



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

Ms Marissa Botha

Environmental Assessment Practitioner
Naledzi Environmental Consultants CC
By email: botham@naledzi.co.za

Copied to:

Mr Moegamat Ishaam Abader

Acting Director General
Department of Environment, Forestry and Fisheries
By email: iabader@environment.gov.za

Dr Thulie Khumalo

National Air Quality Officer
Department of Environment, Forestry and Fisheries
By email: tkhumalo@environment.gov.za

Mr Olebogeng Matshediso

Deputy-Director: Atmospheric Policy, Norms and Standards
Department of Environment, Forestry and Fisheries
By email: omatshediso@environment.gov.za

Mr Dan Hlanyane

Gert Sibande District Municipality
By email: dan.hlanyane@gsibande.gov.za

Ms Mpho Nembilwi

Pollution Control and Environmental Division
Nkangala District Municipality
By email: nembilwim@nkangaladm.gov.za

30 July 2020

Dear Ms Botha

WRITTEN OBJECTIONS TO ESKOM'S APPLICATION FOR A ONCE-OFF SUSPENSION OF COMPLIANCE WITH THE NEW PLANT MINIMUM EMISSION STANDARDS AND VARIATION REQUEST FOR THE GROOTVLEI POWER STATION

1. We address you, again, as the Life After Coal campaign, a joint campaign by the Centre for Environmental Rights (CER), groundWork (gW), and Earthlife Africa Johannesburg (ELA). We also address you on behalf of the Highveld Environmental Justice Network (HEJN), Vukani Environmental Justice Movement in Action (VEJMA), and the Vaal Environmental Justice Alliance (VEJA). CER, groundWork, Earthlife Africa, HEJN, VEJMA, and VEJA are all interested and affected parties (I&APs) in relation to Eskom's multiple rolling applications for suspension, alternative limits and/or postponement of compliance with the minimum emission standards (MES), across its fleet of coal-fired and gas-fired power stations.
2. Upfront, we point out that this is Eskom's 6th round of applications for MES leniency in relation to its coal-fired power stations. As the National Air Quality Officer (NAQO) will recall, when the MES were first due to apply, Eskom (and Sasol) claimed that they were entitled to be completely exempt from the MES. Although the then Minister informed Eskom (as it well knew from being involved in the multi-year process of setting the MES) that exemptions

Cape Town: 2nd Floor, Springtime Studios, 1 Scott Road, Observatory, 7925, South Africa
Johannesburg: First Floor, DJ du Plessis Building, West Campus, University of the Witwatersrand, Braamfontein, 2001, South Africa
Tel 021 447 1647 (Cape Town) | Tel 010 442 6830 (Johannesburg)
Fax 086 730 9098
www.cer.org.za

were (at that time) not legally permitted, exemptions from compliance with South Africa's extremely-weak MES are what Eskom has effectively managed to achieve for many of its stations; and, in fact, apparently regards as its right.

3. From the start of this MES process – and long before Eskom was in its current very dire financial position – it took the view that, should it not be granted exemptions, it would instead seek “rolling postponements” – re-applying for postponements every 5 years until its stations are eventually decommissioned. Although the October 2018 amendment to the List of Activities should have made clear that no postponements beyond April 2025 are permitted, except for facilities to be decommissioned by 31 March 2030, this amendment has not changed Eskom's approach. Instead, it uses the “alternative emission limit” provision to continue as before – effectively seeking ongoing non-compliance with the MES until its stations are decommissioned.
4. It is clear that Eskom regards MES applications as a mere formality – that it will continue to be granted whatever it seeks, no matter how late it makes such applications, and irrespective of the compelling factors weighing heavily against granting them. We are reminded, in this regard, of Eskom's dishonest claim in the background information document that preceded its first set of MES applications that “power station emissions do not harm human health”.¹ It is high time that decision-makers hold Eskom to account for its severe impacts on human health and wellbeing. We call upon them to refuse all non-compliant MES applications.

Overview of our opposition to Grootvlei's application

5. It is noted in the Motivation Report for this once-off suspension of compliance application, that Grootvlei is purported to already achieve the new plant MES limit of 50 mg/Nm³ for particulate matter (PM₁₀) through Fabric Filter Bags, therefore, this application is confined to the new plant limit of 1000 mg/Nm³ for Sulphur dioxide (SO₂) and 750 mg/Nm³ for oxides of nitrogen (NO_x). This applies to the 3 remaining units that are still in operation at Grootvlei power station, as the other 3 units have been shut down and placed in cold storage.
6. The purpose of this written submission, as part of the second round of public participation for this suspension of compliance application for Grootvlei power station – located in the Highveld Priority Area – is as follows:
 - 6.1 **to record that we reiterate and stand by our objections submitted in February 2019 (“February 2019 objections”)**, on behalf of the abovementioned organisations, in opposition to Eskom's applications for suspension of compliance, alternative limits and/or postponement of compliance with the MES for 10 of its coal-fired power stations. VEJMA also endorses these objections and this written submission;
 - 6.2 in addition to the reasons set out in our February 2019 objections, to call on the NAQO, in concurrence with the licencing authority, to reject this suspension application for Grootvlei power station, **as it will be submitted after 31 March 2019 (which is not lawful) and unlawfully seeks to extend the detrimental polluting activities at the station beyond its end of life;** and
 - 6.3 to record that Eskom's MES applications for postponement of compliance, suspension of compliance, and/or alternative limits – covering 14 of its 15 coal-fired power stations – **do not secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development**, in accordance with section 24(b)(iii) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).
7. The following submission uses the same abbreviations and defined terms as used in the February 2019 objections.

¹ https://cer.org.za/wp-content/uploads/2014/08/1_-Eskom-BID-11-June-2013.pdf

February 2019 objections

8. As submitted during the virtual public participation meeting held on Friday 10 July 2020, the abovementioned organisations reiterate and stand by the content of the February 2019 objections. These objections remain applicable to this current suspension of compliance application for Grootvlei power station.
9. We refer, in particular, to the various expert assessments by Dr Ron Sahu, Dr Mike Holland and Lauri Myllyvirta, respectively, on various aspects of Eskom's applications. Three of these expert assessments were either updated or finalised subsequent to the submission of the February 2019 objections, and are therefore attached to this submission as additional annexures:
 - 9.1 **Annexure 2A:** Dr Ron Sahu – *“Eskom Power Station Exceedances of Applicable Atmospheric Emission License (AEL) Limit Values for PM, SO₂ & NO_x During April 2016 to December 2017”* (updated March 2019);
 - 9.2 **Annexure 4:** Dr Michael Holland and Joseph Spadar – *“Review of a Report Providing Health Impact Assessment and Cost-Benefit Analysis (CBA) of Eskom activities”* (February 2019); and
 - 9.3 **Annexure 5:** Lauri Myllyvirta – *“Air quality and health impacts of Eskom's planned non-compliance with South African Minimum Emission Standards”* (March 2019).
10. An additional procedural objection, as we have also submitted in our January 2020 objections to the alternative limit applications for Matimba and Medupi stations, is that this piecemeal application is invalid because it will be submitted after 31 March 2019, contrary to the explicit requirement of the Listed Activities and 2017 Framework. We respectfully maintain that the Minister erred in her decision to condone Eskom's failure to comply with this legally-mandated deadline, as it was able to do so for 11 of its other coal-fired powered stations; in any event, a *complete* suspension application for Grootvlei was not submitted by 30 November 2019, as required in the Minister's letter of decision, in terms of section 47C of NEMA. This delay cannot be justified – it is not in the interests of justice, and should be dismissed by the NAQO.

Unlawful extension of atmospheric pollution at Grootvlei power station

11. Based on the Motivation Report, it is understood that Grootvlei has already been granted postponements of compliance until 1 April 2025, to comply with the new plant NO_x and SO₂ limit. This application is for *“an alternative daily limit of 1100 mg/Nm³ for NO_x and a daily limit of 3500 mg/Nm³ for SO₂ both from 1 April 2000 [sic] until shutdown anticipated by 2028, and no later than 2030.”*
12. This anticipated timeframe for shut down is contrary to the Integrated Resource Plan for Electricity, 2019, which shows that the 50-year life decommissioning dates at Grootvlei were scheduled from 2018-2020. The CER received an 'adjusted' 50-year end-of-life schedule from Eskom in June 2020.² This revised schedule is attached as **“Annexure 6”**, and shows that all 6 units at Grootvlei reach their end of life between 2025 and 2028. In paragraph 'h' of the same attachment, Eskom states that *“at present, while Eskom has anticipated shut down dates based on the 50 year life for each unit at its station it does not have firm decommissioning dates or detailed plans for the decommissioning any of its coal fired power stations.”*
13. We strongly object to this vague schedule and shut-down strategy, on the following grounds:
 - 13.1 we reiterate our February 2019 objections, that in terms of the Listed Activities, read with the 2017 Framework, one of the requirements for a suspension of compliance application, is a “detailed” and “clear” decommissioning schedule. The “anticipation” of “shutdown by 2028, and no later than 2030”, provides neither committed decommissioning dates, nor is it detailed or clear;

² This revised table was received on 25 June 2020, in response to a request in terms of the Promotion of Access to Information Act, 2000, submitted to Eskom in February 2020.

- 13.2 the effect of this application to suspend compliance with the new plant MES limits for SO₂ and NO_x – beyond the compliance postponements to 2025 – is to extend the polluting activities at Grootvlei beyond its 50 year end-of-life. Given the purpose of the Listed Activities, read with the Preamble and object of the Air Quality Act and the 2017 Framework, we submit that it could never had been the intention of the 2018 amendments to the Listed Activities to enable a facility to prolong its harmful polluting activities, beyond its end-of-life. We maintain that a facility must either comply with the law or be decommissioned in a fair and legally-compliant manner. This is especially so in a priority area such as the Highveld, which remains out of compliance with South Africa’s weak NAAQS;
- 13.3 in our February 2019 objections, we address the chemical reaction between SO₂ and NO_x to form secondary PM_{2.5} and detail the fatal health impacts from this pollutant. A crucial omission from the Atmospheric Impact Report for this application was that it was “not possible to deal satisfactorily with the issue of PM_{2.5}. Only limited PM_{2.5} data is available from the monitoring stations and the data that is available is not consistent, so is not useable.”³ The limited availability of useable PM_{2.5} data is a cause of serious concern, alone, but this is also a basis to reject this application for the reasons set out in the February 2019 objections; and
- 13.4 although we do not concede that ‘necessity’ is one of the criteria for consideration in relation to an application to postpone or suspend MES compliance, or for alternative limits, this Grootvlei suspension application is simply unnecessary. Eskom has advised that Grootvlei units 4,5 and 6 (adjusted end-of-life between 2027-2028) are already shut down, and Eskom itself states in the Motivation Report that “*there was, prior to October 2018, no requirement for Eskom to complete an immediate application for Grootvlei as the station had a valid postponement decision until 2025.*”⁴ It appears clear that no justifiable reason for this application has since arisen.

14. Aside from the above procedural objection regarding the 31 March 2019 deadline, we submit that the NAQO should not entertain this application, as it will unlawfully extend the operational lifespan of the remaining units 1-3. This will further contribute to the cumulative air pollution, and resultant health impacts and violations of constitutional rights, attributed to Eskom’s 12 coal-fired power stations in the Highveld Priority Area.

Sustainable development that is consistent with the Constitution

15. In its Motivation Report for this application, as well as its still-pending set of applications covering 10 coal-fired power stations, Eskom states that:

“Eskom is committed to ensuring that it manages and operates its coal-fired power stations in such a manner that risks to the environment and human health are minimised and socio-economic benefits are maximised. As set out in the Constitution of the Republic of South Africa, there is the need to recognise the interrelationship between the environment and development. There is a need to protect the environment, while simultaneously recognising the need for social and economic development. There is the need therefore to maintain the balance in the attainment of sustainable development.”

16. We place on record that we strongly object to the notion that Eskom’s existing mode of operation, including its approach to compliance with air pollution laws over the past decade (at least), has “attained” – or even contributed towards – sustainable development in South Africa. Moreover, we submit that the way Eskom operates its facilities will never achieve a version of sustainable development that is consistent with the Constitution. The preamble of the Air Quality Act confirms this reality, and the Mpumalanga Highveld, in particular, has been treated as sacrifice zone for decades.

17. Section 24 of the Constitution provides that:

³ Page 79 of the Atmospheric Impact Report (May 2020).

⁴ Page 11.

“Everyone has 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) promotes conservation; and

*(iii) **secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.***” (our emphasis).

18. Notwithstanding the ongoing violation of Highveld residents’ Section 24(a) right – an immediate, unqualified right to an environment that is not harmful to health and well-being – we acknowledge that section 24(b) does promote environmental protection, as well as the simultaneous promotion of social and economic development. However, this does not imply a trade-off between these objectives, based on a cost-benefit analysis, or otherwise. The features of Section 24 that are also of crucial importance, but are omitted from Eskom’s motivation reports, are “for the benefit of present and future generations” and “justifiable” –

18.1 Eskom estimates that the emissions from 13 of its coal-fired power stations will result in an additional 320 premature mortality cases and a R17.6 billion baseline health cost, annually;⁵ irrespective of the fact that independent studies show that these figures are much higher,⁶ such ‘collateral fatalities to keep the lights on’, can never be justified and is neither consistent with section 24 of the Constitution, nor a democratic society founded on human dignity, the achievement of equality, and the advancement of human rights and freedoms; and

18.2 we submit that, by definition, sustainable development, properly construed, is based on the rule of law. Eskom is in the process of submitting yet another round of applications to either further delay compliance with the MES, and in some cases avoid compliance altogether, now covering 14 of its 15 coal-fired power stations. Like Eskom’s first round of multiple MES compliance postponement applications in 2013/4, to permit these applications would result in the unreasonable implementation of the MES (as a legislative measure to reduce air pollution), which also exists to protect social, economic and ecological conditions, as well as cultural heritage; this would undermine the Air Quality Act, the rule of law and the supremacy of the Constitution.

19. Simply put, the people of South Africa deserve, and are constitutionally entitled to, a better present that is more just, equitable and truly sustainable, for the inheritance of future generations. We welcome Eskom’s recognition that a just transition is needed and the outline of its Just Transition Strategy in the Motivation Report; however, what is also needed is urgency and immediate action in order to accelerate the just transition process to a low carbon economy. This immediate action, in the energy sector at least, includes expediting the closure of Eskom’s 6 older power stations, whether it be in preparation for decommissioning or repurposing, through inclusive, transparent and lawful processes.

20. Delaying these inevitable processes by seeking to unlawfully extend the operating life of Grootvlei through this suspension of compliance application, should not be countenanced.

21. The NAQO, and competent licencing authorities, are key decision-makers in the context of this just transition – a pathway to securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. We therefore reiterate our call upon these relevant decision-makers to reject all of Eskom’s applications in order to protect constitutional rights and the realisation of environmental and social justice in South Africa.

⁵ Based on 2018 data and this scenario from the CBA assumes that Eskom will not retrofit any more pollution abatement technology in the future.

⁶ See section C on ‘Direct adverse health impacts attributed to Eskom’s coal-fired power stations and flawed cost-benefit analysis’ in the February 2019 objections.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per:



Timothy Lloyd
Attorney

Direct email: tlloyd@cer.org.za

