is a direct result of ACWA's inability to reach commercial and financial close in light of pending litigation and ACWA's failure to obtain a NERSA licence as well as a lack of agreement in respect of the draft PPA (including the "*value for money*" assessment required).

135.2. It is the failure of ACWA and the DWS to provide the documentation on which the grant of the WUL was based that has significantly delayed groundWork's ability to proceed with the Appeal.

135.3. There is no certainty as to whether the Khanyisa Project will be included in the 'new coal capacity' of the final revised IRP.

136. It is premature for ACWA to commence construction until litigation and all other disputes are finalised, all authorisations are obtained, commercial and financial close reached, and a PPA signed. ACWA is far from reaching this stage, since its NERSA licence is outstanding, and its WUL, PAEL transfer, and EA are at various stages of appeal or review and its PPA (notwithstanding the pending litigation) subject to both ongoing negotiation and as well as reservations in light of the inconclusive nature of the draft IRP.

137. In any event, ACWA's construction schedule according to its NERSA application (which was to begin in March 2017, to be completed in 2020) has changed. This delay is an inevitable result of ACWA's inability to reach commercial and financial close and sign a PPA, regardless of the Suspension.

138. Delays to the completion of the Khanyisa Project will not negatively affect energy supply - as recognised by the DOE in the draft IRP and reflected in contemporaneous research, there is excess electricity supply in electricity which will continue for some time.

139. Transitioning away from coal is not only favorable, but affordable, achievable, and least-cost. Building new coal plants, and locking South Africa into expensive, dying infrastructure would be contrary to sustainable socio-economic development. It will also negatively affect the coal workers and unemployed not to swiftly transition towards sustainable energy systems and to support them in doing so: Rather than subsidising a dying and polluting coal industry, support should go to the workers to assist the transition.

140. ACWA has not yet commenced construction of the Khanyisa Project and its current investment risk is the normal risk taken by all IPP bidders, of which ACWA was aware before going through the bidding process. Should the Upliftment Application be granted, the accrued investment risk will remain because, due to other factors preventing the reaching the commercial and financial close and the signing of a PPA (as set out above), the construction of the Khanyisa Project will remain impermissible.

141. Should ACWA be able to commence limited peripheral construction prior to reaching commercial and financial close and concluding the PPA, at its own risk and cost, the Suspension in fact protects ACWA from prematurely starting construction after the suspension is uplifted, and spending funds which ACWA cannot recover if the PPA were not to be signed. As mentioned previously, according to the RFP, the DOE has the right to withdraw or *terminate the Coal Baseload IPP Procurement Programme, at any time without liability compensate or reimburse any person pursuant to termination"*[122]

iii. DWS criterion 3: The suspension will derail the entire project timelines and create uncertainties

142. The Suspension has no significant effect on the timelines for and/or uncertainties of the Khanyisa Project.

143. ACWA has submitted, in paragraph 2.2, that ACWA cannot continue with development without the WUL Suspension, that the PPA signing will be delayed as a result of the suspension and such delay is prejudicial to ACWA. This is inaccurate, as it is not the WUL Suspension which impacts these factors, but rather, ACWA's ability to reach commercial and financial close, and the ability to sign the PPA thereafter. All litigation related to ACWA's various licences is a long way from finalisation, and ACWA also has not obtained a NERSA licence. This means that the Suspension has no significant effect on the timing and uncertainty of the Khanyisa Project.

144. ACWA's construction schedule, according to its NERSA application, was to begin in March 2017, to be completed in 2020. There already is a delay and not in line with the aspired timelines, with no sign of the project being cancelled. As stated above, the delay would inevitably occur due to ACWA's inability to reach commercial and financial close and sign a PPA, and both delay or cancellation of the project would not be as a result of WUL Suspension.

145. In terms of construction activities which according to ACWA is begin imminently, according to the WUL condition 1.13 *"construction activities must be scheduled to take place during the dry seasons when flows are lowest".* Dry seasons in Mpumalanga are March to September and wet seasons October to February, and therefore construction can only begin construction in March 2019. If ACWA were to begin construction "imminently", it would be doing so in violation of its WUL condition.

iv. DWS criterion 4: The suspension will put hundreds of millions of investments at risks as well as forego much needed jobs and community development projects

146. The Suspension does not entail a significant financial and/or socio-economic risk.

147. As set out above, transitioning away from coal is not only favorable, but affordable, achievable, and least-cost. Such transition is already underway, including in South Africa. The Coal Transitions Report makes it clear that building new coal plants, and locking South Africa into expensive, dying infrastructure would be contrary to sustainable socio-economic development. It will also negatively affect the coal workers and unemployed not to swiftly transition towards sustainable energy systems and to support them in doing so: Rather than subsidising a dying and polluting coal industry, support should go to the workers to assist the transition.

148. The Khanyisa Project's so called socio-economic benefits (such as the unsubstantiated number of job creation, and upliftment of previously-disadvantaged groups) will be completely negated and overshadowed by the extremely negative socio-economic impact which will be borne by all South Africans if the Project goes ahead. These include the increase in the cost to the energy system of some R20 billion (for both IPPs); which will be passed on to the consumers – despite the Khanyisa Project providing electricity that is not needed. In addition:

[122] RFP Part A, p10, clause 1.3.

(1) public healthcare costs will be borne by taxpayers as a result of the Khanyisa Project's air and water pollution; (2) additional pollution as a result of coal-fired power generation is likely to result in diminished well-being and quality of life for those in the HPA and reliant on the Olifants River Catchment, due to polluted air and water; (3) there may be a loss of livelihood by all those that are reliant on the Olifants River Catchment to make a living; (4) building the coal IPPs will make it much more difficult for South African to meet its international commitments to reduce GHGs- increased climate change will result in costs, burdens and impacts of extreme weather events such as droughts, destruction of property and houses from flooding and extreme weather events; and (5) building the Khanyisa Project will delay the urgent need for South Africa to transition to cleaner technologies and associated job creation.

149. In terms of ACWA's direct investment, because it has not yet commenced construction of the Khanyisa Project its current investment risk is the normal risk taken by all IPP bidders, of which ACWA was aware before going through the bidding process.

150. In any event, should the Upliftment Application be granted, the accrued investment risk will remain because, due to other factors preventing the reaching the commercial and financial close and the signing of a PPA (as set out above), the construction of the Khanyisa Project will remain impermissible.

v. DWS criterion 5: The issues raised by the Appellant/s in the appeal should be decided upon by the Water Tribunal, and the Appellant/s will not be prejudiced by the lifting of the suspension

151. As set out above, and on the premise that the grant of the Upliftment Application allows for the development of the Khanyisa Project and/or constructing and levelling ground which would trigger section 21(c) and (i) activities. (as ACWA submits),[123] groundWork, other I&APs and affected communities in the area, the environment, and relevant water resources will be severely prejudiced by the uplifting of the Suspension.

152. There is a significant risk of irreparable harm to water resources should ACWA be allowed to exercise its rights in terms of the WUL pending the outcome of the Appeal; in particular because of the significant risk of the ash dump leaking as it is located on top of an unstable rehabilitated ground, the location of the Khanyisa Project in a significantly polluted yet hydrologically important catchment and in close proximity to water resources, the effect of the activities on wetlands (in particular as set out in the Wetland Specialist Report), and the absence of a construction stormwater management plan.

153. This risk is particularly significant because the Khanyisa Project is to be located in the HPA and Olifants River Catchment, neither of which are able to bear additional air and water polluting activities, no matter how small the footprint is claimed to be, and irrespective of the abatement measures proposed.

154. Consideration of this risk must be undertaken in light of the relevant legal principles, including NEMA's Precautionary Principle.

155. In these circumstances, it is clear that the Suspension is effectively operating as a form of interim interdict to 'freeze' the position until the appeal authority decides where the right lies and to ensure, as far as it is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief and, correlatively, that the permitting the exercise of the right subject to appeal does not cause undue prejudice and/or irreparable harm prior to the resolution of the appeal process.

156. Further to this significant risk of irreparable harm, should the Suspension be uplifted, this is likely to pre-empt a decision on Appeal which should be taken by the Tribunal, as independent expert in these matters.

[123] Upliftment Application para 2.2.3.

vi. *DWS criterion 6: If the reasons provided by the person who is affected by the suspension are persuasive.*

157. Further to the above, ACWA has not shown any persuasive reason why the Upliftment Application should be granted. In contrast, groundWork and other I&APs have a significant likelihood of severe prejudice, and the relevant water resources (and environment) have a significant likelihood of irreparable harm, should Suspension of the WULA be uplifted.

I. ACWA'S SUBMISSIONS IN ITS UPLIFTMENT APPLICATION

i. General

158. In its petition, ACWA puts forward various considerations that it believes should persuade the Minister to depart from the automatic suspension provided for in section 148(2)(b) of the NWA.

159. As set out above, the purported socio-economic and environmental benefits, and mitigation measures of the Khanyisa Project are either unsubstantiated, false, or overshadowed by negative factors.

160. Further, in terms of the due process requirement, ACWA has, by its own admission, failed to conduct a lawful public participation process in respect of the application and reports on which WUL was based. This not only contravenes due process, but also the right to fair and just administrative process and decision-making, and the right to public participation - all of which are protected in terms of the Constitution, PAJA, and NEMA.

161. ACWA states that the authorisations it has received to date in respect of the proposed Khanyisa Project should persuade the Minister to lift the Suspension of its WUL pending the decision of the Water Tribunal. However, it would be contrary to administrative law principles for the Minister to take these considerations, relevant to different statutes with different regulatory purposes, into account in a decision under section 148(2) of the NWA.

162. Moreover, in detailing the authorisations it has received to date, ACWA has omitted to mention that all but one of the authorisations are subject to internal appeal or judicial review. The NERSA application has not been granted, and was objected to at the NERSA hearing, including by Eskom, which would be required to buy the electricity and sell it to the public (in circumstances where such electricity is expensive and unnecessary –quite apart from the other negative impacts of coal-fired power).

163. In paragraph 2.2, ACWA deals extensively with how it claims it will be prejudiced if the failure to uplift the Suspension resulted in the Project being delayed or terminated. However, irrespective of the Suspension, development of the Khanyisa Project remains restricted until all agreements are signed and in place, including the PPA which remains contingent *inter alia* on the finalisation of the IRP, and it cannot do so until all litigation is finalised. In the circumstances, having the Suspension in place will not prejudice the applicant or derail any timeframes.

164. In any event: (1) the WUL condition does not allow for ACWA "imminent" commencement with the Khanyisa Project as it must wait until the dry season, which is March 2019; and (2) and the draft IRP only envisages the project commencing in 2023 or 2024.

ii. Allegations in respect of the CER

165. ACWA alleges that "*as the attorneys supporting the Life After Coal Campaign, the CER is actively using all opportunities available to it to challenge the Project, and it would appear aims to prevent the Project from proceeding irrespective of its benefits or the pollution prevention and mitigation measures in place. The Life After Coal campaign could be described as an "orchestrated campaign" against all coal projects, regardless of their merit, assessment of impacts and mitigation measures, socio-economic development in the context of South Africa's development objective security, or government's commitments and policy*." It alleges, in short, that CER is anti-development, irrespective of the economic and social needs.

166. The CER acts on behalf of various communities and civil society organisations in South Africa with the aim of asserting and safeguarding the environmental rights contained in the Constitution. In the WUL Appeal, the CER acts on behalf of groundWork, a non-profit environmental justice organisation. Together with Earthlife Africa, they make up the Life After Coal Campaign, which aims to discourage the development of new coal-fired power stations and mines; reduce emissions from existing coal infrastructure and encourage a coal phase-out; and enable a just transition to sustainable energy systems for the people.[124]

167. In comparison, it is ACWA's aim to develop the Khanyisa Project and, hence, to encourage the development of new coal-fired power stations.

168. Regardless of the CER's and/or groundWork's stance in relation to coal-fired power, groundWork is entitled to exercise its rights under the NWA to appeal to the Water Tribunal to ensure that decisions taken under the NWA are properly scrutinised and compliant with legal requirements, and to use legal representation in order to do so. The Appellant's Appeal, as is evident from the above, relies on the scientific evidence contained in the various specialist studies commissioned by ACWA's EAP, various modelling and studies related to the type of electricity that is needed in South Africa, and the impact of the urgent need for a just transition. To further the scientific knowledge available about the proposed station, the CER – on behalf of groundWork – has sought various independent scientific reviews of the specialist studies in order to contribute to the quality of decision-making in respect of the proposed Khanyisa Project.

169. groundWork, as represented by the CER, also acts in the public interest: It seeks to provide assistance to the Minister, who in this context acts not only as statutory adjudicator, but also as one of the protectors of the environment for present and future generations in terms of section 24 of the Constitution.

170. The importance of the function of the Minister in protecting South Africa's water resources is highlighted by the recent crippling drought that has been faced in South Africa and continues to be experienced in several parts of it. The need to preserve the sanctity of South Africa's water resources has been made only too clear.

J. CONCLUSION

171. It is groundWork's case that upliftment of the Suspension would be unjust and inequitable in the circumstances and comprise the exercise of discretion by the Minister in a manner unlawful, irrational, and entailing the consideration of irrelevant considerations and/or failure to consider relevant considerations.

172. Accordingly, groundWork respectfully asks that the Honourable Minister dismiss ACWA's Upliftment Application and that the *status quo* be maintained until the matter has been decided by the Tribunal. In any event, we submit that it would be premature to decide the Upliftment Application before the IRP has been finalised.

[124] www.lifeaftercoal.org.za

173. In the event that any form of oral hearing is afforded to ACWA in relation to the Upliftment Application, whether by way of a meeting with representatives of ACWA or otherwise, we respectfully submit that the groundWork is entitled to a similar hearing and request that same be afforded to it before any decision is taken. We are also willing to elaborate upon any aspect of the above representations that might require elaboration or clarification. If it is of a technical nature, we are happy to provide the assistance of any of the technical experts that have advised our client.

Yours sincerely
CENTRE FOR ENVIRONMENTAL RIGHTS
per:

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