



# Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Minister of Environment, Forestry and Fisheries

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14 May 2020

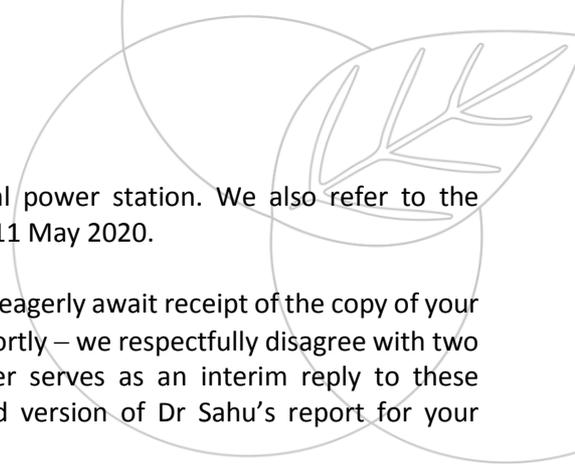
**URGENT**

Dear Minister Creecy

**RE: UPDATED EXPERT ANALYSIS OF THE AIR QUALITY IMPACTS AND HEALTH EFFECTS DUE TO THE EMISSIONS FROM  
ESKOM'S KENDAL POWER STATION**

1. We address you on behalf of our clients, groundWork, Earthlife Africa Johannesburg, and Vukani Environmental Movement.
2. We refer to our letter, dated 28 April 2020, which, among other features, brought two relevant expert reports to your attention, by Dr Ranajit (Ron) Sahu and Dr Andrew Gray, respectively, in order to inform your decision-making

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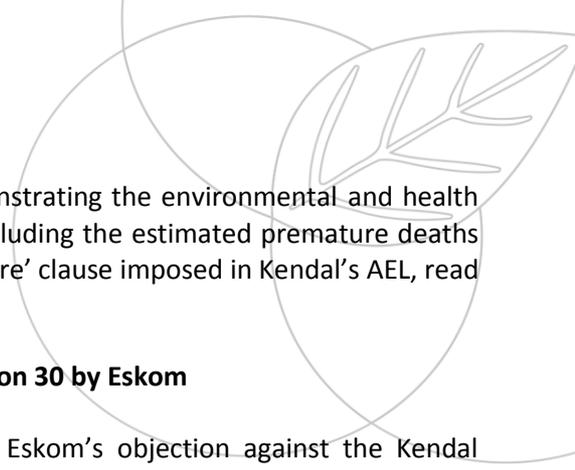


in relation to the pending enforcement action against Eskom's Kendal power station. We also refer to the Minister's letter of response, dated 10 May 2020, which we received on 11 May 2020.

3. Our clients duly note the content of your letter of response. Although we eagerly await receipt of the copy of your decision in this matter – which the Minister indicates is to be released shortly – we respectfully disagree with two statements in your letter. Pending receipt of your decision, this letter serves as an interim reply to these statements, and, based on the reasons below, we submit an updated version of Dr Sahu's report for your consideration and record.

#### **New and relevant information**

4. In your letter of response, it is stated that *“your abovementioned letter was only received on 28 April 2020, almost four months after the lodging of an objection by Eskom Kendal power station on 3 January 2020.”* This may be the case, but as we referred to in our 28 April 2020 letter, our clients did not have access to *any* of the documents sent by your Department to Eskom, or vice versa, until we received a provisional written response from your Department to our Promotion of Access to Information Act, 2000 (PAIA request) on 14 April 2020 – as we write this, access to a number of the requested documents has been denied, including a copy of Eskom's objection to the compliance notice. The suggestion that we should have written to the Minister *earlier* is therefore puzzling.
5. Our 28 April 2020 letter presenting the expert reports was submitted two weeks later, following inconclusive correspondence with Mr Ntsizi November about the status of the Minister's decision on the objection application, and overdue receipt of a copy of the compliance notice from Eskom on 21 April 2020 (the “Kendal compliance notice”).
6. **The real issue here is the lack of transparency around the compliance enforcement action against Kendal power station, operated by Eskom – the largest polluter in South Africa and a perpetual contravener of environmental laws.** Even on its own version, emissions from 13 of Eskom's coal-fired power stations would have resulted in an additional 320 premature deaths in 2018. The emission limits in Kendal's atmospheric emission licence (AEL) primarily exist to reduce public exposure to the harmful pollutants emitted from the station, including particulate matter (PM), causing significant detrimental effect on the environment, including people's health, social conditions, economic conditions, ecological conditions or cultural heritage. The public therefore have an overriding right to be informed, at every step, of the Department's compliance enforcement process, especially where an organ of state with heightened Constitutional duties, such as Eskom, is found to have failed to comply with its AEL conditions.
7. The Department's media release about this enforcement compliance action, dated 21 December 2019, was a promising start; however, despite all our efforts to obtain relevant information, documents, and status updates since then, we are only currently in possession of the Kendal compliance notice and the knowledge of your imminent decision on Eskom's objection application. Today, we received a decision from Eskom to provide access to a copy of your decision to vary the Kendal compliance notice, and your decision to suspend its effect pending the objection outcome, but we have not yet received these documents – now over 3 months since our PAIA applications were submitted.
8. The Minister's response states that *“. . . I do not believe that your letter introduces any new information to the extent of Eskom's failure to comply with the requirements of the Atmospheric Emission Licence”*. While the information submitted is evidently new as the expert reports did not previously exist, and certainly were not before the Minister until our submission, it is not “newness”, but “relevance” that is a requirement for information to be considered by the Minister in this decision. Section 31M(2) of National Environmental Management Act, 1998 (NEMA) requires the consideration of representations from the person who received the compliance notice, as well as *“any other relevant information”* before a decision is made to cancel, modify or confirm a compliance notice by the Minister or MEC. Our clients submit that the two expert reports could not be more relevant to Kendal's failure to comply with its AEL conditions, both corroborating the alarming number of exceedances of the



PM limit in Kendal power station's AEL dating back to 2016, and demonstrating the environmental and health impacts caused by Kendal's significant PM pollution during 2018-9 – including the estimated premature deaths from this pollution. In this regard, we also refer to the 'general duty of care' clause imposed in Kendal's AEL, read with section 28 of NEMA.

#### **Dr Sahu's updated report and notification of apparent abuse of NEMA section 30 by Eskom**

9. We appreciate that you have already received recommendations on Eskom's objection against the Kendal compliance notice. However, as it still bears relevance to your impending decision – and further action by the Department – Dr Sahu's updated (12 May 2020) report titled '*Eskom's Kendal Power Station Exceedances of Applicable Atmospheric Emission License Limit Values for Particulate Matter from April 2016 to March 2020*', is attached as **Annexure "A2"** for your consideration.
10. This updated report includes the assessment of Kendal power station's monthly emission report for December 2019, belatedly provided by Eskom on 28 April 2020, subsequent to us sending our letter to you on the same day. Among the key findings, is that during the period of April 2016 through March 2020, Kendal power station had **2,851 exceedances of its AEL limit of 100 mg/Nm<sup>3</sup> for average daily PM emissions**. According to Kendal's current 2019 AEL, in accordance with the 2020 minimum emission standards, this limit has been reduced to 50 mg/Nm<sup>3</sup> for PM from 1 April 2020, so it is therefore likely that Kendal power station regularly exceeds this new limit based on its emission performance since April 2016.
11. We point out that Dr Sahu only included the final exceedances of the AEL limit in his tally, excluding "raw" exceedances and exceedances in terms of section 30 of NEMA ("section 30 exceedances"). Dr Sahu found that "*monthly reports do not clarify why section 30 exceedances continue for many consecutive days without the unit being shut down or serviced*", and he uses unit 6 in Kendal power station's November 2019 report as a striking example of this "*underreporting*" – "*In the monthly reports from August through March 2020, not a single day of exceedance was marked as Contravention – all were coded as Grace or Section 30 without sufficient explanation*".<sup>1</sup>
12. Our clients are extremely concerned about this questionable, potentially cynical and unlawful, reporting approach adopted by Kendal power station, and the possibility that this same approach has been adopted at Eskom's other coal-fired power stations. We request that you consider this particular issue, along with the other report findings, in making your decision on Kendal's objection application. Our clients also call on the Department urgently to investigate this issue at Eskom's other power stations and to initiate compliance enforcement where it is found that limit contraventions have, and are being, improperly reported as a "Grace" or a "section 30 exceedance".
13. Finally, if the findings in Dr Sahu's and Dr Gray's respective reports are not "new", in that the Department is already in possession of similar analyses and findings, we reiterate that our clients cannot comprehend a more compelling set of circumstances for the Minister at the very least to confirm Kendal's compliance notice, in terms of section 31M (2), but also to initiate further administrative enforcement and criminal action in terms of NEMA and the National Environmental Management: Air Quality Act, 2004. We, and our clients, implore you to do so.
14. Our clients' rights remain fully reserved.

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<sup>1</sup> See page 4-5 of the report.

Yours sincerely

**CENTRE FOR ENVIRONMENTAL RIGHTS**

per:



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