Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

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Dear Forum Members

NATIONAL ENVIRONMENTAL CONSULTATIVE ADVISORY FORUM IN TERMS OF SECTION 3A OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998

1. We write to you as the Centre for Environmental Rights and on behalf of our clients groundWork, Earthlife Africa and the Vaal Environmental Justice Alliance (VEJA).

2. We refer to the following notices:

   2.1. Notice of 12 May 2022 GN 2076 (Government Gazette 46355) ("the Terms of Reference" or "ToR") of the Minister's intention to establish a National Environmental Consultative and Advisory Forum ("the Forum") under section 3A of the National Environmental Management Act, 1998 ("NEMA"). According to the notice, "*the Forum will advise on matters arising from applications for the suspension or postponement of compliance with the minimum emission standards (MES) which were published in terms of section 21 of the National Environmental Management: Air Quality Act, 2004 (AQA) and applications for the issuance of provisional atmospheric emission licences*" (hereinafter referred to as "the s3A process"); and

   2.2. Notice of 18 August 2022 GN 2394 (Government Gazette 46746) ("the appointment notice") to establish the Forum to advise the Minister on matters arising from applications for the suspension and postponement of compliance with the Minimum Emission Standards (MES) and Issuance of Provisional Atmospheric Emission Licences. The appointment notice says that "*the purpose of the National Environmental Consultative and Advisory Forum is to conduct an extensive consultative process with key interested and affected parties to assess and present all significant relevant research and analysis in a public forum for review and interrogation, and to report to the Minister on the outcome. The report will provide the Minister with practical options to resolve the issues arising in respect of non-compliance with the Minimum Emission Standards and applications for the issuance of Provisional Atmospheric Emission Licences, taking into consideration Minister's constitutional and legislative mandate and the country's international commitments, health and wellbeing of people, the energy crisis and the local economic climate*."[1]

[1] At para 2.

3. We congratulate you on your appointment to the Forum and note that the Forum comprises experts with wide-ranging expertise.

4. We record that:

   4.1. While our clients do not expressly dispute the proposed s3A process, as appellants in existing appeal processes regarding suspension or postponement of compliance with the MES, our clients have an interest in this s3A process being conducted in an **expeditious, transparent and fair manner, with full regard to: their rights; the legal obligations imposed on the Minister; as well as the legal obligations of the parties in respect of whom the postponements and suspensions have been sought** – namely Eskom and ArcelorMittal (AMSA). The s3A process must in no way prejudice the rights and interests of our clients, and affected communities; and

   4.2. The context in which this process is taking place is relevant, noting that a number of the facilities to which the appeals relate are the **most polluting in South Africa**, located in designated priority areas in terms of the National Environmental Management: Air Quality Act, 2007 (AQA), where legislated air quality standards are not being met. As a result of unacceptable levels of air pollution by emitters like Eskom and AMSA, communities are breathing air harmful to their health and wellbeing on a daily basis – including children who are particularly vulnerable to the health effects of this air pollution.

5. In this letter we:

   5.1. Set out our clients' conditions as well as the legal and minimum requirements, for this s3A process, noting that the appeal processes referred to below, as per NEMA, as well as the AQA and MES requirements remain in place, and cannot be deferred or set aside through the current process; and

   5.2. Commit to supporting the Forum in undertaking this process as expeditiously and effectively as possible, and subject to the conditions listed below. We would be happy to provide the Forum with records on existing work and activities that have a bearing on, and would be relevant and supportive to, the work to be undertaken by the Forum.

Background: our clients' appeals

6. On behalf of clients we have filed the following appeals against various decisions by the Department's National Air Quality Officer (NAQO) in relation to the requests for the suspension and postponement of compliance with the MES:

   6.1. on behalf of groundWork and Earthlife Africa, an appeal submitted to your office on 9 February 2022 in relation to NAQO decisions on 9 of Eskom's facilities – namely Camden, Hendrina, Arnot, Komati, Grootvlei, Kriel, Majuba, Grootvlei and Tutuka ("the Eskom appeal"). The Minister's decision on the Eskom appeal would have been due 25 May 2022, had the appeal not been held in abeyance. We again **attach** the record that was attached as Annexure A1 to the Eskom appeal, a summary of the decisions by the NAQO of 31 October 2021 ("the NAQO decisions"), which are the subject of these appeals and the present process;[2] and

[2] The following decisions were appealed in the Eskom appeal: the 5-year postponement of compliance granted to Majuba power station for the nitrogen oxide (NOx) new plant standard from 1 April 2020 to 31 March 2025 and directing it to comply with a limit of 1300mg/Nm3 that is above the existing plant standard of 1100 mg/Nm3; the 5-year postponement of compliance granted to Kendal power station for the NOx new plant standard from 1 April 2020 to 31 March 2025 and directing the station to comply with the existing plant limit of 1100mg/Nm3; the 5-year postponement of compliance granted to Tutuka power station for the NOx new plant standard from 1 April 2020 to 31 March 2025 and directing the station to comply with the existing plant limit of 1100mg/Nm3; and the suspension of compliance granted to Camden, Hendrina, Arnot, Komati, Grootvlei and Kriel power stations without detailed and clear decommissioning schedules per station, as required by the List of Activities.

6.2. on behalf of Vaal Environmental Justice Alliance (VEJA) and groundWork, an appeal dated 15 September 2020 was submitted to the DFFE ("the AMSA appeal"). As AMSA filed their responding statement on 27 November 2020, according to the National Appeal Regulations, the Minister's decision became due over a year and a half ago, on 1 February 2021.

7. In respect of the Eskom appeal, on 16 March 2022, we received a letter from the Minister, stating that several appeals have been instituted by interested and affected parties and that, "*due to the conflicting nature of the issues raised in the various appeals [the Minister] … finds that there is a need for consultative process for all appellants, stakeholders and IAPs to participate in*". The Minister's letter confirmed that the appeal process would be held in abeyance pending the outcome of the consultative process.

8. In the case of the AMSA appeal, our clients have waited for nearly 2 years for an appeal decision. Communities in the area have been living with AMSA's unregulated air pollution while the appeal decision continues to be delayed. Our clients have strong prospects of success in their appeal and have an interest in the appeal being decided urgently. Despite this delay in the appeal decision, we received notice on 11 April 2022 in a letter dated 18 March 2022 - a letter similar to one issued to Eskom above – advising that the appeal is held in abeyance pending the outcome of the consultative process in terms of section 3A.

9. We note the legal proceedings that have been instituted in the Pretoria High Court by AMSA against the Minister and other parties (including our clients) under case number 32737/22, to *inter alia*: review and set aside the Minister's decision to suspend the consideration of AMSA's appeal; review and set aside the Minister's failure to decide the AMSA appeal; and direct the Minister to adjudicate and decide the AMSA appeal. We note that the matter has been set down for hearing on the unopposed roll for 15 November 2022. At this stage, we make no comment on the merits or process of that review, only to record that our clients' intentions and interests remain the expeditious, fair and correct processing of their appeal. We have written to the parties in this matter (including the Minister) confirming that our clients (VEJA and groundWork) do not, at this stage, intend opposing the review, based on their desire to have the appeal decided as expeditiously as possible. We have reserved our clients' right to oppose the matter and/or to file any papers as appropriate, in the event that the Rule 53 record is filed and/or if the applicant, AMSA, amends its relief or files supplementary papers.

The applicable legal requirements

10. Section 43 of NEMA, in terms of which the appeals referenced above were lodged, confirms that the Minister has the following powers in respect of appeals: "*(5) The Minister or an MEC, as the case may be, may consider and decide an appeal or appoint an appeal panel to consider and advise the Minister or MEC on the appeal. (6) The Minister or an MEC may, after considering such an appeal, confirm, set aside or vary the decision, provision, condition or directive or make any other appropriate decision, including a decision that the prescribed fee paid by the appellant, or any part thereof, be refunded.*"

11. Section 3A of NEMA provides for the establishment of fora or advisory committees, stating that: "*The Minister may by notice in the Gazette— (a) establish any forum or advisory committee; (b) determine its composition and functions; and (c) determine, in consultation with the Minister of Finance, the basis and extent of the remuneration and payment of expenses of any member of such forum or committee.*"

12. The s3A process must also be governed by other applicable provisions of NEMA such as the section 2 principles,[3] as well as AQA and the Constitution of the Republic of South Africa, 1996 ("the Constitution").

[3] Section 2 contains principles for environmental management, to which any organ of state must adhere in all decision-making and when exercising other functions, including and decision-making on appeal and flowing from this process.

13. The High Court judgment in the case of *Groundwork Trust and Another v Minister of Environmental Affairs and Others* [2022] ZAGPPHC 208, confirms that the Constitutional right to an environment not harmful to health or wellbeing[4] is a right that is realisable here and now. It is not subject to progressive realisation or the taking of reasonable steps, over time, to gradually realise this right. This judgment also acknowledged that people living the Highveld are living with "*enduring and unsafe levels of air pollution … an ongoing violation of the section 24(a) constitutional rights of residents. This violation necessarily violates other constitutional rights, including the rights to dignity, life, bodily integrity and the right to have children's interests considered paramount in every matter concerning the child."*[5] *"It is commonly accepted that the air pollution in the Highveld Priority Area is responsible for premature deaths, decreased lung function, deterioration of the lungs and heart, and the development of diseases such as asthma, emphysema, bronchitis, tuberculosis and cancer. It is also acknowledged that children and the elderly, especially with existing conditions such as asthma, are particularly vulnerable to the high concentrations of air pollution in the Highveld Priority Area*."[6]

14. Fourteen facilities – twelve of which are Eskom power stations - are responsible for the "lion's share" of air pollution in the region.[7]

15. As an organ of state, significant emitter and a major source of air pollution in South Africa, Eskom is legally required, at all times, to limit its emissions to help ensure National Ambient Air Quality Standards (NAAQS) compliance and reduce its impacts on public health. As stated in the Eskom appeal, the legal quagmire in which Eskom finds itself is almost entirely self-inflicted.

16. The relevant regulations under AQA are the Listed Activities which have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions, or cultural heritage published by the Minister pursuant to section 21 of the AQA ("the List of Activities"), this and the MES have been in effect since 1 April 2010. Eskom was not only aware of this provision at least from April 2010, but it was aware several years before that that mandatory emission limits would come into force.

17. In summary, and as confirmed in paragraph 48 of the Eskom appeal, the legal position and requirements insofar as compliance with the AQA and The List of Activities are as follows:

    17.1. Existing plants had to comply with more lenient standards by 1 April 2015 and they had to adhere to stricter new plant standards by 1 April 2020 ("2020 MES"), subject to successful applications to postpone or suspend compliance where the explicit criteria for these applications have been satisfied;

    17.2. in limited circumstances, including demonstration of compliance with existing plant standards and national ambient air quality standards, only one postponement, per pollutant, is permitted for the 2020 MES, and such postponement may not extend beyond 5 years (i.e. all plants must meet the 2020 MES by 31 March 2025 – unless a valid suspension in terms of regulation 11B has been granted);

    17.3. emitters may not lawfully apply to postpone their compliance with the MES, or apply to suspend MES compliance, unless and until the ambient air quality within the three priority air-shed areas where their facilities are located are in compliance with the NAAQS – this is not the case for a number of the facilities in question;

    17.4. a facility that will be decommissioned by 31 March 2030, may apply for a once-off suspension of compliance with new plant MES, provided the application is accompanied by a detailed decommissioning schedule;

[4] Section 24.
[5] Para 76.
[6] Para 70.
[7] See https://cer.org.za/news/the-struggle-to-breathe-clean-air-in-mpumalanga-goes-to-court.

17.5. alternative emission limits that are weaker than the existing plant MES, may not be considered, let alone granted; and

17.6. an application for an alternative limit to a new plant standard must demonstrate a previous reduction in emissions of the said pollutant or pollutants, measures and direct investments implemented towards compliance with the relevant new plant standards, and there must be compliance with the NAAQS in the area for pollutant or pollutants applied for.

18. Based on the above legal framework, and irrespective of the process now being conducted, we submit that the Minister has limited flexibility in terms of the decisions she can make on the appeals. She remains bound to the provisions of NEMA; AQA; the List of Activities and the Constitution.

19. The notice records*, inter alia*, that: "*the consultative process would not in any way condone non-compliance with the MES and shall not impact on any present or future criminal actions in this regard*".

Minimum requirements for the section 3A consultative process

20. It is against this context, and the above legal requirements, that we record the need for this process to be conducted with the following minimum requirements:

20.1. **Clear and strict timeframes**: The process must be undertaken as expeditiously as possible, noting the need for urgent intervention to address the ongoing rights infringements caused by the unacceptable levels of air pollution resulting from persistent non-compliance with MES at a number of the facilities to be considered in this process. This, in circumstances where compliance with MES could play a major role in reducing high levels of air pollution and remedying the breach of Constitutional rights. Paragraph 4 of the Terms of Reference states that "*the work of the panel must be completed within a maximum period of 6 months*", while the appointment notice provides that "*the National Environmental Consultative and Advisory Forum is established for a period of 12 months*" from August 2022. This effectively means that the wok of the Forum must be completed in November 2022, but the Forum will remain in existence until August 2023. This ambiguity and shifting of the goal posts is highly concerning to our clients. It opens the way to potential delays and uncertainty for this process, which is prejudicial to our clients. Further, if the s3A process is only expected to be completed by August 2023, this would pose an unacceptable delay to our clients' appeal processes, where appeal decisions are already out of time.[8] **We emphasise that the original 6 month timeframe as per the Terms of Reference must be honoured and confirmed**, and we reserve our clients' rights to seek alternative remedies should this process exceed the 6 month period. We recommend as well that additional clear timeframes be provided and communicated for further steps and deliverables in terms of this process.

20.2. **Transparency**: It is of the utmost importance that the Forum conducts its work with full transparency. In this we mean that the Forum must publish all the documents it relies on and considers (potentially through a website); all hearings and as many consultations as possible must be conducted in public (in person and/or virtually); and all reports produced, including drafts, must be published. This is an important way for the Forum to build trust in the process and the outcome. Stakeholders **must have access to all relevant records and documentation**, including all appeals being considered, and at least 2 weeks prior to hearings and comment deadlines, to enable adequate consultation. In this regard we note that, despite frequent and persistent requests to the Minister and Department, we have not yet received the following records:

[8] Those decisions ought to have been taken, in terms of Eskom's appeal, by 25 May 2022, and in terms of AMSA's appeal, the decision was due on 1 February 2021, based on the timeframes provided for in the Appeal Regulations under NEMA.

20.2.1. appeal(s) of Eskom in relation to NAQO MES decisions taken in 2021.[9] It is unacceptable that – despite our clients being interested and affected parties ("I&APs") in relation to the Eskom MES postponement and suspension applications - our clients have not yet had sight of Eskom's appeal(s) nor have they had an opportunity to respond to the appeal, despite the clear obligations under the NEMA Appeal Regulations requiring notification of I&APs of appeals and an opportunity to respond;

20.2.2. the SO2 panel report (referenced in paragraph 3.2.1 of the Terms of Reference), which is currently before the Minister; and

20.2.3. the DFFE 2019: Highveld Health Report (final version) – currently before the Minister (referenced in paragraph 3.2.1 of the Terms of Reference).

20.3. **Legal process**: The legal requirements for the appeal process provided for in the NEMA are in no way to be dispensed with or disregarded through this process. Our clients are appellants in appeals against NAQO decisions in relation to Eskom and AMSA and accordingly our clients are entitled to timeous and fair decisions on those appeals in terms of section 43 of NEMA. Those decisions ought to have been taken, in terms of Eskom's appeal, by 25 May 2022, and in terms of AMSA's appeal, the decision was due on 1 February 2021, based on the timeframes provided for in the Appeal Regulations under NEMA.

20.4. **Legal requirements**: We note that, irrespective of the process to be undertaken in terms of s3A of NEMA, the MES must be complied with – the Terms of Reference notice itself confirms this. On this basis, and notwithstanding the section 3A process to be undertaken, there remains little flexibility for the Minister in her decisions on the appeals, considering her legal obligations and the legal obligations of the facilities under AQA. The law is clear. In terms of the List of Activities, all existing facilities must comply with new plant standards by 2025 (following a once-off 5-year postponement if granted). Those which are unable to comply must decommission by 2030. Ultimately the potential outcomes for the appeals before the Minister are somewhat limited, despite the section 3A process being undertaken here, and the Minister's wide appeal discretion under section 43 of NEMA.

20.5. **Streamlining**: We note that a number of the activities to be undertaken in respect of this process, as set out in the notice will not be taking place in a vacuum. On the contrary a number of relevant and overlapping processes regarding Eskom and air pollution for example, are already underway and/or have been taking place over a number of years. We recommend that this s3A process be streamlined with existing and other processes insofar as possible in order to reduce time and capacity of the forum and stakeholders, where existing work is already being/has already been done.

Conclusion

21. We emphasise again that, as the appeals outlined above in paragraph 6 remain pending, our clients are willing to engage constructively with the Forum. They intend to participate in and support the s3A process, however on the basis of the minimum requirements listed above. Further, we do so with full reservation of our clients' rights.

[9] We became aware through media reports on and around 15 December 2021, that Eskom had filed an appeal against these decisions/a number of the decisions. We have been requesting access to the Eskom appeal(s) from Mariss Botha of Naledzi since January 2022. An 18 January 2022 email from Marissa Botha stated that, "*The appeal submission has not been shared with interested and affected parties (I&APs) yet but will be soon. We are waiting for the DFFE Appeal Directorate to provide the cut-off date/period for I&APs to submit responding statements on the appeal submission. Once confirmed, we will share the appeal submission documents on our website and send an emailed notification to I&APs*." On 6 April 2022 we received an email from Marisa Botha of Naledzi Environmental Consultants Pty Ltd, acknowledging receipt – for Eskom - of the Eskom appeal, referring also to the anticipated consultative process and a media release from the Department.

22. We request that the Forum kindly advise us on the plans for the s3A process going forward, particularly in light of our clients' minimum requirements for this s3A process.

23. We and our clients look forward to your response as well as a constructive engagement with the Forum. We would be happy to provide any further information to you.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per:

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