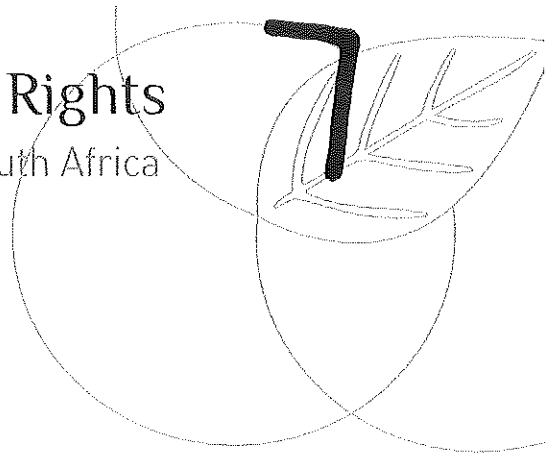


# Centre for Environmental Rights

Advancing Environmental Rights in South Africa



**Mr Sam S. Maluleka**

Chief Director: Environmental Affairs

Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs

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By email: [smaluleka@mpg.gov.za](mailto:smaluleka@mpg.gov.za)

[gmamba@mpg.gov.za](mailto:gmamba@mpg.gov.za)

**Copied to:**

**Anne-Mari White**

Environmental Specialist

Aurecon

By email: [Anne-Mari.White@aurecongroup.com](mailto:Anne-Mari.White@aurecongroup.com)

**Lusani Rathanya**

ACWA Power (Pty) Ltd

By email: [lrathanya@acwapower.com](mailto:lrathanya@acwapower.com)

Our ref: RH/Khanyisa

1 December 2016

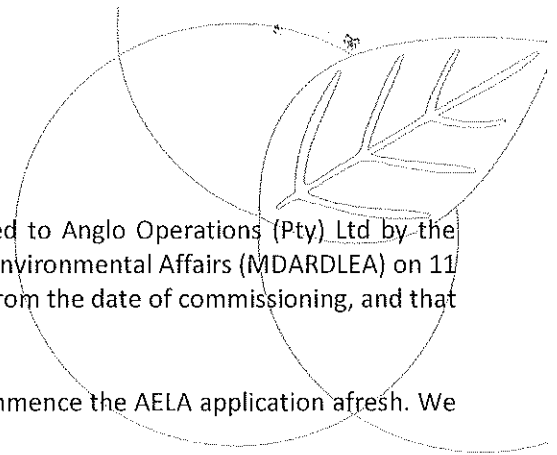
Dear Sir

**PROVISIONAL ATMOSPHERIC EMISSION LICENCE FOR KHANYISA POWER PLANT LICENCE NO. (17/4/AEL/MP312/14/20)**

1. We act for groundWork ("our client"), an environmental justice organisation<sup>1</sup> and registered interested and affected party (I&AP) in relation to the proposed independent power producer (IPP) coal-fired Khanyisa Power Station ("Khanyisa") to be developed by ACWA Power (Pty) Ltd ("ACWA").

<sup>1</sup> groundWork is a non-profit environmental justice service and developmental organisation aimed at improving the quality of life of vulnerable people in South Africa (and increasingly in Southern Africa), through assisting civil society to have a greater impact on environmental governance. groundWork places particular emphasis on assisting vulnerable and previously

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2. We refer to the provisional atmospheric emission licence (“AEL”) issued to Anglo Operations (Pty) Ltd by the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs (MDARDLEA) on 11 September 2015. We note that the provisional AEL is valid for one year from the date of commissioning, and that the stated capacity of the proposed plant is 450MW.
3. It is submitted that ACWA cannot rely on this AEL and is required to commence the AELA application afresh. We say this for the reasons below:
  - 3.1. Anglo Operations (Pty) Ltd is no longer the holder of the environmental authorisation (EA) for the proposed power station – ACWA is;
  - 3.2. on 28 July 2015, the Department of Environmental Affairs (DEA) amended the EA to increase the capacity of the power station from 450MW to 600MW; and
  - 3.3. we understand that Khanyisa only plans to commence operations in December 2020 – 5 years after the issuing of the AEL.
4. In terms of section 40(3) of the National Environmental Management: Air Quality Act, 2004 (AQA), the licensing authority must decide the application within 60 days of the date on which the decision on the application for the environmental authorisation has been made. The EA was granted in 2013 (2 years before the AEL was issued) and has since been subjected to numerous amendments. In going forward, ACWA cannot rely on an AEL granted over a year ago, for a different holder, and for a different capacity station, as it has no regard for the EA amendments and relies on the 2013 EA and public participation procedures conducted as far back as 2013. It is required to submit a new AEL application, and thereafter comply with section 38(3) of AQA, which requires the following:

*“(3)(a) An applicant must, immediately after the submission of the application to the licensing authority, take appropriate steps to bring the application to the attention of relevant organs of state, interested persons and the public.*

*(b) Such steps must include the publication of a notice in at least two newspapers circulating in the area in which the listed activity applied for is or is to be carried out—*

*(i) describing the nature and purpose of the licence applied for;*

*(ii) giving particulars of the listed activity, including the place where it is or is to be carried out;*

*(iiA) indicating where a copy of the application can be obtained;*

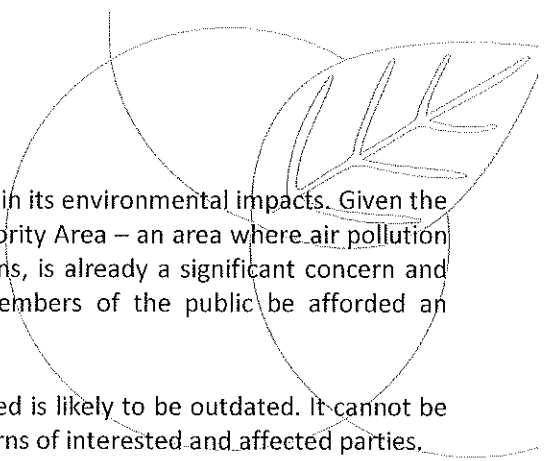
*(iii) stating a reasonable period within which written representations on or objections to the application may be submitted, and the address or place where representations or objections must be submitted; and*  
*(iv) containing such other particulars as the licensing authority may require”.*

5. To the extent that you take the view that these issues can be addressed by a transfer and variation of the AEL (which our client disputes), we are instructed to point out the following:
  - 5.1. in terms of section 44(4) of AQA *“an applicant must take appropriate steps to bring the application for the transfer of an (AEL) to the attention of interested persons and the public ... (b) Such steps must include the publication of a notice in at least two newspapers circulating in the area.”* It is therefore necessary that any transfer of the AEL be subject to public participation, and that our client and other interested and affected parties have an opportunity to consider and comment on the transfer application. If the transfer of the AEL has already been effected, please advise whether the requisite notice was given to the public and, if not, why; and
  - 5.2. AQA’s section 46(3) requires a licence holder to bring an application for a variation to the attention of the public if:  
*“(a) the variation of the licence will authorise an increase in the environmental impact regulated by the licence;*  
*(b) the variation of the licence will authorise an increase in atmospheric emissions; and*  
*(c) the proposed variation has not, for any reason, been the subject of an authorisation in terms of any other legislation and public consultation.”* An increase in the plant’s capacity from 450MW to 600MW

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disadvantaged people who are most affected by environmental injustices.


would certainly result in an increase in the plant's emissions and in its environmental impacts. Given the fact that the power station will be located in in the Highveld Priority Area – an area where air pollution caused by industrial activities, including coal-fired power stations, is already a significant concern and exceeds the ambient air quality standards, it is vital that members of the public be afforded an opportunity to comment on any AEL variation.



6. We point out that any public participation that may have already occurred is likely to be outdated. It cannot be relied on for purposes of evaluating the current circumstances and concerns of interested and affected parties.
7. In the circumstances, we await notification of the new AEL application for comment; alternatively notification of the transfer and variation applications for comment.
8. We emphasise the importance of public participation in order to give effect to the constitutional rights of access to information, administrative justice, and the right to a healthy environment. All comment periods provided should be reasonable and procedurally fair.
9. Should ACWA attempt to rely on the 2015 AEL, our client reserves its rights to take such action as it is advised.
10. We look forward to your response.

Yours sincerely

**CENTRE FOR ENVIRONMENTAL RIGHTS**

per: 

**Nicole Loser**  
**Attorney**

Direct email: [nloser@cer.org.za](mailto:nloser@cer.org.za)



# Centre for Environmental Rights

Advancing Environmental Rights in South Africa



Anne-Mari White  
Environmental Specialist  
Aurecon

By email: [anne-mari.white@aurecongroup.com](mailto:anne-mari.white@aurecongroup.com)

Copies to:

Sam S. Maluleka  
Chief Director: Environmental Affairs  
Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs  
By email: [smaluleka@mpg.gov.za](mailto:smaluleka@mpg.gov.za)  
[gmamba@mpg.gov.za](mailto:gmamba@mpg.gov.za)

Derrick Makhubele  
Department of Environmental Affairs  
By email: [dmakhubele@environment.gov.za](mailto:dmakhubele@environment.gov.za)

Our ref: RH/Khanyisa  
14 March 2017

Dear Madam

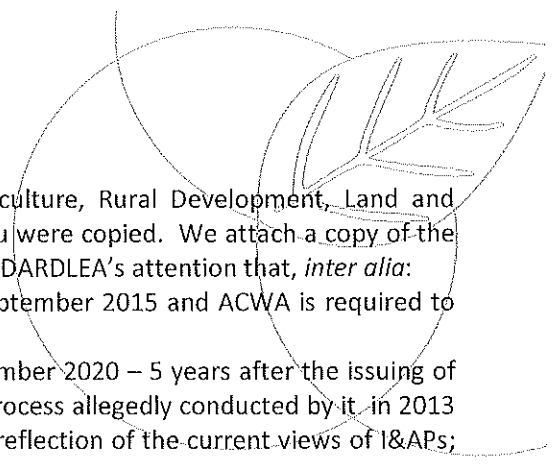
## COMMENTS & CONCERNS IN RELATION TO THE INTENDED TRANSFER OF AIR EMISSION LICENSE TO ACWA POWER KHANYISA THERMAL POWER STATION RF (PTY) LIMITED.

1. We act for groundWork<sup>1</sup> ("our client"), a registered interested and affected party (I&AP), in relation to the proposed independent power producer (IPP) coal-fired Khanyisa Power Station ("Khanyisa") to be developed by ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd ("ACWA").
2. We refer to your notification, dated 20 February 2017, in terms of which ACWA purportedly seeks to transfer a provisional atmospheric emission licence (AEL) for the Khanyisa project from Anglo Operations (Pty) Ltd ("Anglo"), the current holder, to ACWA, apparently in terms of section 47 of the National Environmental Management: Air Quality Act 39 of 2004 ("AQA").

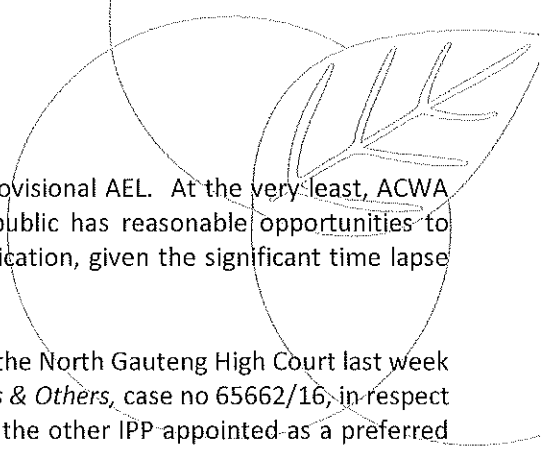
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<sup>1</sup> A non-profit environmental justice service and developmental organisation aimed at improving the quality of life and vulnerable people in South Africa (and increasingly in Southern Africa), through assisting civil society to have a greater impact on environmental governance, groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices. See more information at: [www.groundwork.co.za](http://www.groundwork.co.za)

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3. We refer to a letter sent to the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs (MDARDLEA) on 1 December 2016, on which you were copied. We attach a copy of the letter for your ease of reference. In this letter, we sought to bring to MDARDLEA's attention that, *inter alia*:
  - 3.1. ACWA cannot rely on the provisional AEL issued to it on 17 September 2015 and ACWA is required to commence the AELA application afresh;
  - 3.2. ACWA only plans to commence operations at Khanyisa in December 2020 – 5 years after the issuing of the provisional AEL – as such the AEL and public participation process allegedly conducted by it in 2013 are wholly outdated and cannot be relied upon as an accurate reflection of the current views of I&APs; and
  - 3.3. to the extent that the application process will not be commenced again (the appropriateness and correctness of which we dispute), ACWA must at least have the AEL varied to provide for the fact that the capacity of the power station is no longer 450MW but 600MW, as per an amendment of the environmental authorisation (EA) of 28 July 2015 – this amounts to an increase of the power station's environmental impact and the necessary variation must therefore be brought to the attention of the public as required by section 46(3) of AQA.
  
4. We point out that the above concerns still stand and that in light of:
  - 4.1. the substantial time lapse since the granting of the provisional AEL to Anglo;
  - 4.2. the fact that public participation proceedings for the AEL were conducted several years ago - as far back as 2013;
  - 4.3. Khanyisa only intending to commence operations in 2020, seven years after the public participation was conducted; and
  - 4.4. the numerous amendments to the EA, a new AEL application with a fresh public participation procedure is necessary. To simply transfer the AEL from Anglo to ACWA, relying on the outdated and inaccurate provisional AEL, would be wholly inadequate, and, we submit, unlawful.
  
5. At the very least, a variation of the provisional AEL is necessary to provide for the increase in plant capacity and the public must, in terms of s46(3) of AQA, have an opportunity to comment on the process. The intended transfer notification makes no mention of the plant's increased capacity, nor does it state that the AEL is in fact a provisional AEL.
  
6. Furthermore, even if a transfer were the appropriate process to follow (which we dispute), the process purportedly followed to effect the transfer, is incorrect in that:
  - 6.1. S47 of AQA – a provision which regulates the renewal of AELs and does not deal with the transfer of AELs – has incorrectly been cited in the notification in support of the transfer, when s44 deals with transfer of AELs ;
  - 6.2. the notification did not meet the criteria of S44, as Aurecon failed to adequately bring this to the attention of the public and facilitate their participation:
    - 6.2.1. to our knowledge, the intended transfer was not published in at least two newspapers within the Emahlaleni Local Municipality as required. Kindly provide us with proof of advertisement if this was advertised; and
    - 6.2.2. the notification fails to stipulate a reasonable period within which written representations on or objections to the application may be submitted, as required in terms of s44(4)(iii) of AQA.
  - 6.3. The notification must clearly state whether the intended transfer is in fact a transfer (and if so, the correct provisions of AQA (s44) must be cited and followed, and a reasonable period for comment should have been provided. We submit that at least 30 days for comment would be necessary, as this is the minimum number of days required for comment in the Environmental Impact Assessment Regulations, 2014.
  
7. In the circumstances, we object to the intended transfer process as the requisite legal rules have not been followed, and because we submit that the provisional AEL purportedly relied upon and being transferred can no longer be regarded as valid.

- 
8. We submit that ACWA must, in light of the above, apply for a new provisional AEL. At the very least, ACWA must apply to vary the provisional AEL and must ensure that the public has reasonable opportunities to participate and comment on the transfer, variation, and the AEL application, given the significant time lapse since the initial public participation on the AEL application.
  9. We also wish to bring to your attention the judgment handed down in the North Gauteng High Court last week in the case of *Earthlife Africa Jhb / the Minister of Environmental Affairs & Others*, case no 65662/16, in respect of the Thabametsi independent power producer (IPP) power station - the other IPP appointed as a preferred bidder, along with Khanyisa, under the coal baseload IPP procurement programme.<sup>2</sup> The case revolved around Thabametsi's, the Department's and the Minister's failure to adequately assess the climate change impacts of the Thabametsi power station. The judgment held that *"the decision to grant the authorisation without proper prior consideration of the climate change impacts is prejudicial in that permission has been granted to build a coal-fired power station which will emit substantial GHGs in an ecologically vulnerable area for 40 years without properly researching the climate change impacts for the area and the country as a whole before granting the authorisation."* It was thus confirmed that the National Environmental Management Act, 1998 requires a comprehensive assessment of the climate change impacts of a proposed power station, before such power station can go ahead. The same, we submit, applies to the proposed Khanyisa power station, which has not undertaken a detailed assessment of the climate change impacts of the power station. A climate change impact assessment requires, *inter alia*, not only an assessment of the project's greenhouse gas emissions, but also an assessment of how the project will impact on South Africa's resilience and adaptation to a changed climate (in other words how the project will exacerbate the impacts of climate change); and how climate change will impact on the project's own feasibility and efficiency. It must look at the remedial and mitigation measures which can be put into place, if any, to address the impacts, and the social and environmental costs of those impacts.
  10. We submit that, in light of the Thabametsi judgment, ACWA should have undertaken a detailed climate change impact assessment for Khanyisa. Kindly advise if ACWA has any intention of undertaking such as assessment now, as the project has not yet commenced, nor have financial and commercial close been reached.
  11. We await to hear from you.

Yours sincerely

**CENTRE FOR ENVIRONMENTAL RIGHTS**



per:

**Nicole Loser**

**Attorney**

Direct email: [nloser@cer.org.za](mailto:nloser@cer.org.za)

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<sup>2</sup> The judgment can be accessed here <http://cer.org.za/wp-content/uploads/2017/03/Judgment-Earthlife-Thabametsi-Final-06-03-2017.pdf>.

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E Anne-mari.white@aurecongroup.com  
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Our Reference: 111415

27 March 2017

Centre for Environmental Rights  
1 Scott Road  
Cape Town  
7925

**ATTENTION: Ms. N. Loser**

Dear Ms. Loser

**RE: COMMENTS & CONCERNS IN RELATION TO THE INTENDED TRANSFER OF AIR EMISSION LICENSE TO ACWA POWER KHANYISA THERMAL POWER STATION RF (PTY) LIMITED.**

1. We refer to your letter dated 14 March 2017 in respect of your request for an extension of the comment period of the application to transfer the provisional atmospheric emissions licence ("PAEL") to Power Khanyisa Thermal Power Station RF (Pty) Limited.
2. Although we do not believe there has been any prejudice suffered by you and that you have already had any opportunity to comment from 24 February 2017 to 24 March 2017, being 30 days, please note that, and as confirmed by you in your letter, this application pertains only to a change to the holder of the PAEL and not to any of the substantive conditions of the PAEL.
3. Due to the incorrect reference to section 47 instead of section 44 of the National Environmental Management: Air Quality Act 39 of 2004, we are prepared to grant you an extension until Friday, 31 March 2017, for you to comment on the present application for a transfer of the PAEL.
4. Regarding your questions whether this invitation was advertised, please refer to copies of the attached copies of press advertisements.
5. We reiterate (and as you have identified in your letter) that this application pertains to a change to the holder of the license only.
6. To the extent that any other changes to the PAEL may be required, these will follow the requisite processes and all interested and affected parties will be informed accordingly.
7. Please let us know if there is any further clarification required in respect of the above.

Yours sincerely

A handwritten signature in black ink, appearing to read "R. Heydenrych".

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**REUBEN HEYDENRYCH**  
Associate: Environmental Services

A handwritten signature in black ink, appearing to read "A. White".

---

**ANNE-MARI WHITE**  
Environmental Specialist

## Nicole Loser

---

**From:** Anne-Mari White <Anne-Mari.White@aurecongroup.com>  
**Sent:** 28 March 2017 06:45 PM  
**To:** vancastlep@emalahleni.gov.za  
**Cc:** phine@sahra.org.za; 'Imahlangu@environment.gov.za'; 'jmmabuza@mpg.gov.za'; dtswai@mpg.gov.za; nkabindeej@emalahleni.gov.za; mokomatsiliTT@emalahleni.gov.za; tphooko@environment.gov.za; presildas@webmail.co.za; spienaar@mpg.gov.za; maceveles@dwa.gov.za; mofokenglp@emalahleni.gov.za; ugovender@gibb.co.za; nontsikelelo.letsosa@gauteng.gov.za; langaam@emalahleni.gov.za; MTheledi@mpg.gov.za; damaphanga@mpg.gov.za; dingaan.mkhize@labour.gov.za; peterp@dws.gov.za; rademeyerS@dws.gov.za; jsiwela@mpg.gov.za; careens@social.mpu.gov.za; strydomj@webmail.co.za; schmidtk@nra.co.za; dennis.seemela@nersa.org.za; sunday.mabaso@dmr.gov.za; Martha.Mokonyane@dmr.gov.za; lebogang.mojanaga@energy.gov.za; envhelp@eskom.co.za; mohauram@mpg.gov.za; johnm@social.mpu.gov.za; mphog@social.mpg.gov.za; mudaulo@emalahleni.gov.za; kiefefa@yahoo.com; patrick.msibi@eskom.co.za; gmmondlane@mpu.gov.za; imakwetla@mpg.gov.za; jacques@amitek.co.za; health1@web4us.co.za; abeetge@mweb.co.za; malcolms@lantic.net; ewt@ewt.org.za; janineopp1@gmail.com; witbank.scpu@saps.org.za; phillip.olivier@eskom.co.za; nmkhonto@xtratacoal.co.za; gert@smithfarm.co.za; neelssmith@mweb.co.za; wit.wim.duplessis@gmail.com; natie.dp@gmail.com; annie.vangreuning@iprplc-gdfsuez-azia.com; Harmhout (harmhout@mweb.co.za); liebenpi@eskom.co.za; tielmanroux@mweb.co.za; nwbennella@mweb.co.za; Gerhard Steyn; croucam@gmail.com; nico.vw@vodamail.co.za; hettabez@gmail.com; adie@cleanstreamsa.co.za; riana@cleanstreamsa.co.za; akruiger@tis-sa.com; md@pravinamar.com; rethuseng@lantic.net; andrew.silarela@webmail.co.za; johan.gericke@eskom.co.za; inabarnard@gmail.com; herman@uniqueblinds.co.za; swanepwj@eskom.co.za; mareep@telkomsa.net; mu.dpps@web4us.co.za; dawid@caseenviro.co.za; annahj28@gmail.com; thembamabhena@gmail.com; mwbenel@mweb.co.za; oppermangert@gmail.com; tielmanroux@mweb.co.za; dirkjsmit@telkomsa.net; edmond.navess@gmail.com; shabanuronald@gmail.com; Robyn Hugo; Sylvia Kamanja; Nicole Loser; Nathan Philander; Ruth Kruger; 'Bobby Peek (bobby@groundwork.org.za)'; robs@groundwork.org.za; thomas@groundwork.org.za; hallowes@telkomsa.net; Lusani Jacqueline Rathanya (LRathanya@acwapower.com); Prabashen Govender; Reuben Heydenrych

**Subject:** Correction of notification: Notification of application for the transfer the Khanyisa Power Station AEL to ACWA Power Khanyisa Thermal Power Station

**Attachments:** 111415 AEL Correction of Notification letter - Khanyisa Power Station 17.03.28.pdf

Good day

Please find attached correction of notification letter distributed on 20 February 2017 regarding the applicant's intent to transfer the Provisional Air Emission License issued for the Khanyisa Power Station, from Anglo Operations (Pty) Ltd to ACWA Power Khanyisa Thermal Power Station (RF) (Pty) Ltd.

Kind Regards

**Anne-Mari White** Cert. Sci. Nat  
Environmental Specialist, Aurecon  
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F 013 753 2116  
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W [www.aurecongroup.com](http://www.aurecongroup.com)



28 March 2017

Dear Interested and Affected Party

**PROJECT 111415: CORRECTION OF NOTIFICATION DISTRIBUTED REGARDING THE TRANSFER OF AIR EMISSION LICENSE FOR THE KHANYISA IPP PROJECT LOCATED NEAR EMALAHLENI, MPUMALANGA PROVINCE**

The Department of Energy has awarded preferred bidder status to ACWA Power Khanyisa Thermal Power Station (RF) (Pty) Ltd for the ACWA Power Khanyisa IPP Project under its coal baseload programme for independent power producers. Therefore, ownership of the provisional Atmospheric Emission License (AEL) must be transferred from Anglo Operations (Pty) Ltd, the current holder, to ACWA Power Khanyisa Thermal Power Station (RF) (Pty) Ltd.

As a registered Interested and Affected Party for the above project, you are hereby informed that, in terms of Section 44 (not section 47 as previously indicated) of the National Environmental Management: Air Quality Act (Act No. 39 of 2004), a request will be submitted to the Nkangala District Municipality (the competent authority for this AEL) to transfer the provisional Air Emission License for the Khanyisa IPP Project from Anglo Operations (Pty) Ltd to ACWA Power Khanyisa Thermal Power Station (RF) (Pty) Ltd.

Kindly note that this application affects only the holder of the provisional license, and does not affect the content or emission standards.

In previous communication distributed, the timeframe within which comments must be received was omitted. As notifications were distributed 20 February 2017, we would like to give all I&APs an opportunity until 31 March 2017 to submit any queries, comments or concerns to the Environmental Assessment Practitioner, Ms Anne-Mari White of Aurecon at the address indicated above or via e-mail on: [anne-mari.white@aurecongroup.com](mailto:anne-mari.white@aurecongroup.com)

Yours sincerely,

Aurecon

A handwritten signature in black ink that reads "A White".

**Anne-Mari White** (Cert. Sci. Nat)  
Environmental Specialist

## Nicole Loser

---

**From:** Nicole Loser  
**Sent:** 29 March 2017 03:38 PM  
**To:** 'Anne-Mari White'  
**Cc:** Reuben Heydenrych; Lusani Jacqueline Rathanya (LRathanya@acwapower.com); Prabashen Govender; Robyn Hugo  
**Subject:** RE: Khanyisa Power Station  
**Attachments:** CER Letter Aurecon - Khanyisa AEL 14 3 17.pdf; CER Letter to MDARDLEA 1 12 16.pdf

Thank you for the response Anne-Mari and for the corrected notice sent yesterday.

We are out of office for most of the week and certainly will not be in a position to submit formal comments by the suggested deadline of 31 March 2017.

Please, however, regard the attached letters as our comments for purposes of the intended transfer. We place on record that we do not regard this as a valid notification for purposes of section 44 of the Air Quality Act. We confirm that we, on behalf of groundWork, object to the transfer on the basis that a new AEL must be applied for based on the reasons set out in the attached letters.

Kind regards

Nicole Löser

Attorney

Centre for Environmental Rights NPC

A non-profit company with registration number 2009/020736/08, PBO No. 930032226, NPO No. 075-863, VAT No. 4770260653 and a Law Clinic registered with the Law Society of the Cape of Good Hope

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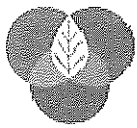
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Centre for  
Environmental Rights

Advancing Environmental Rights in South Africa

---

**From:** Anne-Mari White [mailto:Anne-Mari.White@aurecongroup.com]  
**Sent:** 27 March 2017 02:01 PM  
**To:** Nicole Loser <nloser@cer.org.za>  
**Cc:** Reuben Heydenrych <Reuben.Heydenrych@aurecongroup.com>; Lusani Jacqueline Rathanya (LRathanya@acwapower.com) <LRathanya@acwapower.com>; Prabashen Govender <Pgovender@acwapower.com>  
**Subject:** RE: Khanyisa Power Station

Dear Ms. Loser

Please find attached our response to your letter dated 14 March 2017.