
GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT

NO. 2394

18 August 2022

**NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998
(ACT NO. 107 OF 1998)**

ESTABLISHMENT OF THE NATIONAL ENVIRONMENTAL CONSULTATIVE AND ADVISORY FORUM IN TERMS OF SECTION 3A OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) TO ADVISE THE MINISTER ON MATTERS ARISING FROM APPLICATIONS FOR THE SUSPENSION AND POSTPONEMENT OF COMPLIANCE WITH THE MINIMUM EMISSION STANDARDS AND ISSUANCE OF PROVISIONAL ATMOSPHERIC EMISSION LICENCES

I, Barbara Dallas Creecy, Minister of Forestry, Fisheries and the Environment, hereby establish the National Environmental Consultative and Advisory Forum, under section 3A of the National Environmental Management Act, 1998 (Act No. 107 of 1998), as set out in the Schedule hereto.



**BARBARA DALLAS CREECY
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT**

SCHEDULE

Period for the establishment of the National Environmental Consultative and Advisory Forum

1. The National Environmental Consultative and Advisory Forum is established for a period of 12 months.

Purpose of the National Environmental Consultative and Advisory Forum

2. 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.

Remuneration and payment of expenses of the National Environmental Consultative and Advisory Forum

3. The Public Finance Management Act, 1999 (Act No. 1 of 1999) and its associated Treasury Regulations are applicable to the remuneration of members. Members are remunerated in accordance with Category B1 (part-time members), Committee of Inquiry/ Audit Committee rates, as concurred with the Minister of Finance.

Composition of the National Environmental Consultative and Advisory Forum

4. The National Environmental Consultative and Advisory Forum consists of the following persons appointed by the Minister:

Chairperson:

Mr Peter Harris

Members:

Mr Etienne Rubbers
Prof Aneesa Vanker
Ms Lauren Hermanus
Dr Emily Tyler
Mr Arvishkar Ramandh
Dr Maphuti Kwata

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BARBARA DALLAS CREECY
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT



forestry, fisheries & the environment

Department:
Forestry, Fisheries and the Environment
REPUBLIC OF SOUTH AFRICA

TERMS OF REFERENCE

TERMS OF REFERENCE FOR THE ESTABLISHMENT OF A NATIONAL ENVIRONMENTAL CONSULTATIVE AND ADVISORY FORUM IN TERMS OF SECTION 3A OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT 107 OF 1998) (NEMA) TO ADVISE THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT ON MATTERS ARISING FROM THE APPLICATIONS FOR THE SUSPENSION AND POSTPONEMENT OF COMPLIANCE WITH THE MINIMUM EMISSION STANDARDS AND THE APPLICATIONS FOR THE ISSUANCE OF PROVISIONAL ATMOSPHERIC EMISSION LICENCES

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1. BACKGROUND

- 1.1 Section 24 of the Constitution provides for the right to an environment that is not harmful to the health or well-being of people and to have the environment protected, for the benefit of the present and future generations. In order to give effect to these rights in the context of air quality, the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (herein referred to as “NEMAQA”) was promulgated to provide reasonable measures for the protection and enhancement of the quality of air in the Republic; the prevention of air pollution and ecological degradation; and securing ecological sustainable development while promoting justifiable economic and social development.
- 1.2 NEMAQA recognises that the quality of ambient air in many areas of the Republic is not conducive to a healthy environment for the people living in those areas, let alone promoting their social and economic advancement. It appreciates that the burden of health impacts associated with polluted ambient air falls most heavily on the poor, and that air pollution carries a high social, economic and environmental cost that is seldom borne by the polluter. In this regard NEMAQA provides for a

national framework, national, provincial and local standards, institutional arrangements, air quality management measures and licensing mechanisms to give effect to the constitutional imperative to protect the environment for the benefit of the present and future generations.

- 1.3 Section 21 of NEMAQA requires that the Minister must publish a list of activities which result in atmospheric emissions and which the Minister reasonably believe have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage. Once identified, these activities are known as Listed Activities and require an Atmospheric Emission License (AEL) to operate. Section 21 further requires the establishment of Minimum Emission Standards (MES) for specified pollutants or mixture of substances emitted by the identified activities.
- 1.4 The list of activities prescribe minimum requirements for emissions control and reporting for significant emission sources in the country; including compliance timeframes with the MES. The Section 21 notice stipulates timeframes for compliance with MES provided for new activities to comply with new plant emission standards immediately (i.e. from the date of publication in the gazette, 01 April 2010) and the existing industries to comply with existing plant standards by 01 April 2015. The existing listed activities transitioned to new plant standards from 01 April 2020.
- 1.5 Companies that could not meet the prescribed MES in the legislated timeframes could apply for the postponement of the compliance timeframes to the National Air Quality Officer (NAQO). In addition to postponements, a provision for a once-off suspension with the compliance timeframes for new plant standards was made for existing plants that are scheduled to be decommissioned by 31 March 2030.
- 1.6 From 2014 to date, the NAQO administered a number of applications for postponement and suspension from the MES and applications for the issuance of provisional atmospheric emission licences (PAEL) in concurrence with the atmospheric emission licencing authorities. Upon assessment of these applications, it became evident that the major challenge that facilities are battling to adequately and effectively manage particulate matter, oxides of nitrogen and sulphur dioxide emissions, specifically within the power generation and chemical sectors of the economy.
- 1.7 During 2019, the NAQO received the last applications for postponements and suspensions to comply with the new plant standards and applications for PAELs. The NAQO **granted** some of the applications for

postponement and suspension with the MES and some of the applications for PAELs and **refused** others. These decisions triggered varying appeals: those seeking to appeal the NAQO's decisions to **grant** the applications, and those seeking to appeal those applications that had been **refused**. Consequently, there are varied and conflicting grounds of appeal for Minister's consideration and determination on issues relating to the applications for postponements and suspension to comply with the new plant standards and applications for PAELs.

- 1.8 Due to the complex and conflicting nature of the issues arising from these matters, the Minister is of the view that a comprehensive consultative process is required to address the issues emanating from the various applications for suspension and/or postponement of compliance from the timeframes of the MES and/or for the issuance of a PAEL.
- 1.9 The consultative process will deal with matters, which have a bearing on the environment, in particular air quality, health of the people, as well as matters relating to the security of energy supply and sustainable development within the country. The process aims to ensure sustainable compliance with the MES which will assist in providing an environment that is not harmful to the health and well-being of the people.
- 1.10 The Minister, acting in terms the National Environmental Management Act, 1998 (Act No .107 of 1998) (NEMA), has invoked the provisions of section 3A of NEMA to establish a National Environmental Consultative and Advisory Forum (Forum), that will allow the interested and affected parties, as well as relevant stakeholders, to make representations as part of the consultative process. The current appeal process shall be held in abeyance pending the outcome of this consultative process. It should be noted 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.
- 1.11 The terms of reference provide guidance on the establishment and functioning of the Forum.

2. OVERALL OBJECTIVE OF THE FORUM

- 2.1 The purpose of the Forum will be 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.

2.2 The report referred to above will provide the Minister with practical options to resolve the issues arising in respect of ESKOM's non-compliance with the MES and the issues arising from the applications for PAELs, taking into consideration Minister's constitutional and legislative mandate and the country's international commitments, constitutional right of the people to an environment that is not harmful to their health and well-being, the energy crisis and the local economic climate.

3. THE FUNCTIONS OF THE FORUM

Process and Workplan

- 3.1 The Forum will conduct the following functions:
 - 3.1.1 Review the documentary and technical reports listed below and those available at DFFE, including:
 - 3.1.1.1 History of MES and decisions of the National Air Quality Officer to date, as well as the various applications for PAELs;
 - 3.1.1.2 Summary of MES and PAEL appeals currently before the Minister; and
 - 3.1.1.3 ESKOM's compliance and non-compliance history with MES.
 - 3.1.2 Review of documents and technical reports with respect to:
 - 3.1.2.1 Health impacts of air emissions and the constitutional right of the people to an environment that is not harmful to health and well being;
 - 3.1.2.2 Costs of compliance with MES by ESKOM and the co-benefit from reducing that pollution;
 - 3.1.2.3 What it means for the Eskom's coal fleet to meet the lower bound of the 2021 Nationally Determined Contribution Update (South Africa's "Fair Share" on a 1.5° trajectory)?
 - 3.1.2.4 What is needed to achieve improved energy security in the country?
 - 3.1.3 Undertake preliminary hearings in which all the interested parties are able to participate and make verbal and written submissions.
 - 3.1.4 Conduct one on one consultations with key interested and affected parties to understand their positions in more detail.
 - 3.1.5 Conduct consultations with:
 - 3.1.5.1 Department of Water and Sanitation;
 - 3.1.5.2 Department of Minerals and Energy;
 - 3.1.5.3 Department of Public Enterprise;

- 3.1.5.4 Department of National Treasury;
- 3.1.5.5 Department of Science and Innovation;
- 3.1.5.6 Department of Trade, Industry and Competition;
- 3.1.5.7 Members of the Executive Councils responsible for the environment in the Provinces;
- 3.1.5.8 The South African Local Government Association.
- 3.1.6 Visits to affected communities in airsheds affected by Eskom power stations and the applications for PAELs that are subject to appeal.
- 3.1.7 Conduct detailed technical and energy modelling work to address key questions arising from consultations.
- 3.1.8 Propose practical resolutions on matters of air pollution to ensure that compliance with the MES can be achieved in a manner that gives consideration to the following:
 - 3.1.8.1 The energy crises that the country is facing;
 - 3.1.8.2 The socio-economic implications (e.g., jobs, livelihoods, etc) for each proposed option;
 - 3.1.8.3 The economic and the health impacts associated with the non-compliance with the MES;
 - 3.1.8.4 The legal implications for each compliance pathway and present recommendations;
 - 3.1.8.5 Propose funding mechanism/s to implement the most suitable pathway to achieve compliance with MES.
- 3.1.9 Consideration of evidence and submission, and drafting of report with recommendations;
- 3.1.10 Presentation of findings to the Minister;
- 3.1.11 Further consultation, if necessary, thereafter consideration of comments and finalisation and submission of the final report to the Minister; and
- 3.1.12 Additional work that may be identified before or during commencement of project activities that would result in improving the outcome of the project may be undertaken, subject to agreement amongst the parties concerned. Such work would be subjected to Ministerial approval should it result in additional costs to the project budget.

Research and Analysis

- 3.2 The following additional areas should be reviewed (studies or sources of evidence listed may not be a complete list):
 - 3.2.1 What are the health impacts from emissions from Eskom's power stations?
 - DFFE 2019: Highveld Health Report (final version) – currently before the Minister

- Dr Andrew Gray: Impacts due to Large Stationary Source Emissions in and around South Africa's Mpumalanga Highveld Priority Area: <https://cer.org.za/wp-content/uploads/2019/06/Andy-Gray-Report.pdf>
- Dr Peter Orris: Coal Plant Emissions and Public Health: <https://cer.org.za/wp-content/uploads/2019/06/Peter-Orris-Report.pdf>
- Dr Mike Holland: Health impacts of coal fired power plants in South Africa: <https://cer.org.za/wp-content/uploads/2017/04/Annexure-Health-impacts-of-coal-fired-generation-in-South-Africa-310317.pdf>
- DFFE 2018: Cost Benefit Analysis; Dr Ranajit Sahu's expert critique
- Dr Ranajit Sahu: Comments on the series of Applications for Suspension of the Minimum Emissions Standards (MES) Compliance Timeframes for Various Eskom Coal-Fired Power Plants; <https://cer.org.za/wp-content/uploads/2019/02/Annexure-1.pdf> Additional supporting information the NAQO asked from Eskom
- SO₂ Expert Panel Report – currently before the Minister

3.2.2 What are the costs of compliance with MES? What are the co-benefits from reducing that pollution?

- CSIR, 2019: Improving health and reducing costs through renewable energy in South Africa: <https://www.cobenefits.info/resources/cobenefits-south-africa-health/>
- Nkambule and Blignaut, 2017: Externality costs of the coal-fuel cycle: The case of Kusile Power Station (SA Journal of Science): <https://sajs.co.za/article/view/4123>
- Impacts of reduced operation of coal fleet on ambient air quality and Ambient Air Quality Standards
- Cost of different types of pollution abatement: Eskom; Lauri Myllyvirta, CREA, others
- Implications for levelised cost of electricity, and implications for electricity tariffs: Affordability and just transition considerations of different options

3.2.3 What does meeting the lower bound of the 2021 NDC Update (South Africa's "Fair Share" on a 1.5° trajectory) mean for the Eskom's coal fleet?

- ESRG/CSIR net zero pathways modelling currently being undertaken under the Presidential Climate Commission's auspices
- South Africa's NDC Update Technical report
- ESRG, to be published end of March 2022: Policy Brief on Low NDC Scenarios
- Meridian Economics, 2021: What does South Africa's Updated Nationally Determined Contribution Imply for Its Coal Fleet: <https://meridianeconomics.co.za/our-publications/briefing-note-2021-10-what-does-south-africas-updated-nationally-determined-contribution-imply-for-its-coal-fleet/>
- NBI "Decarbonising South Africa's Power Sector" report
- Climate Equity Reference Project's Fair share report - <https://cer.org.za/wp-content/uploads/2021/06/NDC-vs-fair-share-memo-v04-corrected-version.pdf>
- Expert reports on the GHG emissions and climate impacts of alternative technologies
- Dr Ranajit Sahu report on Potential Impacts of Proposed New Coal under the IRP 2019 - <https://cer.org.za/wp-content/uploads/2021/08/SAHU-SA-2019-IRP-2021-07-6jl-clean-final.docx.pdf>
- McCall et al, UCT ERC, 2019: Least-cost integrated resource planning and cost-optimal climate change mitigation policy: Alternatives for the South African electricity system: https://sa-tied.wider.unu.edu/sites/default/files/pdf/SATIED_WP29_February_2019_McCall_Burton_Marquard_Hartley_Ireland_Merven.pdf

3.2.4 What is needed to achieve improved energy security?

- Electricity demand: ESRG, CSIR, DMRE (in IRP2019), NERSA
- Potential for energy conservation through efficiency measures – DMRE, GreenCape, NBI, Eskom, Theo Covary (energy efficiency)
- State of the Eskom coal fleet (Eskom, Chris Yelland, EE Publishers)
- Eskom's current decommissioning schedule and number of units per station in cold-storage

- State and contribution of existing and new embedded renewable energy (PQRS, SAPVIA, SALGA, Association of Municipal Energy Users)
- Options for accelerating the pace of RE roll-out and storage: by Eskom, by the private sector but also embedded generation that is socially-owned (Prof Mark Swilling, SALGA, DBSA, SAREM)
- Eskom's JET strategy and planning documents for the re-purposing of Grootvlei, Komati, and Hendrina
- Costs to increase RE connection to the transmission grid (in Eskom's comments to NERSA on 2020 determination including coal, gas, RE and battery storage); Eskom's Transmission Development Plan for IRP and grid strengthening:
https://www.eskom.co.za/wp-content/uploads/2021/08/TDP-Report-2019-2029_Final.pdf

4. TIMEFRAME

The work of the panel must be completed within a maximum period of 6 months.

5. DELIVERABLES

The project deliverables should be as follows:

- Provide the Minister with a project plan based on the TOR within 10 days from the date of appointment.
- Conduct live recordings of all hearings that is to be made available to the public on DFFE website.
- Draft a report that summarises their review of the documentary evidence, submissions made by stakeholders, and the proceedings of hearings, with recommendations for consideration by the Minister.
- Final report which addresses any comments made and gaps identified by Minister and DFFE.

6. COMPOSITION OF THE FORUM

6.1. The Forum shall consist of a maximum of six members appointed by the Minister, with relevant qualifications and extensive knowledge on air quality matters with respect to air quality, human health, economics, engineering, energy and environmental management.

6.2. The following fields of speciality and qualifications are required for members to serve on the committee:

6.2.1 HEALTH PRACTITIONER

A Minimum of a Master's degree in Health related studies. A minimum of 7 years' experience in air quality health impact assessments. Knowledge and experience in carrying out health impact investigations and studies in relation to the air pollution health impacts.

6.1.2 ECONOMIST

A Minimum of a Master's degree in Economics/Developmental Studies. A minimum of 7 years' experience in application of economic evaluation (or cost benefit analysis) relating to environmental policy development. Knowledge of estimating the effects of environmental legislation on the economy using economic instruments/models.

6.1.3 ENVIRONMENTAL SPECIALIST/SCIENTIST

A Minimum of a Master's degree in Environmental Science, Geosciences or Environmental Engineering. A minimum of 7 years' experience in environmental impact assessment and management. Knowledge of cleaner production, climate change mitigations, resource efficiency, prevention and control techniques.

6.1.4 CHEMICAL/METALLURGICAL/MECHANICAL ENGINEER

A minimum Master's degree in Chemical, Metallurgical or Mechanical Engineering. A minimum of 7 years' experience in industrial processes design, construction, operations, pollution prevention and control techniques. Knowledge of evaluating, costing and inspecting of industrial equipment and facilities related to pollution control and climate change mitigations.

6.3 The Forum shall be led by a Chairperson appointed by the Minister.

7. TENURE OF APPOINTMENT OF MEMBERS OF THE FORUM

The tenure of appointment for the members to the Forum shall be for a period of not more than twelve months from the date that the Minister issues a letter of appointment to the members and shall terminate upon completion of the assignment, unless otherwise stated/required by the Minister.

8. TERMINATION OF MEMBERSHIP

8.1. A member's tenure of service is terminated if the member—

8.1.1 resigns by submitting a one month's written notice to the Minister, but the Minister may accept a shorter period in certain circumstances;

8.1.2 is absent from three consecutive meetings of the Forum without written permission from the chairperson of the Forum, and the chairperson may not unreasonably refuse permission on good cause shown by the member of the Forum;

8.1.3 neglects to properly perform a function or functions of the Forum;

8.1.4 uses his or her position, privilege or knowledge as a member of the Forum for private gain or to improperly benefit another person.

8.2. A member ceases to be a member of the Forum if his or her tenure of service has expired, or if his or her membership is terminated by the Minister.

9. CONDITIONS OF APPOINTMENT OF MEMBERS OF THE FORUM

9.1. A member must perform the functions of the Forum in good faith and without favour or prejudice.

9.2. A member of the Forum must be willing and able to devote sufficient time to contribute meaningfully to the work of the Forum.

- 9.3. A member of the Forum may not act in a way that compromise the credibility, impartiality, independence or integrity of the Forum.

10. MANAGEMENT OF THE FUNCTIONING OF THE FORUM

- 10.1 The operations of the Forum must be in accordance with acceptable standards such as timely distribution of documents for any scheduled meetings.
- 10.2 The Secretariat shall keep all records of the meetings and also ensure co-ordination and organization of face-to-face meetings.
- 10.3 Minutes of meetings shall be made available to members of the Forum by the secretariat.
- 10.5. Forum meetings shall be convened if comprised of minimum of 75% confirmed members.
- 10.6. The Forum is accountable to the Minister in terms of the decisions made.

11 MEETINGS OF THE FORUM

- 11.1. Members of the Forum shall develop a detailed schedule of meetings and activities and workplan within 10 days of their appointment.
- 11.2. If the Chairperson is not available to chair a meeting, members present must nominate another member to preside at the meeting.
- 11.3. Sufficient time must be allocated for review, discussion and formulation of recommendations.

12. DISTRIBUTION OF DOCUMENTS

- 12.1. Summary documents of all discussions, findings and recommendations, which are ready for distribution, shall be circulated to the members at least a week in advance.
- 12.2. The summary should highlight areas requiring the attention of the Forum.

13. CONFIDENTIALITY

- 13.1. Members of the Forum will be subjected to confidentiality agreements.

- 13.2. Members of the Forum will advise the Chairperson on the confidential or sensitive nature of documents presented to the Forum and will not disclose it to any party, unless approval to that effect has been granted by the Minister.
- 13.3. Members of the Forum must honour the confidentiality of documents presented to the Forum, including protecting individual research ideas.

14. FUNDING-RELATED MATTERS

- 14.1 Members of the Forum shall be remunerated at rates as approved by National Treasury in terms of section 3A(c) of NEMA.
- 14.2 The Department will provide the Forum with the necessary legal support and shall bear the full administrative, travel and accommodation cost of all expenses incurred as a result of the workings of the Forum in relation to the aforementioned objectives.