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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 (ELA). Life After Coal, and ELA, in particular, work with a network of communities within the Waterberg District Municipality whose health and well-being has been detrimentally impacted by industrial developments in the area – such as Eskom's Matimba and Medupi coal-fired power stations and the large-scale coal mines that supply these power stations.	Thank you for your participation in the Eskom Alternative MES applications and/or exemption application. Kindly note that the Life After Coal Campaign has been registered on the I&AP database as the individual entities representing the campaign rather than as the Life After Coal Campaign for ease of correspondence.
2. Upfront, we reiterate that these current alternative (weaker) limit applications is the **third time** that Eskom's Medupi and Matimba power stations – both situated in the Waterberg-Bojanala Priority Area – have applied for MES leniency. 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 were not legally permitted, exemptions from compliance with South Africa's extremely-weak MES are what Eskom has effectively managed to achieve, to date, for many of its stations; and, in fact, Eskom appears to believe it is legally entitled to such leniency. This is also a reflection of how the Air Quality Directorate within the Department of Environment, Forestry and Fisheries (the "Department") has performed over the last decade, which has largely contributed to the failure of air quality governance in the 3 priority areas of the Republic.	Eskom believes it is legally entitled to submit the requested applications and that the applications are appropriately formulated and are lawfully before the relevant authorities to consider. **Exemption versus Postponement** An exemption needs to be distinguished from postponement. Both are lawfully permitted and are catered for in the regulatory regime established by the National Environmental Management Act: Air Quality Act 39 of 2004 ("NEMAQA"). As regards exemptions, the Minister responsible for Environmental Affairs is legally entitled to grant an exemption from the application of a provision of NEMAQA, as expressly provided for in section 59(1) of NEMAQA. Previously, Eskom has not made use of this legal mechanism, which it is lawfully entitled to do. Previously, Eskom had only made use of the transitional arrangements allowing for the postponement of the MES as expressly provided for in 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 (GN 893 of 22 November 2013, as amended) ("NEMAQA Listed Activities"). **Postponement** The minimum emission standards ("MES") were first published in 2010 in terms of in terms of section 21(3)(a), (b) and (c) of NEMAQA and apply to the listed activities that were published therein. These were replaced and repealed by the updated NEMAQA Listed Activities, including updated MES in November 2013. Further amendments were

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	made to the Listed Activities Regulations, including the MES, on 31 October 2018 ("2018 Amendments". Section 21(3)(b) of NEMAQA allows the Minister of the Department of Environment, Forestry and Fisheries ("the Minister") ("DEFF"), in her discretion, to include transitional and other special arrangements in respect of activities which were in operation at the time of their listing when publishing the NEMAQA Listed Activities. The previous Minister introduced such transitional arrangements and other special arrangements in the NEMAQA Listed Activities as well as in the amendments of 22 November 2013 and 31 October 2018. Part of those transitional arrangements were to provide for the ability for applicants to apply to postpone the application of the MES. All of Eskom's currently operational facilities were operating at the time the NEMAQA Listed Activities were promulgated, while the balance of their facilities were at an advanced stage of their design or development. This made it difficult to comply with the stringent MES for Eskom's fleet of facilities. As a result, Eskom sought to make representation during the commenting period for the NEMAQA Listed Activities as well as their subsequent amendments. As these representations were to no avail and out of an operational necessity, Eskom had no choice but to make use of the lawful ability granted to it by the NEMAQA Listed Activities to apply for a postponement of the application of the MES. These postponement applications were submitted as an operational necessity as it sought to plan and budget for the required upgrades and retrofit installations to allow for compliance in a phased and prioritised approach. Medupi Power Station will comply with most of the required emission limits, however the Flue Gas Desulphurisation ("FGD") project which is required to support compliance to the Sulphur Dioxide limits is now considered inappropriate and further investigations on a suitable technology are planned. In order to support meeting the Sulphur Dioxide standards in particular, FGD would be required at the Matimba Power Station. Eskom does not believe that given the limited air quality impact and considering the significant volumes of water required, the additional waste produced and a cost of between R15 and R26 billion for the FGD, that installing the technology is appropriate for Matimba. Eskom is thus requesting an alternative limit for Sulphur Dioxide for this station as well.

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	Eskom is lawfully entitled to apply for a suspension of compliance timeframes with the MES for an alternative emissions limit in terms regulation 12A(a)) of GN 1207 of 31 October 2018. It should be noted that prior to the 2018 Amendments, postponements were only permitted for a 5 year period and as such if Eskom required more than 5 years for a postponement then it was required to submit additional postponements after 5 years. Consequently, your statement that this "is the **third time** that Eskom's Medupi and Matimba power stations" [LAC's emphasis], is merely a statement of the facts. To the extent that you suggest that such an approach was legally impermissible, Eskom denies this and puts you to prove and justify your statements, which are clearly contrary to what was envisaged by the NEMAQA Listed Activities, that allowed for postponements to be granted for a period of 5 years and contained no restriction on the amount of postponements that could be submitted subsequently. Practically this is what Eskom did, submitting a postponement for multiple stations in 2014 with the then DEA granting 5 year postponements in 2015. Thus with the lapsing of these approvals Eskom has applied for further postponement where required in November 2018 (Tutuka) and March 2019 (Majuba, Kendal, Lethabo, Duvha, Matla, Kriel, Arnot, Hendrina, Camden, Komati). Additional applications for Grootvlei, Acacia, Port Rex, Medupi and Matimba were submitted in November 2019 and these latest applications are presently being updated. In respect of Medupi and Matimba the detailed history is as follows. In February 2014 Eskom's Matimba and Medupi Power Stations submitted applications requesting postponement from the compliance timeframes for the 'existing' and 'new plant' emission limits for SO_2. These postponements were requested based on results of spot emission tests conducted at Matimba Power Station, and calculations conducted at Medupi Power Station based on the expected Sulphur content of the coal, which indicated that both stations would, at times, not be able to comply with a daily limit of 3500mg/Nm^3. The applications for postponement of the existing plant SO_2 limit were rejected by the authorities (although postponement of the new plant limit was granted from 2020). The availability of new evidence in the form of continuous emission monitoring outputs at both Matimba and Medupi Power Stations confirmed that infrequent exceedances of the SO_2 limit of 3500 mg/Nm^3 are indeed taking place. For this reason, Eskom in 2017

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	requested postponement of the existing plant limit for SO_2 and requested a more lenient daily limit of 4000 mg/Nm^3 or 3500 mg/Nm^3 monthly for both stations. Postponement decisions granting both stations monthly limits of 3500mg/Nm^3 were issued by the NAQO in September 2018. It is therefore incorrect and misleading to suggest that Eskom regards it as its right to enjoy an effective "blanket exemption" from the MES. Eskom has had to make use of the legal mechanisms granted to it by statute to, on the one hand, plan for and where possible implement the required upgrades and retrofit installations and on the other hand apply for postponement where this is not feasible in the legislated timeframes, all so as to allow for compliance with the law in a phased and prioritised approach. **Exemption** As regards exemptions, the Minister responsible for Environmental Affairs is legally entitled to grant an exemption from the application of a provision of NEMAQA, as expressly provided for in section 59(1) of NEMAQA. Previously, Eskom had only made use of the transitional arrangements allowing for the postponement of the MES as discussed above. Eskom's reservation of the use of the exemption mechanism contained in section 59(1) of NEMAQA cannot be construed as a waiver of its rights. In fact, to the contrary, Eskom, indicated its views on the potential to utilise this legal mechanism upfront, as you note in your submission. Furthermore, Eskom's reservation of the use of this mechanism cannot be construed as Eskom conceding or accepting the views expressed by the DEFF (which was then known as the Department of Environmental Affairs) back in 2013, on the issue. In the 2013 statement, attached as Annexure "1", the Department provides that "*it is clear that no exemptions may be granted from a provision of section 22 (Atmospheric Emission License)(sic), among others*". However, it is important to emphasise that Eskom is not seeking an exemption from the application of section 22 of NEMAQA requiring it to secure the required AELs. The ability to apply for such an exemption, exempting a party from the need to secure an AEL, is prohibited in terms of section 59(1)(b) of NEMAQA. Eskom is not seeking an exemption from the need to secure an AEL but rather an exemption from having to comply with the minimum emission thresholds set out in the Minimum Emission Standards.

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	Eskom is justified in requesting this of the Minister as the Minister is legally entitled to grant an exemption from the application of a provision of NEMAQA, as expressly provided for in section 59(1) of NEMAQA. Section 59(1) of NEMAQA provides that any person may, in writing, apply for exemption from the application of a provision of the "Act" to the Minister. Specific exclusions are specified in section 59(1)(b) of NEMAQA which do not apply to Eskom and do not form a part of the application. The "Act" is defined in section 1 of NEMAQA to include any regulations made in terms of NEMAQA. The Minimum Emission Standards are included in such a regulation, the NEMAQA Listed Activities Regulations. Accordingly, it is permissible to apply for an exemption from the application of a provision of these NEMAQA Listed Activities Regulations. Specifically, it is permissible to apply for an exemption from the application of the emission limits imposed by these regulations by way of the Minimum Emission Standards. Further, much has changed in the regulatory framework since 2013 when this statement was made. Thus, your reliance on a 7-year old statement allegedly reflecting the DEFF's alleged opinions on the applicability of the exemption mechanism to Eskom are misplaced. Moreover, as you are aware and do not appear to refute in your submissions, it is indisputable that the amendments to the Air Quality Framework and the 2018 Amendments to the NEMAQA Listed Activities in 2018 attempted to introduce significant changes to the regulatory framework governing postponements. Eskom disputes your submission to the extent that you suggest that Eskom was aware since 2010 that it would not be able to apply for postponements from both the existing and new plant standards. While Eskom has been exploring the feasibility of compliance with both existing and new plant MES since the MES were published in 2010, the process has been stalled by financial and other constraints at Eskom, which you are no doubt well aware of as such factors have been extensively published in major news sources. Thus, Eskom has been exploring feasibility, but has been utilising the postponement mechanism available to it to-date to allow it to operate lawfully during this period. It cannot be said or even implied that there has been neglect or an express intention on Eskom's part to disregard the regulatory framework.

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	The benchmark / goal post in respect of sulphur dioxide in the MES was shifted in relation to existing plants as recently as March 2020. The moving benchmarks create regulatory uncertainty and are characteristic of the regulatory changes in relation to the MES for the past ten years. This does not assist Eskom in securing the necessary funding for FGD and is not conducive to the smooth running and effective planning of the future of the Medupi and Matimba plants. Eskom notes that the approach adopted towards the MES to date and the uncertainty referred to above potentially threatens the rule of law and is potentially inconsistent with the Constitution. Eskom reserves its rights to exercise the remedies that are available to it in this regard. Despite the regulatory uncertainty described above, Eskom has consistently attempted to use legal mechanisms available to it throughout the changing regime. Furthermore, Eskom has done so in a transparent manner, consistently meaningfully engaging with I&APs throughout all of its applications. **<u>Your opinion of the performance of the Air Quality Directorate</u>** You state that Eskom's approach to-date is a "reflection of how the Air Quality Directorate within the Department of Environment, Forestry and Fisheries (the "Department") has performed over the last decade, which has largely contributed to the failure of air quality governance in the 3 priority areas of the Republic." Eskom disagrees with your opinion of the Air Quality Directorate. Eskom is concerned with your selective reliance on the opinions of the regulatory authorities who are tasked with constitutional responsibilities to manage and enforce the air quality regulatory framework. How should Eskom read your statement above with your previous reliance on the DEFF's opinion in 2013 regarding the alleged non-availability of the exemption mechanism? The selective and contradictory approach to, on the one hand praising DEFF and on the other hand bemoaning their apparent failures impacts the credibility of the submissions that are made and are interpreted as being opportunistic and disingenuous.
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	In light of what we say in response to your comments at paragraph 2 above, it is incorrect and misleading to conflate the exemption mechanism with the postponement mechanism. Eskom has had to make use of the legal mechanisms granted to it by statute to, on the one hand, plan for and where possible implement the required upgrades and

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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.	retrofit installations and on the other hand apply for postponement where this is not feasible in the legislated timeframes, all so as to allow for compliance in a phased and prioritised approach. This phased and prioritised approach is consistent with the principle of sustainable development, which as you note later, underpins the entire environmental and air regulatory framework. Eskom recognises the need to transition to a lower-carbon economy, however, Eskom's financial and budgetary constraints make it difficult to implement FGD (in addition to the other impacts that militate against the use of FGD technology including environmental issues and water constraints). Decommissioning both Medupi and Matimba immediately, as you suggest, is also not a viable option as it will jeopardise the energy and electricity security of millions of South Africans and will effectively cripple the South Africa economy. Whilst we appreciate your comments, engagements and concerns, we note that your proposed alternative, namely to shut down Matimba and Medupi, is not in keeping with the principles of sustainable development. Your comments in paragraph 2 supports Eskom's submission above as you concede the point that the regulatory framework changed as a result of the 2018 Amendments. It is telling that you rely on this version of the MES to suggest that "no postponements beyond April 2025 are permitted" (which we deny) because this suggests that no previous prohibition existed in the MES. Despite these changes, Eskom has remained consistent and transparent in its approach. And has now had to consider alternative legal mechanisms available to it, including the exemption application.
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, irrespective of whether it meets the other qualifying criteria to make 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". It is high time that decision-makers hold Eskom to account for its severe impacts on human health and wellbeing, and continued willful disregard of	It is denied that Eskom has ever regarded the MES applications as a "mere formality" as you suggest. Eskom, with significant effort and expense, has ensured that proper, legally acceptable and scientifically motivated MES applications are made. Eskom has worked hard to ensure fair and transparent public participation processes were followed in preparing the applications as illustrated in the multiple meetings and comments received and responded to. It is unfair and disingenuous to lift a single phrase from the entire expanse of the voluminous MES applications to paint a picture that Eskom has been dishonest. The claim that power stations do not harm human health must be read in the context of the

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– even disdain for - the law. We call upon NAQO to refuse all non-compliant MES applications and stand up for the health of the people of South Africa.	applications that were made. When read in the entirety of the applications that were made, Eskom is of the view that the impacts of its emissions on human health are clearly and fairly reflected in Eskom's present MES applications and are supported by the technical studies that accompanied these MES applications. We similarly call on the decision makers to not be drawn into any attempts to simplify the issue through reliance on out-of-context extracts but rather to consider the detailed technical reports submitted on behalf of Eskom as well as any interested and affected parties as part of their sustainability enquiry. The emotive language that is employed by the LAC to create atmosphere in its comments and the untruthful allegations that Eskom "wilfully" disregards the law, or has "disdain" for the law, is not in the spirit of meaningful engagement, nor is it accurate or correct and Eskom takes exceptions to these allegations. As described above, Eskom has been consistent and transparent in its approach. The framework and the supporting regulations make specific provision for applications for postponement, suspension or alternative limits and Eskom believes that it is thus legally entitled to make its application for the decision makers to rule on the matter as it has done successfully before. Eskom also believes that it is lawfully entitled to make application for an exemption and is engaging with the Minister in this regard, who is the competent authority and decision-maker in respect of such an application. Eskom recognises the need to transition to a lower-carbon economy. Running parallel with the postponement and/or exemption processes, Eskom is putting together a Just Transition Strategy. Decommissioning both Medupi and Matimba immediately, as you suggest in your comments, is not a viable option as it will jeopardise the energy and electricity security of millions of South Africans and effectively cripple the South Africa economy. Whilst we appreciate the LAC's comments, engagements and concerns, we note that your proposal is not in keeping with the principles of sustainable development. The LAC's call for the NAQA to "stand up for the health of the people of South Africa" must be seen in the context of the environmental right, which recognises sustainable development. The pillars of sustainable development must be equitably balanced. The COVID-19 pandemic has illustrated government's commitment to human health in South Africa, and it has also demonstrated that one pillar (if health is considered as part of the environmental pillar, which has not been directly acknowledged in the Constitution nor

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	by the courts) cannot simply override the others. All pillars must be considered. Whilst Eskom agrees that human health is a fundamental aspect of sustainability and certainly falls within the environmental pillar of sustainable development, socio-economic development must be considered as well and equitably balanced. We recognise that this is not an easy task, but LAC's approach to oversimplify the issues and give heightened precedence to one pillar of the sustainable development balancing act, which is characteristic of all of its comments on Eskom's applications thus far, is not in keeping with the Constitution and the human rights enshrined therein. Eskom plays a fundamental role in South Africa, both in ensuring energy security to millions of South Africans in redressing the discrimination of the past that prioritised access to and energy security for certain sectors of society at the expense of others. Eskom's important role in the electricity industry enables the South African economy as a whole. Eskom is required to ensure accessibility, affordability and energy security for all South Africans and its contribution to the realisation of other human rights, including equality and dignity need to be recognised and taken into account in the sustainability enquiry.
Overview of the LAC's opposition to Medupi and Matimba's alternative limit applications	
5. The tables below summarise the requests for alternative emission limits at Matimba and Medupi previously granted, as well as the current applications *Medupi - Requested Alternative Emission Limits*	Many thanks for your comment.

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Pollutant Name	New Plant MES (mg/Nm^3)	Previously Granted Limit (mg/Nm^3)	Limit Requested (mg/Nm^3)	Timeframe Requested
Sulphur Dioxide - SO_2	500 by 1 April 2020 (Daily)	3,500 until 2025 (Monthly)	4,000 (Monthly)	2020 - 2030
			1,000 (Monthly)	2030 - Decommissioning

Matimba – Requested Alternative Emission Limits

Pollutant Name	New Plant MES (mg/Nm^3)	Previously Granted Limit (mg/Nm^3)	Limit Requested (mg/Nm^3)	Timeframe Requested
Particulate Matter - PM	50 by 1 April 2020 (Daily)	N/A	50 (Monthly)	2020 - Decommissioning
Sulphur Dioxide - SO_2	500 by 1 April 2020 (Daily)	3,500 until 2025 (Monthly)	4000 (Monthly)	2020 - Decommissioning
Oxides of	750 by 1 April	N/A	750 (Monthly)	2020 -

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Nitrogen - NOx | 2020 (Daily) | | | Decommissioning	
6. Through these alternative emission limit applications at Medupi and Matimba power stations, Eskom unlawfully seeks permission to circumvent South Africa's critically important air pollution laws that exist to give effect to several fundamental human rights enshrined in the Constitution of the Republic of South Africa, 1996 (the "Constitution") - and to do so indefinitely. This is tantamount to an exemption from the MES and we submit that it is unlawful. The Life After Coal campaign reiterates its unequivocal objection to these applications as their approval would be regressive and violate the National Environmental Management Act, 1998 (NEMA), AQA, the National Framework for Air Quality Management, 2017, and the Constitution.	Please see our responses to paragraphs 2, 3 and 4 above.
7. The purpose of this written submission, as part of 'phase 2' of the public consultation process of these alternative limit applications, is the following: 7.1 **to record that we reiterate and stand by our objections in the written comments submitted in January 2020 ("January 2020 objections")**, on behalf of the Life After Coal campaign, in response to the Background Information Document ('phase 1') for these alternative limit applications for the Medupi and Matimba power stations; 7.2 to highlight that the atmospheric impact reports for both Matimba and Medupi demonstrate that Eskom's requested alternative limits would **cause significant exceedances of hourly and daily national ambient air quality standards (NAAQS) for SO2 at <u>every</u> sensitive receptor until 2030**; 7.3 to submit that these applications should be postponed as there has been **inadequate consultation with affected communities**, especially those residing in close proximity to Medupi and Matimba power stations; and 7.4 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**	Many thanks for your comment. We respond to each of these comments extensively below in turn.

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resources while promoting *justifiable* economic and social development, in accordance with section 24(b)(iii) of the Constitution. [LAC's emphasis].	
8. The following submission uses the same abbreviations and defined terms as used in the January 2020 objections.	Noted.
January 2020 objections	
9. The Life After Coal campaign reiterates the content and submissions in our January 2020 objections. By and large, the objections remain applicable to these alternative limit applications, which now include the updated and overdue atmospheric impact reports (AIR) prepared for both Medupi and Matimba power stations. In particular, we emphasise our objections addressing the non-compliance with the NAAQS in the WBPA, that these applications for weaker alternative standards amount to impermissible exemptions from compliance with the new plant MES, and that alternative emission limits that are in effect weaker than the existing plant MES, may not be considered, let alone granted.	As you have indicated, the framework and the supporting regulations make specific provision for applications for postponement, suspension or alternative limits (and exemptions in terms of NEMAQA) and Eskom believes that it is thus legally entitled to make its application for the decision makers to consider and decide. We reiterate our responses to your submissions in paragraphs 2-4 above.
10. We also specifically refer to paragraph 44 in our January 2020 objections, addressing the purported reasons for these alternative limit applications set out in Eskom's November 2019 "application reports" for Medupi and Matimba power stations. As Eskom continues to rely on the same reasons reflected in its 2013 MES postponement applications, and more recently, in its pending 2019 applications to postpone and/or suspend compliance with the MES for 10 of its coal-fired power stations, we continue to stand by, and reiterate, our 2019 objections. We presume that the NAQO is already in possession of these 2019 objections, as well as the supporting expert assessments; however, we will gladly re-submit these documents if required.	Noted.

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MES exemption applications are legally impermissible 11. In the notification letter issued on 27 July 2020 by Environmental Impact Management Services (EIMS), we noted, with grave concern, that "[w]hilst Eskom intends to submit the alternative emission limit application in terms of the Minimum Emission Standards referred to above it may also be required to submit an application for exemption from compliance to these standards in terms of section 59(1) of the National Environmental Management: Air Quality Act." (our emphasis). During the virtual publication participation meeting held on 20 August 2020, Eskom confirmed that it was "engaging with the Minister" with regard to an exemption application. Eskom can, however, be in no doubt that exemptions are legally impermissible. This has been reiterated to it in multiple public fora (including in Parliament) and the List of Activities makes clear that facilities that cannot comply with new plant MES by April 2025, cannot operate beyond this date, unless they have obtained a once-off suspension of compliance and will be decommissioned by the end of March 2030. No amount of "engagement" will legitimise exemptions from the law.	As discussed in our response in paragraph 2 above, a distinction must be drawn between postponement applications and an exemption application. As regards an exemption, the Minister responsible for Environmental Affairs is legally entitled to grant an exemption from the application of a provision of NEMAQA, as expressly provided for in section 59(1) of NEMAQA. In this regard, Eskom submits that none of the express exclusions contained in section 59 are applicable in the circumstances, since Eskom is not requesting to be exempted from the need to obtain an AEL and consequently it can permissibly make an exemption application to the Minister, who is the competent authority. The LAC does not justify why it believes that "exemptions are legally impermissible". The LAC simply suggests that exemptions are impermissible because the authorities say so (and the LAC) say so. But as discussed above in our response to paragraph 2 above, reliance ought not to be placed on a 7-year old statement by the DEFF (Annexure 1), which respectfully does not purport to constitute law and does not bind the DEFF (or even the Minister) on its opinion. Furthermore, the DEFF's statement was made when the pre-2018 Amended version of the MES was in place. The LAC used a similar tactic in its January 2020 objections. At paragraph 42, the LAC stated: *"In this regard, the NAQO has made her position clear when opposing Sasol's May 2014 High Court application in an attempt to set aside parts of the MES. Although the subject here is Eskom, the principle remains:* *'[a]chieving ambient air quality standards (in the sense of bringing ambient air quality down to below the prescribed levels) is not an exercise in economics nor is it a matter for negotiation with the Applicants: that fundamental right [section 24 of the Constitution] may not be infringed by Sasol or any of the other Applicants and their argument or defence, that they are infringing that environmental right because it costs too much to adapt their existing plants and bring them up to standard, must be rejected out of hand.'"* Our response to that paragraph is to state that Sasol's May 2014 High Court application that the LAC referred to was never fully ventilated or decided in a court as the case was

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	withdrawn. Consequently, the LAC's reliance on the abovementioned quote as if it appeared in a judgment is misleading (this is a similar tactic to the LAC's use of the 2013 statement by the DEFF in Annexure 1). Whilst the NAQO is charged with the responsibility to be responsible for coordinating matters pertaining to air quality management in the national government (in terms of section 14 of NEMAQA), overarching environmental legislation aims to achieve sustainable development, which includes economic and social considerations. Whilst it is commendable and understandable why the NAQO would have made such a statement given the NAQO's legislative responsibilities, such responsibilities cannot be viewed out of the context of the wider environmental legislative framework and constitutional imperatives. The NAQO also has a responsibility to ensure that her approach is in line with the principle of sustainable development in making any decision. Previously, Eskom had only made use of the transitional arrangements allowing for the postponement of the MES as discussed above. Eskom's reservation of the use of the exemption mechanism contained in section 59(1) of NEMAQA cannot be construed as a waiver of its rights. In fact, to the contrary, Eskom, indicated its views on the potential to utilise this legal mechanism upfront, as you note in your submission. Furthermore, Eskom's reservation of the use this exemption mechanism cannot be construed as Eskom conceding or accepting the views expressed by the DEFF back in 2013, on the issue.
12. Eskom's alternative limit applications amount to an unlawful exemption from the rule of law, and it defeats the strict protection regime laid out in the AQA, List of Activities, and 2017 Framework. It would also be a clear violation of section 24 of the Constitution. Similarly, and as we have always maintained, an exemption application, whether in terms of section 59(1) of the AQA or any other provision, is also impermissible, as it would defeat the strict protection regime laid out in the AQA, List of Activities and 2017 Framework, not only violating section 24 of the Constitution, but several other human rights that depend on a healthy environment. Any granting of exemptions will face stern opposition.	Eskom respectfully disagrees with your opinions. As regards the rule of law, the shifting benchmark / goal posts in relation to the MES and postponement applications, especially in respect of sulphur dioxide, which was shifted in relation to existing plants as recently as March 2020, creates regulatory uncertainty and are characteristic of the regulatory changes in relation to the MES for the past ten years. This does not assist Eskom in securing the necessary funding for FGD and is not conducive to the smooth running and effective planning of the future of the Medupi and Matimba plants. Eskom notes that the approach adopted towards the MES to date and the uncertainty referred to above potentially threatens the rule of law and is potentially inconsistent with the Constitution. Eskom reserves its rights to exercise the remedies that are available to it in this regard. Section 24 of the Constitution entrenches the principle of sustainable development. Eskom recognises the need to transition to a lower-carbon economy, however, Eskom's

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	financial and budgetary constraints make it difficult to implement FGD (in addition to the other impacts including environmental issues and water constraints that militate against implementing FGD). Decommissioning both Medupi and Matimba immediately, as you suggest in your comments, is also not a viable option as it will jeopardise the energy and electricity security of millions of South Africans and effectively cripple the South Africa economy. Whilst we appreciate the LAC's comments, engagements and concerns, we note that the LAC's proposal is not in keeping with the principles of sustainable development. We dispute the LAC's allegation that the granting of postponement applications and/or an exemption would infringe the environmental right enshrined in section 24 of the Constitution and several other human rights. The environmental right provides that *"Everyone has the right… to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that… (iii) secure ecologically sustainable development and use of nature resources while promoting justifiable economic and social development."* The pillars of sustainable development must be equitably balanced. One pillar cannot simply override the others, otherwise other human rights might be violated. All pillars must be considered. Whilst Eskom agrees that protection of the environment is a fundamental aspect of sustainability, socio-economic development must be considered as well and equitably balanced. We recognise that this is not an easy task, but LAC's approach to oversimplify the issues and give heightened precedence to one pillar of the sustainable development balancing act, which is characteristic of all of its comments on Eskom's applications thus far, is not in keeping with the Constitution and the human rights enshrined therein. Eskom plays a fundamental role in South Africa, both in ensuring energy security to millions of South Africans in redressing the discrimination of the past that prioritised access to and energy security for certain sectors of society at the expense of others. Eskom's important role in the electricity industry enables the South African economy as a whole. Eskom is required to ensure accessibility, affordability and energy security for all South Africans and its contribution to the realisation of other human rights, including equality and dignity. The NAQO is required to take into account the sustainable development balancing act in any decision she takes, given the imperatives in the

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	overarching environmental legislative framework, as well as the specific imperative contained in the preamble to and objects of NEMAQA in section 2. Eskom reserves its rights to make an application for exemption, as expanded on in our response to paragraph 11 above.
13. In a 2013 statement, attached as Annexure "1", the Department confirmed that *"it is clear that no exemptions may be granted from a provision of section 22 (Atmospheric Emission License)*(sic), *among others"*. The Department also notes in the statement that developing the List of Activities constituted an *"elaborate consultation and participation process. . . in which all affected stakeholders (including Eskom) were part of these processes and made contributions regarding limits that are achievable with the view of upholding the constitutional right of all people in the country to an environment that is not harmful to health and well-being."* Notwithstanding the need for the relatively weak-MES to be strengthened, we call on the Department, at the very least, not to retreat from its firm position in this statement; and to summarily reject any attempts by Eskom to apply for exemption from compliance with the MES, using section 59 of the AQA, or otherwise.	We have responded to your comment and misplaced reliance on a 2013 statement by the DEFF in our responses to paragraphs 2 and 11 above.
14. Moreover, we note that one of the additional factors which prohibits the Department from considering these indefinite weaker alternative limits, and/or a section 59 exemption application, is one of the reasons behind the Department's March 2020 decision to double the permissible SO2 MES limit from 500mg/Nm3 to 1000mg/Nm3 for existing solid-fuel combustion plants; it is common-cause that this accommodates all of Eskom's coal-fired stations and Sasol's coal-fired boilers, in particular. In a letter from the Department, dated 20 July 2020, containing the reasons for this decision, it is stated that: "*When implemented, the revised limit of 1000mg/Nm3 will achieve a 58% reduction in total emissions. It will significantly improve compliance compared to the current state of air, in which sulphur dioxide emissions are measured at 3500/Nm and above."*	There is no direct reference to Eskom and Sasol, as you suggest, in the DEFF's letter that you refer to. Furthermore, we dispute your suggestion that "it is common-cause that this accommodates all of Eskom's coal-fired stations". To the contrary, the March 2020 amendment that you refer to clearly does not accommodate Eskom's coal-fired stations, hence the need for a postponement application and/or exemption. If anything, the most recent amendment to the MES that you refer to in March 2020 demonstrates and proves Eskom's argument regarding the continued uncertainty in relation to the MES, even to this day, which threatens the rule of law. Eskom reserves its right to challenge the March 2020 Amendment.

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	From a technical perspective while the 1000 mg/Nm^3 SO_2 limits is more lenient than the previous 500 mg/Nm^3, the average SO_2 reduction required from the power stations will be in excess of 60%. This will still necessitate the need for post combustion SO_2 abatement technologies to be retrofitted. It remains Eskom's view that the dry-type desulphurisation technologies will not be able to achieve the reductions required to achieve the 1000 mg/Nm^3 and this can only be done with the semi-dry or wet type technologies. Nevertheless, Eskom intends issuing an RFI to seek a more formal response from the market with respect to what is achievable with the respective technology type, considering a range of SO_2 removal efficiencies including the 500 mg/Nm^3 limit. As indicated in the application, this will assist in making a more informed decision with respect to the Medupi FGD project in particular.
15. We continue to dispute the lawfulness of this decision to double the 2020 SO_2 MES limit, on various grounds, but for the purposes of this submission, we submit that granting MES exemptions, or permitting alternative weaker limits for SO_2 - at the majority of Eskom's coal-fired power stations - will clearly not achieve the claimed 58% reduction in total emissions, making the above decision irrational, unreasonable, and therefore invalid. This is especially the case for Medupi and Matimba, considering the AIR findings presented below.	It is submitted that to tease out a single justification for a decision, such as the one that has been relied upon by the LAC, and then to wholly rely on it as the sole reason for an administrative decision, whilst ignoring the multitude of potentially other applicable reasons for the decision is again opportunistic and misplaced. Eskom submits that a decision to refuse postponement applications in respect of Medupi and Matimba given all of our responses to the LAC's objections would be irrational, unreasonable, unlawful and therefore invalid.
16. Despite our repeated caution in 2013 about the danger of Eskom's intended "rolling postponement" approach, government still gave Eskom the proverbial inch during the initial implementation of the MES regime, and it has been allowed to take a irrecoverable mile, resulting in significant and unjustified costs to public health and South Africa's constitutional project; costs that the most vulnerable, in particular, are still having to bear. Our plea is that the Department does not continue to sanction Eskom's recalcitrant approach to air pollutions laws, through alternative limit applications or exemption applications.	We have responded to your comments above, especially at paragraphs 2, 4, 12 and 15.

Comment	Response
Air quality in the WBPA is non-compliant with NAAQS	
17. The List of Activities and 2017 Framework allow the NAQO, after consultation with the licensing authority, to grant an alternative emission limit or emission load, provided there is "material compliance" with NAAQS in the area for pollutant or pollutants applied for. We reiterate that we strongly dispute that these provisions provide for a separate set of circumstances permitting facilities to apply for alternative emission limits in circumstances where they will not meet the 2015 MES by April 2020 and/or the 2020 MES by April 2025 (barring those facilities which have obtained suspensions of compliance; in which event, they are required to comply at least with 2015 MES until they are decommissioned, at least before April 2030). In the alternative, if this is indeed the intention of the List of Activities, we submit that it is clearly unconstitutional and our clients reserve their rights to challenge it.	As you have indicated the framework and the supporting regulations make specific provision for applications for postponement, suspension or alternative limits and Eskom believes that it is thus legally entitled to make its application for the decision makers to rule on the matter as it has done successfully before. Kindly refer to our previous comments on sustainable development and Eskom's Just Energy Transition Strategy above. We submit that the air quality framework must give effect to principles of sustainable development, otherwise it runs the risk of being unconstitutional.
18. In any event, the AIRs for Matimba and Medupi power stations both clearly demonstrate that each plant would independently cause material non-compliance with the relevant NAAQS in the area under the alternative limits scenario (monthly limit of 4000 mg/Nm^3).	Firstly it should be noted that the operation of the two plants at 4000 mg/Nm^3 is a ceiling limit and not a concentration that the power plants would operate at continuously. Conservatively, these ceiling limit concentrations were simulated assuming they are emitted continuously (which does not happen), thus providing a worst-case prediction of impacts. The dispersion modelling completed for the applications predicts: (a) Medupi Power Station operations only: Simulated hourly and daily SO_2, ground level concentrations for Alternative Emission Limits exceeds the NAAQS off-site at residential sensitive receptors within the study area. Simulated annual SO_2 concentrations are below the NAAQS at all residential sensitive receptors within the study area for Alternative Emission Limits. (b) Matimba Power Station operations only: Simulated hourly and daily SO_2, ground level concentrations for Alternative Emission Limits exceeds the NAAQS off-site at residential sensitive receptors within the study area. Simulated annual SO_2 concentrations are below

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	the NAAQS at all residential sensitive receptors within the study area for Alternative Emission Limits. It was also noted in the AIR that the dispersion modelling does over prediction high SO_2 levels especially in regards to shorter time periods such as hourly and daily results. The longer time periods such as the annual averages (and which are in compliance to the NAAQS standards) are generally considered more closely aligned to actual results. A point illustrated when the modelling of actual emissions results in predictions of SO_2 non-compliance at the monitoring stations while non-compliance of the SO_2 standards is not recorded at the stations historically, Given the above it is not certain that the practical operation of the plant at the requested limits would result in "material" non-compliances to the SO_2 standard for hourly or daily averaging periods. "Material" compliance can be expected in respect of the annual SO_2 averaging period however.
19. Table 5-14 of the AIR supporting Matimba's application shows that emissions from the station, based on Eskom's requested alternative limit, would independently cause material non-compliance with daily SO_2 NAAQS at almost every sensitive receptor and exceedances of monthly SO_2 standards at many sensitive receptors. By contrast, there would be full compliance with all SO_2 NAAQS if the new plant MES (1000 mg/Nm3) is met.	Responded to in 18 above.
20. Table 5-14 of the AIR for Medupi shows that emissions from the station, based on Eskom's requested alternative limit for SO_2, would independently cause non-compliance with hourly and daily SO_2 NAAQS for 67% of the sensitive receptors. By contrast, there would be full compliance with all SO_2 NAAQS if the new plant MES is met.	Responded to in 18 above.
21. Furthermore, the reports show that the air quality significantly worsens when considering SO_2 emissions from both plants under the alternative limit scenario. Table 5-	The AIR does indicate that "Simulated hourly and daily SO_2, ground level concentrations for Baseline Emissions, Future Baseline Emissions, Alternative Emission Limits (2020-

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23 in both Medupi's and Matimba's AIR demonstrates that Eskom's requested alternative limits would cause significant exceedances of hourly and daily SO_2 NAAQS at every sensitive receptor until 2030. In other words, there would be 100% non-compliance. Again, by contrast, should these plants meet the new plant MES, there would be full compliance with SO_2 NAAQS.	2030) and Alternative Emission Limits (post 2030) exceed the NAAQS off-site at numerous sensitive receptors." However, it also notes that " Simulated hourly, daily and annual SO_2 concentrations are **below** the NAAQS within the study area for New Plant Minimum Emission Standards " As discussed in 18 above the dispersion modelling does over prediction high SO_2 levels especially in regards to shorter time periods such as hourly and daily results. The longer time periods such as the annual averages (and which are in compliance to the NAAQS standards) are generally considered more closely aligned to actual results. A point illustrated when the modelling of actual emissions results in predictions of SO_2 non-compliance at the monitoring stations while non-compliance of the SO_2 standards is not recorded at the stations historically, Given the above it is not certain that the practical operation of the plant at the requested limits would result in "material" non-compliances to the SO_2 standard for hourly or daily averaging periods. "Material: compliance can be expected in respect of the annual SO_2 averaging period however and this is confirmed with actual monitoring.
22. Based on these findings, and considering the health impact caused by short-term exposure to low concentrations of SO_2, as described in the 2020 objections, it is legally and morally inconceivable that the NAQO could even consider granting these alternative limit applications. We reiterate our submission that no industries operating within the WBPA (nor in any other priority areas) should be permitted to apply for alternative limits. Granting such applications would, evidently, worsen the high levels of air pollution in the WBPA, and its dire impact on human health, well-being, and the environment, which would, in turn, make it even more difficult for the Priority Area to meet its goals of ensuring compliance with NAAQS.	The LAC's submission that no industries operating within the WBPA (nor in any other priority area) should be permitted to apply for alternative limits is inconsistent with applicable law. As you have indicated the framework and the supporting regulations make specific provision for applications for postponement, suspension or alternative limits and Eskom believes that it is thus legally entitled to make its application for the decision makers to rule on the matter as it has done successfully before. Kindly refer to our previous comments on sustainable development and Eskom's Just Energy Transition Strategy above. We submit that the air quality framework must give effect to principles of sustainable development, otherwise it runs the risk of being unconstitutional. We also highlight that the ambient air quality monitoring undertaken around Lephalale has shown material compliance in respect of SO_2 and NO_2, and that any non-

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	compliances for PM are probably linked to low level sources rather than high level sources such as the Eskom's stack stations. Eskom submits that a decision to refuse postponement applications in respect of Medupi and Matimba given all of our responses to the LAC's objections would be irrational, unreasonable, unlawful and therefore invalid.
23. Furthermore, SO2 and NOx, as primary pollutants, also react through chemical and physical processes in the atmosphere, to form secondary PM2.5. This formation contributes significantly to total ambient PM2.5, causing severe health impacts. Eskom itself is aware of, and acknowledges, this in its pending 2019 applications to postpone and/or suspend compliance with the MES for 10 of its coal-fired power stations. The effect of this accumulation will be an increasing health risk for a large part of the Waterberg District, and, we submit, that this will more than likely perpetuate the state of non-compliance with NAAQS in the WPA and the continued breach of section 24 of the Constitution.	See previous response to paragraph 22. Eskom is aware of the significance of secondary particulates and these are explicitly included in the AIR and included in the dispersion model results (see section 5.1.4.3). The simulated PM_{10} and $PM_{2.5}$ concentrations reported thus include direct emissions of PM and secondary particulates formed from Eskom's emissions. The modelling also makes the highly conservative assumption that all PM_{10} is actually $PM_{2.5}$, a known over estimate. The modelling predicts that Eskom's emission would be in compliance with the PM_{10} and $PM_{2.5}$ standard under all the scenario's modelled at all sensitive receptors. The occurrences of exceedances of these pollutants in the historical ambient data illustrates the significance of emissions sources beyond Eskom e.g. local mines and brick works.
Inadequate consultation with affected communities	
24. In addition to our submission in the 2020 objections, that this piecemeal application approach is procedurally flawed, ELA's community partners in the Waterberg District also object to these alternative limit applications on the basis that there has been inadequate consultation with communities who would be most affected by the aggravated levels of air pollution.	We disagree with your comment that Eskom's "piecemeal application approach is flawed". The application process is iterative and Eskom is entitled to supplement its application. Eskom submitted the November 2019 documents as applications and has supplemented them with updated dispersion modelling and public participation. This public participation process provides a further opportunity for public participation in respect of the updated dispersion modelling and Eskom's application motivation. In terms of your objection at paragraph 5 of your January 2020 comments and the comment here that Eskom is undertaking a piecemeal application, it is unclear why the

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	LAC is of the view that the moment where a postponement "application" crystallises is the moment immediately prior to the commencement of the public participation process when an application is first considered. Neither do you refer to any specific provisions that disallow Eskom to supplement its application prior to ultimate submission. Eskom submits that in terms of the NEMAQA Listed Activities, an "application" crystallises once all the relevant documents, studies and public participation process, have been met, which would include the supplemental information and completion of the related public participation process. In terms of your comments regarding inadequate consultation with communities in close proximity to Medupi and Matimba, Eskom denies that the public participation process has been procedurally flawed. As you note below, the COVID-19 pandemic has posed difficulties and obstacles to the normal working conditions of most companies, Eskom included. To ensure that the least disruption is caused, government has been publishing sector-specific Directions to manage the devastating effects of the pandemic on each sector without crippling their administration and working conditions. The COVID-19 pandemic has therefore resulted in many compromises. As you note below, EIMS have been guided by the Directions issued by the Department, in terms of the Disaster Management Act, 57 of 2002. Eskom has tried to ensure that the integrity of the public participation process is not jeopardised in relation to its applications. In this regard, the following meetings were held: • Public Open Day: Held on the 29th January 2020 from 10am to 7pm at the Mogol Club in Lephalale Town. • Virtual Public Meeting: Held on 20th of August 2020 from 10:00 to 12:00. • Virtual Focus Group Meeting: Held on 20th of August 2020 from 14:00 to 16:00. • Supplementary Virtual Meeting: 26th of August 2020 from 16:00 to 18:00. Notification of the second phase of consultation meetings was by way of press notices, sms and emails to registered I&AP's (including local councillors). Whilst anyone was able to attend any meeting the focus of the meetings were as follows;

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	• Virtual Meeting 1 – The meeting was held on the 20th of August 2020 from 10:00 to 12:00. In response to the meeting invitations, 55 registrations were received and 52 people attended the meeting. Thirty (30) of those attendees were external to the project and included various members of the community, Ward Councillors, NGOs like yourselves as well as other Organs of State. • Virtual Meeting 2 (Focus Group Meeting): This meeting was held on 20th of August 2020 from 14:00 to 16:00. Organs of state representatives and Municipal representatives were invited to the meeting. The meeting was attended by 19 people. Three (3) of the attendees were external to the project and included 2 representatives from the DEFF and also 1 representative from the Waterberg District Municipality. • Supplementary Virtual Meeting: This meeting was held on the 26th of August 2020 from 16:00 to 18:00. The meeting was attended by 32 people. External Attendees included members of the community and NGOs. Virtual meetings 1 and 2 were set up using the Crowdcast, a platform that is setup like a webinar. The 3rd supplementary meeting was set up using a MS Teams and was setup like a meeting in order to allow more direct verbal interaction with attendees. This meeting was also scheduled at 4pm in an effort to provide other members of the public the opportunity to attend. In our notices of the meeting we indicated if anyone had any challenges with accessing the meeting they should feel free to contact us. We did not get anyone contacting us indicating they have challenges with access to the meeting due to data, for us to be able to determine if we need to make any arrangements for them to access the meeting . It should be noted that whilst the reports were available on the EIMS internet site, hard copies of the report were also made available at the following locations to further allow community access to the documents: • Local ward councillor for Ward 3 (Cllr Nicolaas Hendrik Pienaar) • Local ward councillor for Ward 4 (Cllr Sybil Nieywouldt). • A copy of the full report at the main entrance of Matimba Power Station.

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	• A copy of the full at the Medupi Power Station. Eskom submits that the integrity of the public participation process remained intact despite the pandemic and to the extent that changes had to be made, they were done in line with national government's guidelines and Directions and were consequently reasonable and justified. However, in line with its consistent approach to be transparent, Eskom does not wish to be obstructive. It is beneficial to all parties concerned for the public participation process to be as wide and inclusive as possible.
25. Despite the ongoing State of the National Disaster and restrictions imposed on the public, we understand that EIMS has conducted 3 public participation meetings; however, we have been informed that there was limited representation from, and on behalf of, affected communities, while staff and contractors from the Medupi and Matimba power station were in full attendance. Specifically, the communities from Wards 3 and 4, both within a 30 kilometre radius of Medupi and Matimba power stations, did not to participate in these public participation meetings. In part, this was due to the fact that many community members did not receive information about the meeting.	Kindly refer to our response to paragraph 24 above.
26. Although we acknowledge the procedure followed by EIMS, guided by the Directions issued by the Department, in terms of the Disaster Management Act, 57 of 2002, the lack of attendance from affected community members was apparent. The reality is that many individuals within these affected communities do not have access to internet and constant data, and/or poor network connections mean that individuals are unable to join virtual meetings. It also appears that documents shared with Ward Councillors in Wards 3 and 4, did not filter through these affected communities, during the 30-day comment period.	Kindly refer to our response to paragraph 24 above.
27. It is crucial that the public participation process for an application related to MES leniency, especially these alternative limit applications, which we submit are inherently unlawful with severe implications for communities health and well-being, should ensure adequate, practical and meaningful consultation; this includes sufficient time and the sharing of information for affected individuals to properly engage with the process. We	Kindly refer to our response to paragraph 24 above.

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again refer to the binding directive principles in NEMA, set out in the 2020 objections, which include the pursuit of environmental justice to protect vulnerable and disadvantaged persons, in particular, and that the environment is held in public trust for the people. These affected communities form part of 'the people', and they must be provided with a real opportunity to be heard.	
28. We therefore call for this public participation process for these alternative limit applications for Medupi and Matimba to be postponed until the National State of the Disaster is lifted, to allow for community mobilisation and meaningful engagement.	Kindly refer to our response to paragraph 24 above.
Sustainable development that is consistent with the Constitution	
29. In the Matimba and Medupi "application" documents, 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."*	Noted.
30. We place on record, again, 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. The Mpumalanga Highveld, in particular, has been treated as a sacrifice zone for decades, and considering some proponents' 'coal ambitions' for the area, the Waterberg District	Eskom respectfully disagrees with your opinions. Section 24 of the Constitution entrenches the principle of sustainable development. Eskom recognises the need to transition to a lower-carbon economy, however, Eskom's financial and budgetary constraints make it difficult to implement FGD (in addition to the other impacts that militate against the use of FGD technology including environmental issues and water constraints). Running parallel with the postponement and/or exemption processes, Eskom is putting together a Just Transition Strategy. Decommissioning both Medupi and Matimba immediately, as you suggest in your

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is on the same unsustainable trajectory, which will only exacerbate the existing degradation of the environmental base.	comments, is also not a viable option as it will jeopardise the energy and electricity security of millions of South Africans and effectively cripple the South Africa economy. Whilst we appreciate the LAC's comments, engagements and concerns, we note that the LAC's proposal is not in keeping with the principles of sustainable development. We dispute the LAC's allegation that the granting of postponement applications and/or an exemption would infringe the environmental right enshrined in section 24 of the Constitution and several other human rights. The environmental right provides that *"Everyone has the right… to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that… (iii) secure ecologically sustainable development and use of nature resources while promoting justifiable economic and social development."* The pillars of sustainable development must be equitably balanced. One pillar cannot simply override the others, otherwise other human rights might be violated. All pillars must be considered. Whilst Eskom agrees that protection of the environment (and human health) is a fundamental aspect of sustainability, socio-economic development must be considered as well and equitably balanced. We recognise that this is not an easy task, but LAC's approach to oversimplify the issues and give heightened precedence to one pillar of the sustainable development balancing act, which is characteristic of all of its comments on Eskom's applications thus far, is not in keeping with the Constitution and the human rights enshrined therein. Eskom plays a fundamental role in South Africa, both in ensuring energy security to millions of South Africans in redressing the discrimination of the past that prioritised access to and energy security for certain sectors of society at the expense of others. Eskom's important role in the electricity industry enables the South African economy as a whole. Eskom is required to ensure accessibility, affordability and energy security for all South Africans and its contribution to the realisation of other human rights, including equality and dignity. The NAQO is required to take into account the sustainable development balancing act in any decision she takes, given the imperatives in the overarching environmental legislative framework, as well as the specific imperative contained in the preamble to and objects of NEMAQA in section 2.

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31. Section 24 of the Constitution provides that: *"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).*	Noted.
32. Although we maintain that section 24(a) is 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, and we do not concede that the principle of progressive realisation applies to section 24. The features of section 24 that are also of crucial importance, but are omitted from Eskom's various motivation reports, are "for the benefit of present and future generations" and "justifiable" – 32.1 Eskom's estimation 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, is indicative; while independent studies show that these figures are much higher than Eskom estimates, with 626 equivalent annual deaths attributed to Medupi and Matimba, alone. Such 'collateral fatalities to keep the lights on', can never be justified and this 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; 32.2 we reiterate that, aside from the impending obligations of the MES (at the time), Eskom had knowledge of the direct health impacts of its coal-fired power stations and the pressing need to reduce its emissions, based on studies in 2006, including an Eskom	Eskom is not suggesting a "trade-off", but rather appropriate balancing of the sustainable development enquiry. Please refer to our responses to paragraph 30 in this regard. Your approach suggests a trade-off of economic and social security at the expense of the environment. Eskom has consistently and transparently used mechanisms available to it in terms of the legal framework. If you are of the opinion that the legal framework, which entrenches sustainable development, is flawed (which we deny), then you would need to bring the appropriate remedy. Your suggestion that Eskom's applications and approach to-date are inappropriate, is incorrect since Eskom is simply relying on the legal mechanisms available to it in the legal framework. As regards the emphasis on "the benefit of future generations" and the requirement that economic and social development needs to be justifiable in paragraph 32, Eskom generates approximately 95% of electricity used in South Africa. Should Eskom's applications fail, one of the economic consequences will be the potential closure of its Medupi and Matimba facilities with the precedent being set for its other facilities to be closed as well. With that will come the elimination of 95% of available electrical supply in South Africa. Without the revenue generated from the generation, transmission and distribution of electricity, Eskom is likely to be forced to shut down. It is unclear what alternative energy resource would be available in South Africa at such short notice so as

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Limpopo Health Study, which concluded that "emissions from existing Matimba Power Station operations are estimated to be responsible for 80% of the premature mortality and 50% of the respiratory hospital admissions" and that Medupi "would result in health risks being doubled from 1.5 to 3 premature deaths and from 144 to 300 respiratory hospital admissions per year". Even prior to this study, Eskom - as an organ of state with heightened constitutional duties toward the public then and now - was obliged to ensure that it was implementing the necessary abatement measures to effectively mitigate the known adverse impacts of its coal-fired power stations; and 32.3 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, or avoid compliance altogether using these weaker alternative limits, 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, especially where there is an attempt to circumvent the MES completely, 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.	to satisfy the needs of the South African market. In other words, while Eskom will face grim commercial repercussions if its applications are not granted, those repercussions will occasion additional negative repercussions for all businesses that utilise electricity from Eskom and, consequently, there will be undesirable socio-economic and related undesirable environmental consequences for South Africa as a whole. A potential direct result of the detrimental consequences of not granting the applications will be the inability for society to function as we know it. A closing of Eskom's facilities will directly give rise to the inability for municipalities, large metros, Government Departments, public and private hospitals, schools, water and sanitation infrastructure and defence systems to operate optimally or at all. The knock-on consequences of the lack of electricity to the functioning of South African society and the resulting socio-economic impacts that this will give rise to are significant and will be intergenerational in that they will effect present and future generations. As regards your comment about the rule of law at paragraph 32.3, we agree that any constitutional principle must be construed in line with the rule of law. We are of the view that the shifting benchmark / goal posts in relation to the MES and postponement applications, especially in respect of sulphur dioxide, which was shifted in relation to existing plants as recently as March 2020, threatens the rule of law since it creates regulatory uncertainty and are characteristic of the regulatory changes in relation to the MES for the past ten years. This does not assist Eskom in securing the necessary funding for FGD and is not conducive to the smooth running and effective planning of the future of the Medupi and Matimba plants. Eskom notes that the approach adopted towards the MES to date and the uncertainty referred to above potentially threatens the rule of law and is potentially inconsistent with the Constitution. Eskom reserves its rights to exercise the remedies that are available to it in this regard. Eskom's approach to-date has been grounded in the law and consequently, Eskom submits that its approach does not undermine the rule of law.
33. 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. To this end, we acknowledge and support the Department's	Your comments are noted. We disagree that the DEFF has demonstrated an "unambiguous stance toward Eskom", and on your own version, you contradict this statement. Furthermore, we disagree that these comments, to the extent that they were

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unambiguous stance toward Eskom in its 'Comments and Responses' report, behind the disputed decision to weaken the 2020 SO2 MES limit: *"Your view on what is best for the country is inconsistent with the principles of sustainable development that you mentioned. . .* *Sustainable development is not limited to cost, and as it stands there is a need to reduce sulphur dioxide on the atmosphere to minimize the direct impact and indirect contribution to the secondary formation of particulate matter. This is what is in the best interest of the country in terms of protection of environmental rights."*	made by DEFF, support your imbalanced interpretation of the principle of sustainable development. To the extent that they do, which we deny, we respectfully disagree with the comments expressed. We refer to our response to paragraph 2 above, where we note your selective reliance on DEFF's comments when it suits you. Here is yet another example of your selective reliance, where you have relied on the DEFF's alleged reasoning for a decision that you dispute.
34. We reiterate that we welcome Eskom's recognition that a just transition is needed and the outline of its Just Transition Strategy in the Grootvlei Motivation Report. We also reiterate that this must include 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. In the midst of these alternative limit applications for Medupi and Matimba, it is necessary to add that, as the Life After Coal campaign, we do not consider the circumvention of South Africa's critically important air pollution laws that exist to give effect to several fundamental human rights as an inclusive, transparent, or lawful part of the just transition process.	Thank you for your comment. It is noted. Your opinion on Eskom's Just Transition Strategy can be fully ventilated in that public participation process and we welcome the opportunity to constructively engage with the LAC on this strategy. However, we do not agree with your submissions made in this paragraph and reserve our rights to respond at the appropriate time in this regard. To the extent that you suggest that Eskom is circumventing South Africa's air pollution laws, we strongly deny such an untruthful allegation. To the contrary, Eskom's approach has consistently been transparent and inclusive, and has given priority to the rule of law and sustainable development. Eskom has utilised mechanisms available to it within the legal framework. We refer you to our previous comments above.
35. 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. To the contrary, if the Department were to grant these alternative limit applications, it will, in effect, be authorising additional early deaths, disease and disabilities, which are undisputedly associated with air pollution in the WBPA – let that be at the forefront of your decision making when you apply your mind to this application.	We agree that the competent authorities must apply the principles of sustainable development to Eskom's applications. For the reasons set out above in our responses to the LAC's submissions, as well as the applications as a whole, Eskom submits that sustainable development demands an equitable balancing of environmental, social and economic considerations. The lack of alternatives proposed by the LAC is telling. If the LAC's proposals were accepted, there would be major negative implications for South Africa. Without energy security, South Africans are unable to realise other fundamental human rights and it is submitted that rejecting Eskom's applications would jeopardise and threaten such rights and would have profound unintended consequences for the country, which may include further unemployment, food insecurity, dignity and equality.

Comment	Response
	Consequently, a positive decision in Eskom's favour would be rational, fair, reasonable and lawful.
36. 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.	Your opinion is noted. We call on the relevant decision-makers to accept Eskom's applications to protect constitutional rights and the realisation of sustainable development.