APPEAL TO THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM

In the matter between:

VAAL ENVIRONMENTAL JUSTICE ALLIANCE	First Appellant
GROUNDWORK	Second Appellant
and	
THE DEPARTMENT OF ENVIRONMENT, FORESTRY AND FISHERIES	First Respondent
ARCELORMITTAL SOUTH AFRICA	Second Respondent

APPELLANTS' GROUNDS OF APPEAL TO THE MINISTER

IN TERMS OF SECTION 43 of NEMA AND REGULATION 4 OF THE 2014 APPEAL REGULATIONS

A. INTRODUCTION

1. This is an appeal to the Minister of the Department of Environment, Forestry and Fisheries (DEFF) in terms of section 43(1) of the National Environmental Management Act (NEMA) read together with Regulation 3(1) of the National Appeal Regulations 2014 ("the Appeal Regulations") and the Guideline on the Administration of Appeals, 2015 ("the Appeal Guidelines"), in respect of the National Air Quality Officer's (NAQO)'s decision of 23 March 2020 to grant ArcelorMittal South Africa's ((AMSA)) Vanderbijlpark facility with a suspension to comply with the Minimum Emission Standards (MES) and granting it alternative limits in respect of various pollutants ("the decision").

2. MES are regulated in terms of Section 21 of the National Environmental Management: Air Quality Act, 2004 (AQA), read together with the Regulation of the List of Activities Which Result in Atmospheric Emissions Which Have or May Have a Significant Detrimental Effect on the Environment, Including Health, Social Conditions, Economic Conditions, Ecological Conditions or Cultural Heritage, 2013 ("Listed Activities").

3. The purpose of the MES and the Listed Activities, is – as the full title of the Listed Activities suggests - to control the emission of pollutants which may have a detrimental impact on the environment, health social and economic conditions, among others.

4. This Appeal is being instituted to dispute the decision of the First Respondent to postpone the MES and to grant alternative limits for Hydrogen Sulphide (H2S) to AMSA's Vanderbijlpark facility. It is unlawful, and unconstitutional, to grant standards, which are more lenient than existing plant standards under the MES. This is addressed in further detail under the grounds of appeal below.

5. Postponing compliance with health-based standards, or providing impermissible alternative limits to standards which are intended to protect people's health, particularly in the designated Vaal Triangle Airshed Priority Area (VTAPA)[1], is unlawful. This is a matter of public and national interest and of relevance to all people of South Africa.

[1] https://cer.org.za/wp-content/uploads/2010/03/Vaal.pdf

B. THE PARTIES

6. The First Appellant is the Vaal Environmental Justice Alliance (VEJA), a democratic alliance of empowered civil society organisations in the Vaal Triangle who have the knowledge, expertise and mandate to represent the determination of the communities in the area to control and eliminate emissions to air and water that are harmful to these communities and to the environment VEJA is an active role-player in various environmental (including air quality) campaigns within the Vaal Triangle Airshed Priority Area (VTAPA). VEJA is a non-profit organisation with registered address, Frikkie Meyer Blvd & Rutherford Blvd, Vanderbijlpark C. W. 2, Vanderbijlpark, 1900.

7. The Second Appellant is groundWork, a non-profit environmental justice campaigning organisation working primarily in South Africa, in the areas of Climate & Energy Justice, Coal, Environmental Health, Waste, Environmental Justice Education and Environmental Justice Information. groundWork Trust ("groundWork") which has its offices at 8 Gough Street, Pietermaritzburg, KwaZulu-Natal, South Africa.

8. The First and Second Appellants will be referred to collectively as "the Appellants".

9. The First Respondent is the Minister of Environment, Forestry and Fisheries.

10. The Second Respondent is ArcelorMittal South Africa, whose registered office is located in Delfos Boulevard, Vanderbijlpark, Gauteng.

C. BACKGROUND

11. As elucidated in this appeal, the decision, should be regarded in the context that AMSA has, for decades, not complied with various environmental laws, including Hydrogen Sulphide (H2S) emissions. Of relevance to this appeal, AMSA retrofitted new abatement technology for H2S, which after delays, was completed in 2010. However, the technology has not worked for a number of months. After almost a decade of flaring uncleaned gas, and only after a criminal prosecution against AMSA in 2019 and a fine in 2020, AMSA undertook to build new abatement technology. It is vital to understand the background of decades of transgression and non-compliance by AMSA in relation to various environmental laws, and that this is yet another avenue for AMSA not to comply with the legislated requirements, giving the impression that companies, like AMSA, are exempt from environmental legal requirements. This cannot be permitted.

12. AMSA is the largest steel-producing operation in Africa, and its Vanderbijlpark operation is located in the VTAPA, declared so in 2006 due to the significantly high air pollution in the area.

13. The first appellant, VEJA also has a history of struggles against AMSA's Vanderbijlpark facility. In 2014, VEJA successfully challenged AMSA in the Supreme Court of Appeal (SCA)[2] in litigation to access AMSA's environmental Master Plan. AMSA was compelled by the SCA to disclose its environmental Master Plan 2002-2003. In the judgment, the SCA recognised, through evidence presented to it, that AMSA "*is a major, if not <u>the</u> major, polluter in the areas in which it conducts its operations*…."*[AMSA's] industrial activities, impacting as they do on the environment, including on air quality and water resources, has an effect on persons and communities in the immediate vicinity and is ultimately of importance to the country as a whole*".[3] AMSA's Environmental Master Plan of 2002-2003 revealed extensive historic pollution from

[2] *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA). This case was in accordance with the Promotion of Access to Information Act, 2000 (PAIA).

[3] *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* (69/2014) [2014] ZASCA 184 at Paragraphs 51, 52, 71 and 72.

AMSA's Vanderbijlpark operations, posing severe risks to human health and the environment. It identified over 20 urgent projects required at the Vanderbijlpark operations to minimise the risks to environment and health, and these were to commence and to be completed during the years 2002-2007, including construction of abatement technology to curb H2S emissions.

14. The sulphur abatement technology belatedly commissioned in 2010, however, only operated for several months and has not been operational for almost a decade. The flaring of sulphur-rich gas has been identified as a recurring problem in AMSA's various annual external audit reports.[4]

15. AMSA was found guilty of a criminal offence for noncompliance with conditions of its AEL and issued with a fine of R3.64 million on 20 June 2020 in relation to H2S emissions. In its media statement, AMSA stated it is working towards a sustainable solution, which includes construction of R1.1 billion sulphur abatement technology starting in June 2020.

16. In addition to AMSA's 2002-2003 Master plan's evidence of historical environmental pollution, AMSA features repeatedly in the government's annual National Environmental Compliance Reports[5] from 2009-2019, for various environmental transgressions, including air emission non compliances. Moreover, a joint inspection was conducted in 2015 by various governmental departments and the inspection report revealed that there were numerous non-compliances with various environmental laws and licence conditions resulting in or as a result of: air pollution (including H2S emissions); water pollution; PM exceedances and abatement utilisation rate non-compliances, among others. This according to the Department's 2015 joint inspection report, is as a result of: a failure to provide sampling results; AMSA's reports (including external reports) not meeting the required legal standard; a failure to mitigate dust pollution; improper handling, storage and disposal of toxic waste; poor stormwater management; and conducting activities without authorisation.

17. As can be seen from the above, AMSA has a history of environmental non-compliance, going back many decades. In respect of H2S emissions, AMSA's previous commitments to the government to reduce its pollution by building abatement technology have not resulted in any meaningful change for many decades. AMSA clearly has a history of emitting unacceptable levels of H2S and of noncompliance with H2S emission limits. This history and these impacts are perpetuated by the decision, which is the subject of this appeal.

18. On 11 March 2019, groundWork and VEJA, as registered Interested and Affected Parties (I&APs) in relation to AMSA's postponement application and request for alternative emission limits, submitted their objections to AMSA's Background Information Document (Annexure 1). The Appellants stand by the contents of the objections and this Appeal should be read in conjunction with those objections.

19. In support of our clients' appeal, we attach the following documents:

    19.1. groundWork and VEJA's objection to the MES postponement, dated 11 March 2019 (Annexure 1) – "the objection"
    19.2. AMSA's postponement application as submitted (Annexure 2) – "the postponement application";
    19.3. Correspondence from CER to Ms Khumalo dated 15 & 29 June 2020 (Annexure 3);
    19.4. Email from Ms Khumalo dated 1 July 2020, advising CER of the decision, together with a copy of the decision (Annexure 4) - "the decision";

[4] Coke Oven Clean Gas and Water Project External Audit Reports (2016, 2017, 2019); Air Emission Licence External Audit Report (2014, 2015); Kiln 5&6 External Audit Report (2016, 2017, 2018) – reports can be made available on request.
[5] https://cer.org.za/virtual-library/government-documents/national-environmental-compliance-and-enforcement-reports

19.5. Correspondence from CER to Ms Khumalo dated 21 July 2020 (Annexure 5);
19.6. Correspondence from the Appeal Authority to the CER, dated 21 July 2020 (Annexure 6);
19.7. Correspondence from CER to Ms Khumalo, dated 25 August 2020 (Annexure 7)
19.8. Correspondence from DEFF to CER with reasons the decision, dated 26 August 2020 (Annexure 8) – "the reasons";
19.9. Correspondence from CER to Ms Khumalo and AMSA, dated 26 & 27 August 2020 (Annexure 9);
19.10. Correspondence Between CER and Appeal Authority 2015, 2018 and 2020 (Annexure 10).

D. DEFICIENCIES IN THE NOTICE TO I&AP, REQUEST FOR REASONS, AND CONDONATION

20. This appeal is submitted, within timeframe envisaged by the Appeal Regulations, 2014, in that to date, our clients have not received the full reasons for the NAQO's decision, nor have they been advised of their right to an appeal or the manner in which to appeal, at the time of this submission, and as legally required in terms of the Appeal Regulations, 2014 and the Appeal Guidelines, 2015, as well as the Promotion of Access to Information Act, 2000.

21. Whilst the Appeal Regulations state that the appeal is to be submitted within 20 days of the decision itself, the Appeal Guideline makes clear that all I&APs have to be informed of the decision, furnished with the full reasons as well as their right to an appeal and the manner in which to appeal within 12 days of the decision. This is also in line with sections 33(1) and 33(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), read together with sections 3(2) and 5 of the Promotion of Administrative Justice Act, 2000 (PAJA), which require that in order for the decision to be deemed procedurally fair, the decision-maker must inform those that are affected by the decision-making of their right to an internal appeal, and their right to request reasons for its decision; and that the decision-maker must, upon request, provide adequate written reasons for its decision within 90 days after receiving the request for reasons. These requirements have been outlined in detail in correspondence exchanged with DEFF, and are applicable to the appeal (Annexures 3, 4, 5, 6, 7, 8, 9).

22. In addition to the correspondence exchanged with DEFF, in terms of our clients' rights to submit an appeal under section 43 of NEMA, we note that the Department as previously advised (in 2015) that "*the right to appeal … NAQO MES decisions has always been available in Section 43(1) of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA). The National Air Quality Officer will include right to appeal provision in future decisions*." A copy of the email is attached as Annexure 10. In October 2018, we were invited by DEFF to submit an appeal in respect of Postponement Application Decisions for Medupi and Matimba. In addition to asserting that our clients are legally entitled to appeal this decision, we submit this appeal in line with the advice from DEFF, and an established practice at DEFF to invite appeals of MES postponement decisions, and in order to exhaust our clients' internal remedies.

23. On 21 July 2020, we gave notice of our clients' intention to appeal the decision, and reserved our clients' rights to appeal upon receipt of the requested reasons. The Appeal Authority, in turn, acknowledged our clients' intention to appeal (Annexures 5 and 6). It did not dispute our clients' right to appeal the decision.

24. We received the NAQO's purported reasons on 26 August 2020 (Annexure 8), but submit that the full reasons and the notification of the appeal process, have not yet been communicated to the public, and/or our clients in accordance with the Appeal Guideline, the Appeal Regulations and PAJA. The reasons provided are not adequate reasons because a number of the supporting records requested and referred to in the NAQO's decision, including a quarterly report and roadmap for compliance with the alternative limits, as well as the SO2 offset programme referred to in the decision, were not provided and remain outstanding.

25. We submit further that, given the public interest in the decision, the wide-ranging impacts of the decision, the technical complexity or the matter and our clients' roles as environmental justice organisations working with affected communities in the vicinity of the AMSA Vanderbiljpark facility, it would be in the interests of justice to grant condonation for any late filing of this appeal, to the extent that it is required. We therefore request condonation in terms of section 47C of NEMA.

E. THE DECISION AND GROUNDS OF APPEAL

26. On 23 March 2020, the National Air Quality Officer (NAQO), granted AMSA postponements under Regulation 21 of the Listed activities, to comply with the MES and granted alternative limits for various pollutants including H2S. A summary of the decision is reflected in the following table for ease of reference. The decision is attached (Annexure 4):

S 21 Activity	**Pollutant**	**Existing Plant Standard (1 April 2015)**	**New Plant Standard (1 April 2020)**	**NAQO Postponement and alternate limits granted**
Category 3.2: Coke Production (AMSA Coke Oven Battery 4), 6, 7, 8, 9)	Hydrogen Sulphide (H2S)	10mg/Nm3	7mg/Nm3	Alternative Limit is declined, and postponement of compliance timeframe with the MES for a new plant is granted with **a limit of 40mg/Nm3** for the period 1 April 2020 to 31 March 2025.
Category 3.2: Coke Production (AMSA Coke Oven Battery 6)	Hydrogen Sulphide (H2S)	10mg/Nm3	7mg/Nm3	Alternative Limit is declined, and postponement of compliance timeframe with the MES for a new plant is granted with **a limit of 50mg/Nm3** for the period 1 April 2020 to 31 March 2025.
Category 3.2: Coke Production (AMSA Coke Oven Battery 7)	Hydrogen Sulphide (H2S)	10mg/Nm3	7mg/Nm3	Alternative Limit is declined, and postponement of compliance timeframe with the MES for a new plant is granted with **a limit of 70mg/Nm3** for the period 1 April 2020 to 31 March 2025.
Category 3.2: Coke Production (AMSA Coke Oven Battery 8)	Hydrogen Sulphide (H2S)	10mg/Nm3	7mg/Nm3	Alternative Limit is declined, and postponement of compliance timeframe with the MES for a new plant is granted with **a limit of 50mg/Nm3** for the period 1 April 2020 to 31 March 2025.
Category 3.2: Coke Production (AMSA Coke Oven Battery 9)	Hydrogen Sulphide (H2S)	10mg/Nm3	7mg/Nm3	Alternative Limit is declined, and postponement of compliance timeframe with the MES for a new plant is granted with **a limit of 30mg/Nm3** for

				the period 1 April 2020 to 31 March 2025.

27. As can be seen from the above, AMSA has been granted postponements to comply with standards for H2S which are **effectively 3-7 times weaker than the existing plant standards, and 4-10 times weaker than the new plant standards. This is unacceptable and not permissible in law.** This is our primary objection and ground of appeal.

28. Our clients stand by their objections of 23 March 2019 (Annexure 1). Those submissions are applicable to, and should be read in conjunction with, this appeal.

29. The Reasons provided by the NAQO on 26 August 2020 (referenced above) state that "*This determination is based on the current or latest emission results from the facility. Your assertion that the postponement emission limits ought not to be weaker than the existing plant MES due to paragraph 11 D of the Section 21 Notice of 31 October 2018 seems to be unfounded. 11 D, which says, no postponement of compliance timeframes or suspension of compliance timeframes shall be granted for compliance with minimum emission standards for existing plant, has to do with prohibiting postponement or suspension applications and the granting of postponement or suspension decision for existing plant MES. Furthermore, compliance with MES for existing plant during postponement period is only applicable to facilities/applications subjected to a once-off suspension of compliance timeframes in terms of 11B. Please note that AMSA's postponement application and decision thereof was for new plant MES and not for existing plant MES and was not an application for a once-off suspension of compliance timeframe*."

30. In other words, the NAQO seeks to justify the decision to grant postponements and alternative limits that are weaker than existing plant standards on the bases that:

    30.1. the limits are based on the latest emission results from the facility – i.e what the facility is currently emitting;

    30.2. it is not legal to postpone 2015 ("existing plant") MES (section 11D), however, when a plant is granted a once-off suspension of compliance (meaning it must be decommissioned before April 2030) in accordance with section 11C, it is allowed to comply with 2015 MES;

    30.3. however, because AMSA applied to postpone the 2020 ("new plant") MES, and not existing plant standards of 2015, AMSA is allowed a postponement that is weaker than the existing plant standards.

31. With respect, this is a grave misconstruing of the legislation at hand, and allows for an untenable position that would entitle any industry to apply and be granted an alternative limit that is weaker than the already lenient standards for existing plants, notwithstanding the clear intention in the regulations, that the existing plant standards must be the bare minimum. Section 11D of the Listed Activities makes clear that **no** postponement of compliance timeframes or a suspension of compliance timeframes shall be granted for compliance with MES for existing plants. The NAQO's decision renders redundant the already weak MES. It is a deliberate weakening of the applicable laws, that were put in place to protect health. The NAQO's legal position is contrary to s24 of the Constitution.

32. It is also not legally permissible to grant these limits to AMSA given the existing noncompliant air quality in the vicinity of the Vanderbijlpark facility. This is inconsistent with, and an unjustifiable limitation of, Constitutional rights.

33. In terms of section 49(a) of the AQA, persons who do not comply with air quality legislation are not fit and proper persons to hold an AEL. AMSA's history of noncompliance including its criminal conviction is a relevant factor, which should have weighed heavily on the NAQO's decision-making process in respect of the application and decision, which are the subject of this appeal. AMSA should not be permitted to continue its operations where there is non-compliance with the law, let alone be granted impermissible MES postponements and alternative limits, as was the case in the NAQO's decision.

34. We submit, further below, the bases on which we object to the NAQO's decision and the grounds for this appeal.

Decision-making based on emission results is unlawful

35. The NAQO contends (in her reasons) that the limits in the decision are based on what the facility is currently emitting. Yet, it is not legally permissible to regard AMSA's latest emission results as determinative of the application outcome. This is irrational, and constitutes an unlawful fettering of discretion and a failure to adequately apply the law. Basing a decision on current or latest emission results, instead of looking to the law, and applying the legislative standards, is to place cart before the horse.

36. DEFF's mandate is to give effect to the Constitution, NEMA principles, and AQA. The legal obligations of the DEFF and NAQO, in terms of the Constitution, NEMA, and AQA have been extensively addressed in our clients' objection (Annexure 1) at paragraphs 7-19. DEFF's obligation is not to make the law in accordance with what the company is able to financially afford or may comply with, according to its own stated pace and scale, but to give effect to the Constitution and the applicable air quality laws, which are health-based and intended to be protective of the public. It is not for DEFF to concern itself with the financial stability of AMSA, but with the protection of peoples' health and the environment in accordance with section 24 of the Constitution. If AMSA cannot comply with the law, it cannot be permitted to operate.

The Listed Activities do not allow for postponement of compliance with existing plant standards

37. The law is clear that no postponement of compliance timeframes or a suspension of compliance timeframes shall be granted for existing plant standards. This is confirmed in the Listed Activities (section11D) and the National Framework for Air Quality Management in the Republic of South Africa ("the Framework") under AQA. This means that existing plant standards are the line in the sand for the MES.

38. Granting limits more lenient than the existing standards is not legally permissible. It effectively amounts to an illegal exemption from the MES. It is also contrary to the objectives of AQA,[6] and to the section 24 Constitutional right to an environment not harmful to health and wellbeing.

39. It is also of relevance that the AMSA facility is located in a designated priority area – the VTAPA – where National Ambient Air Quality Standards[7] are regularly exceeded. This renders the NAQO's decision even more unacceptable, as surrounding communities are exposed to increasing unacceptable health risks.

[6] Section 2 of the AQA – "*The object of this Act is—(a)to protect the environment by providing reasonable measures for—(i)the protection and enhancement of the quality of air in the Republic;(ii)the prevention of air pollution and ecological degradation; and Page 9of 53(iii)securing ecologically sustainable development while promoting justifiable economic and social development; and(b)generally to give effect to section 24(b) of the Constitution in order to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people*."

[7] https://cer.org.za/wp-content/uploads/2010/03/National-Ambient-Air-Quality-Standards.pdf

40. Furthermore, this decision runs contrary to the objectives of the Listed Activities and the context of the Listed Activities being that for a number of years existing plants have been aware of the MES and have had an opportunity to come into compliance. The time for unjustifiable lenience is over. The relevant background is provided below.

41. In the Listed Activities, "existing plant" is defined as **"***any plant or process that was legally authorized to operate before 01 April 2010 or any plant where an application for authorisation in terms of the National Environmental Management Act, 1998 (Act No.107 of 1998), was made before 01 April 2010*." The **"**new plant" is "*any plant or process where the application for authorisation in terms of the National Environmental Management Act 1998, (Act No.107 of 1998), was made on or after 01 April 2010.*" AMSA's coke-making plant, which entails the coke ovens in respect of which the NAQO decisions were made, was established before 1 April 2010 and therefore is an "existing plant".

42. The Listed Activities were always intended to put in place stricter emission standards incrementally, to improve air quality in line with the rights contained in s24 of the Constitution. In doing so, new plants were envisaged to be in compliance with stricter standards, however, some grace and a more lenient standard - the existing plant standards - were provided for old plants for a limited, specified number of years, so that they could have time to make modifications in accordance with industry cycles to meet the legislative requirements.

43. The Listed Activities came into force in 2013, and new plants were to comply with new plant standards by 1 April 2010 and existing plants were granted more lenient emission limits, and were to come into compliance with the stricter new plant standards by 1 April 2020. Hence in terms of the Listed Activities, AMSA was required to comply with limits for H2S of 10mg/Nm2 by 1 April 2015, to meet stricter standards of 7mg/Nm3 by 1 April 2020, and to upgrade its technology to meet those standards. AMSA has been well aware of these legal obligations for a number of years and has had ample time to come into compliance.

44. In practice we have seen that, rather than complying with the law, industries proceeded to apply for a widespread and repeated postponement, essentially exempting them from compliance under the legislation, even if the ambient air quality standards are out of compliance. This has essentially eroded the incremental improvement in air quality intended by the Listed Activities, as industries are repeatedly exempt from complying with what was initially intended as a temporary leniency to old plants to refurbish and come into compliance with stricter standards over a limited number of years. For example, we have seen large-scale noncompliance with emission limits in AELs by South Africa's biggest polluter – Eskom.[8] In reference to AMSA, and the number of decades that it has not been in compliance with the law, it appears that it too has become accustomed to not complying with legislation (as evidenced by the regular National Environmental Compliance and Enforcement Report findings and the recent criminal proceedings against AMSA). This speaks to the problem of rampant disregard for the rule of law and Constitutional rights when it comes to large industrial operators in South Africa like AMSA.

45. The 2017 Framework, states that: "***It should be noted that the year 2020 marks 10 years since the publication of the 2010 AQA Section 21 notice (Listed activities and minimum emission standards). Therefore, sufficient time has been afforded to industry towards compliance with the initial MES by 2020"***. In upholding the objectives of the AQA, the Department provides certainty regarding postponement or suspension of compliance timeframes in the following order:
    - "*Existing facilities may apply for a once-off postponement of compliance timeframes for new plant standards. A postponement if granted will be for a period not exceeding 5 years and no postponement would be valid beyond 31 March 2025;*

[8] https://cer.org.za/wp-content/uploads/2020/04/Annexure-A_Dr-Sahu-Kendal-report-April-2020.pdf

- *Existing facilities that will be decommissioned by 2030 may apply for a once-off suspension of compliance timeframes with new plant standards for a period not beyond 2030. An application must be accompanied by a clear decommissioning schedule and no such application shall be accepted after 31 March 2019;*
- *Existing facilities that will be granted a suspension of compliance timeframes shall comply with existing plant standards during the suspension period until they are decommissioned; and*
- ***No postponement of compliance timeframes or a suspension of compliance timeframes shall be granted for existing plant standards.***
- *An existing facility may submit an application regarding a new plant standard to the National Air Quality Officer for consideration, **if the facility is in compliance with other emission limits but cannot comply with a particular pollutant or pollutants**. An application must demonstrate previous reduction in emissions of the said pollutant or pollutants, measures and direct investments implemented towards compliance with the relevant new plant standards. The National Air Quality Officer, after consultation with the Licensing Authority, may grant an alternative emission limit or emission load **provided there is compliance with the national ambient air quality standards in the area** for pollutant or pollutants applied for; or the Atmospheric Impact Report does not show increased health risk where there is no ambient air quality standard*."

46. The Listed Activities were amended on 31 October 2018 to*, inter alia*, prevent rolling MES postponements and an abuse of process. The relevant provisions state the following:

(*9) Existing plant must comply with minimum emission standards for existing plant as contained in Part 3 by 01 April 2015, unless where specified.*

(10) Existing plant must comply with minimum emission standards for new plant as contained in Part 3 by 01 April 2020, unless where specified.

(11) As contemplated in paragraph 5.4.3.5 of the National Framework for Air Quality Management in the Republic of South Africa, published in terms of Section 7 of this Act, an application may be made to the National Air Quality Officer for the postponement of the compliance time frames in paragraph (9) and (10) for an existing plant.

(11A) An existing plant may apply to the National Air Quality Officer for a once-off postponement with the compliance timeframes for minimum emission standards for new plant as contemplated in paragraph (10). A once-off postponement with the compliance timeframes for minimum emission standards for new plant may not exceed a period of five years from the date of issue. No once-off postponement with the compliance timeframes with minimum emission standards for new plant will be valid beyond 31 March 2025.

(11B) An existing plant to be decommissioned by 31 March 2030 may apply to the National Air Quality Officer before 31 March 2019 for a once-off suspension of compliance timeframes with minimum emission standards for new plant. Such an application must be accompanied by a detailed decommissioning schedule. No such application shall be accepted by the National Air Quality Officer after 31 March 2019.

(11C) An existing plant that has been granted a once-off suspension of the compliance timeframes as contemplated in paragraph (11B) must comply with minimum emission standards for existing plant from the date of granting of the application and during the period of suspension until decommissioning.

(11D) No postponement of compliance timeframes or a suspension of compliance timeframes shall be granted for compliance with minimum emission standards for existing plant.

47. Section 11A above makes clear that existing plants may only apply for a once-off postponement for compliance with the new plant standards, and not the existing plant standards. As such, it makes reference only to the legal requirement to comply with section 10 and not section 9. If the legislature intended to allow for postponement of compliance with the existing plant standards of 10mg, then it would have included reference to both sections 9 and 10 in section 11A. In other words, postponements under section 11A do not alleviate the legal requirement under section 9 to comply with the existing plant standards. Section 11D further clarifies that no postponement shall be granted for compliance with MES for an existing plant.

48. On the basis of s11D alone, the application should have been refused.

49. As elucidated above, existing plants are expected to have been in compliance with the more lenient standards of 10mg for H2S by 1 April 2015. AMSA has had more than 10 years to comply.

50. To interpret these provisions to allow postponement for compliance with the existing plant standards, or enable a standard more lenient than the existing plant standards, is to make mockery of the law. Moreover, to allow for a standard which is far weaker than the existing plant standards of 2015 is to retrogress to the *status quo* that was permitted before 2015. This is an unjustifiable limitation of the rights of communities neighbouring AMSA's Vanderbijlpark facility to a healthy environment under s24 of the Constitution, as well as other rights, given the unacceptable health impacts that this will have for them.

Other legal requirements not met by AMSA in its application

51. AMSA's request for postponement under the AQA should be understood in the context not only of the legislation at hand but the context of AMSA's operations, which have a history of decades of non-compliance with various environmental laws. The decision to grant AMSA further lenience from the law and allowing it to continue its pollution unabated in Vanderbijlpark infringes on the surrounding communities' rights to healthy environment, as guaranteed in terms of the Constitution, in addition to being legally impermissible under AQA.

52. The NAQO, in making her decision, also failed to consider a number of key relevant factors – particularly the increased health risk to communities from AMSA's high H2S emissions - that ought to have resulted in the postponement being refused. AMSA does not meet the section12A requirements for alternative limits.

53. AMSA did not meet the requirements of s12(A)(a) of the Listed Activities, which states that "*an existing plant may submit an application regarding a new plant standard to the National Air Quality Officer for consideration* ***if the plant is in compliance with other emission standards*** *but cannot comply with a particular pollutant or pollutants*" (emphasis added).

54. As can be seen from AMSA's application, AMSA is not only out of compliance with H2S, but Sulphur Dioxide (SO2), Oxides of Nitrogen (NOx), among others.

55. The VTAPA is a priority area, and there is evidence of continuous noncompliance with the national ambient air quality standards in the area and widespread harmful impacts for human health.

56. Section 12A(c) would only permit alternative limits in instances where

"(*i) there is material compliance with the national ambient air quality standards in the area for pollutant or pollutants applied for; or*

(ii) the Atmospheric Impact Report does not show a material increased health risk where there is no ambient air quality standard".

57. Contrary to AMSA's AIR which seem to suggest that the health impacts are mostly due to high concentration exposure, the WHO report on the Concise International Chemical Assessment Documents for Hydrogen Sulphide ("WHO Report")[9] indicates otherwise, and reveals the following impacts even at the levels between 30-70mg/NM3 which AMSA was granted postponements for:

Concise International Chemical Assessment Document 53

Table 2: Human health effects at various hydrogen sulfide concentrations.

Exposure (mg/m^3)	Effect / observation	Reference
0.011	Odour threshold	Amoore & Hautala, 1983
2.8	Bronchial constriction in asthmatic individuals	Jappinen et al., 1990
5.0	Increased eye complaints	Vanhoorne et al., 1995
7 or 14	Increased blood lactate concentration, decreased skeletal muscle citrate synthase activity, decreased oxygen uptake	Bhambhani & Singh, 1991; Bhambhani et al., 1996b, 1997
5–29	Eye irritation	IPCS, 1981
28	Fatigue, loss of appetite, headache, irritability, poor memory, dizziness	Ahlhorg, 1951
>140	Olfactory paralysis	Hirsch & Zavala, 1999
>560	Respiratory distress	Spolyar, 1951
≥700	Death	Beauchamp et al., 1984

58. In addition, the WHO report indicates that H2S is a lung and eye irritant, is rapidly absorbed by the lungs. The reports state that "*Short-term inhalation exposure to high concentrations of hydrogen sulfide causes health effects in many systems; reported health effects in humans following exposure to hydrogen sulfide include death and respiratory, ocular, neurological, cardiovascular, metabolic, and reproductive effects….Due to the serious toxic effects associated with exposures to high concentrations of hydrogen sulfide for very short durations, all exposure should be avoided*."[10]

59. As indicated in the Appellant's objections, there are many deficiencies associated with the AIR. In addition to those outlined in the objections, as shown above, the AIR fails to adequately and accurately address or outline the health impacts, which pose material risks for surrounding communities, including the cumulative impacts of already unacceptable levels of air pollution in the VTAPA, since there are many industries in the area. As such, alternative limits could not be permissible in this instance owing to the material health risks posed to communities.

60. AMSA's application also does not meet the requirement that ambient air should be in compliance with NAAQS in order to grant alternative limits, as mentioned in 5.4.3.4 of the Framework. According to the Draft Second Generation Air Quality Management Plan for the Vaal Triangle Airshed Priority Area, 2020[11] industrial sources were the main contributors of SO2 (99.8%) and NOx (93%) emissions within the VTAPA,

[9] WHO report on the Concise International Chemical Assessment Documents for Hydrogen Sulphide, page 13 https://www.who.int/ipcs/publications/cicad/en/cicad53.pdf

[10] WHO report on the Concise International Chemical Assessment Documents for Hydrogen Sulphide, page 5 https://www.who.int/ipcs/publications/cicad/en/cicad53.pdf

[11] Draft Second Generation Air Quality Management for the Vaal Triangle Airshed Priority Area, 2020, https://cer.org.za/virtual-library/legislation/national/air-quality-and-climate-change/national-environmental-management-air-quality-act-2004

and NOX and PM are still out of compliance with the NAAQS.[12] Furthermore, in the area of Sebokeng, Sharpville, Kliprivier, Zamdela (few locations which are near AMSA Vanderbijlpark operations), "*The NAAQS are frequently exceeded at all four sites in summer, winter and spring, but it is significantly worse during winter with PM10, PM2.5 and SO2 the main pollutants of concern*". In other words, the NAAQS are being exceeded for several pollutants, and also in the vicinity of AMSA Vanderbijlpark's operation.

61. Section 12A(b) of the Listed Activities and paragraph 5.4.3.4 of the 2017 Framework, also state that an application must demonstrate previous reductions in emissions of the said pollutant or pollutants, measures and direct investments implemented towards compliance with the relevant new plant standards. In this regard, the NAQO's Reasons at paragraph 2.1 indicate that *"[AMSA] provided a compliance roadmap that provided detailed information on how the planned activities would be conducted and the timeframe during which the task for each planned activity would be undertaken. After having assessed the motivation and reasons put forward as grounds for applying for postponement, the National Air Quality was satisfied that this was justifiable and worth considering*."

62. No such compliance road map was made available to the public or our clients, despite our request. Moreover, AMSA's application does not reveal any evidence as to how it has tried to curb its emissions. It merely states that it is impossible to comply with the H2S existing and new plant standards, indicating that it may never be able to comply with the standards even beyond 2025:

> "*Although the above-mentioned upgrades are anticipated to aid in a partial reduction of H2S emitted from the coke battery stacks, it is not foreseen that the recovery of sulphur from the coke oven gas will yield H2S stack emissions below the prescribed minimum emission standards. Achievement of both the current prescribed H2S standard of 10 mg/Nm3 for existing plants and 7 mg/Nm3 for new plants (to be achieved by all plants by 1 April 2020) is unfeasible for Coke Batteries of the technology and age as those at AMSAVW. An alternative H2S stack emission standard of 150 mg/Nm3 will thus be proposed for the 5 coke batteries*"[13]

63. Firstly, as indicated above, the compliance road map referred to by the NAQO should have been made available to the public, and other documentation such as offset programme as part of the public participation process in AMSA's application. This information was not before I&APs, nor has it been provided despite our requests.

64. Moreover, AMSA has not shown, how it had attempted to comply with the emission standards. In this regard, the NAQO quotes from the AIR, stating that "*The first aspect of the postponement application is required for the special arrangement stipulated under Sub-category 3.1: Combustion Installations, which prescribes the recovery of sulphur containing compounds from gases to be used for combustion with a recovery efficiency of not less than 90%, measured as hydrogen sulphide. Although a project has already been initiated to, amongst others, revive sulphur recovery from the coke oven gas, the deadline of 1 April 2020 will not be achievable owing to the complexity of the intended upgrades to the gas cleaning facilities. Despite numerous attempts to ensure operations of the current sulphur recovery facilities, the long term operation of this failing equipment was no longer feasible. Hence the decision to invest in the installation of new, state-of- the-art equipment (at a cost of approximately R800m) for the cleaning and recirculation of by-product coke oven gas for utilisation as a fuel source on site. The primary use of the Coke Oven gas is to provide additional heat input for the heating of the batteries (5%) - increasing the energy efficiency of the facility. The onsite boilers also utilise the Coke Oven gas for the production of steam and subsequent*

[12] Draft Second Generation Air Quality Management for the Vaal Triangle Airshed Priority Area, 2020, page vii

[13] AMSA's Air Impact Report, Page 1.

generation of electricity. The remainder of the gas is utilised at downstream facilities, such as reheating furnaces. The excess coke oven gas, which currently cannot be utilised, is flared."[14]

65. Contrary to this, and as indicated above, DEFF has repeatedly identified that AMSA has, over the decades, not been in compliance with various emission limits and environmental legislation, including H2S limits. No information exists in the application as to why the abatement technology for H2S constructed in 2010 has not operated for months, why it has not been recommissioned since 2010, and why – only after criminal prosecution in 2019 – AMSA committed at such a late stage to undertake to construct new abatement technology. It is unknown how this technology will differ from the previous unsuccessful technology, or how long the compliance will take.

66. This is a far cry from evidence of "*measures and direct investments implemented towards compliance with the relevant new plant standards*" as required by section 12A(b).

67. One of the considerations by the NAQO in the reasons letter of August 2020, is whether or not the postponement will eventually lead to compliance.[15] Alarmingly, the application instead indicates that AMSA will never be able to comply with the H2S due to the age of the plant, even after commissioning of a new abatement plant in 2020. Since AMSA cannot comply with the law, and is never likely to comply even after 2025, the postponement should not have been granted.

F. RELIEF SOUGHT

68. In light of the aforementioned, we respectfully request that the Minister grant our appeal and set aside the NAQO's decision. In addition and in particular, we request that:
    68.1. That the NAQO and AMSA be directed to produce all documents pertaining to AMSA's postponement application including the quarterly report and roadmap for compliance with the alternative limits, as well as the SO2 offset programme referred to in the decision;
    68.2. The Minister confirm the legal position that the Listed Activities do not allow for postponement of standards and granting of alternative limits that are weaker than the existing plant MES; and
    68.3. the postponement granted to AMSA for compliance with the H2S MES and provision of more lenient standards that the existing plant standards for H2S is declared unlawful and set aside.

69. Our clients' rights to supplement the appeal on provision of further documents, as requested above, are reserved.

[14] The Reasons, para 2.1 page 4.
[15] The Reasons, para 2.1 page 3.