



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

Honourable Ms Barbara Creecy

Minister of Environment, Forestry and Fisheries

By email: mndamase@environment.gov.za;

msipilica@environment.gov.za;

fshaik@environment.gov.za

Copied to:

Dr Thulie Khumalo

National Air Quality Officer

Department of Environment, Forestry and Fisheries

By email: tkhumalo@environment.gov.za

Our ref: TL/DS
3 November 2020

Dear Minister Creecy

ESKOM'S INTENDED APPLICATIONS FOR EXEMPTION FROM COMPLIANCE WITH THE MINIMUM EMISSION STANDARDS UNDER THE NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT 39 OF 2004

1. We address you as the Life After Coal campaign (LAC), a joint campaign by the Centre for Environmental Rights (CER), groundWork (gW), and Earthlife Africa (ELA).¹
2. We note, with grave concern, that Eskom has submitted another round of applications to the National Air Quality Officer (NAQO), to either further delay compliance with the Minimum Emission Standards (MES), and in some cases avoid compliance altogether, now covering 14 of its 15 coal-fired power stations. The LAC campaign has submitted written objections to all of these applications² and the decisions of the NAQO are awaited.
3. Following the submission of Eskom's latest applications to the NAQO for weaker 'alternative emission limits' at Medupi and Matimba coal-fired power stations – which are in effect exemption applications, to which the LAC campaign has objected – Eskom confirmed in an email on 17 September 2020, that it is *"in the process of submitting MES exemption applications in terms of section 59 of the Air Quality Act to the Minister of DEFF in respect of Medupi, Matimba and our Highveld stations. Details of these will be shared with stakeholders in due course."*

¹ Life After Coal campaign aims to discourage investment in new coal-fired power stations and mines, to accelerate the retirement of South Africa's existing coal infrastructure, and to encourage and enable a just transition to renewable energy systems for the people.

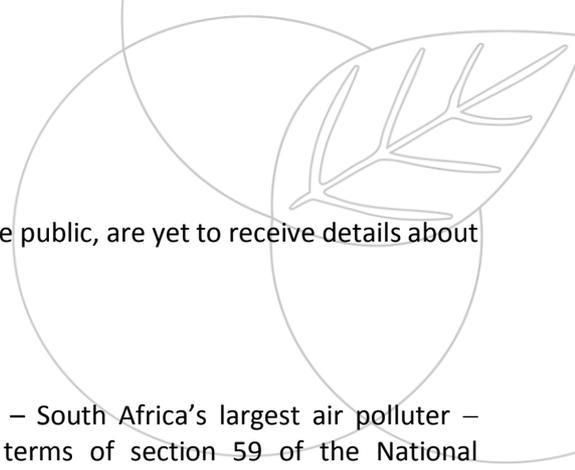
² The three sets of comments are available at: https://cer.org.za/wp-content/uploads/2019/02/LAC-Eskom-MES-Postponement-Submissions_4-February-2019.pdf; https://cer.org.za/wp-content/uploads/2020/08/LAC-submission_objections-to-Grootvlei-MES-suspension-application_30-July-2020.pdf; and https://cer.org.za/wp-content/uploads/2020/11/LAC-Objections_Medupi-and-Matimba-MES-applications_28-August-2020.pdf

Cape Town: 2nd Floor, Springtime Studios, 1 Scott Road, Observatory, 7925, South Africa

Johannesburg: First Floor, DJ du Plessis Building, West Campus, University of the Witwatersrand, Braamfontein, 2001, South Africa

Tel 021 447 1647 (Cape Town) | Tel 010 442 6830 (Johannesburg) | Fax 086 730 9098

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4. As far as we are aware, stakeholders, including interested persons and the public, are yet to receive details about these exemption applications.
 5. In the interim, we write to you to record the following:
 - 5.1 the LAC campaign wholly and unequivocally objects to Eskom – South Africa’s largest air polluter – applying for exemption from compliance with the MES, in terms of section 59 of the National Environmental Management Act 39 of 2004 (AQA); or any other legislative provision;
 - 5.2 Eskom is prohibited from applying for exemption from the MES as a set of established national standards for emissions from point-sources, in terms of section 9(1)(c) of AQA;
 - 5.3 the prescribed MES in Eskom’s numerous atmospheric emission licences (AELs) is an indispensable legislative measure to reduce the harmful effects of the air pollutants from its power stations, and granting exemption from compliance with the MES would be a regressive step; and
 - 5.4 we implore you not to entertain Eskom’s exemption applications; however, in the event that you do and prior to considering such applications (which we submit are *ultra vires* and unlawful), we request that you require Eskom to take appropriate steps to bring the application to the attention of relevant organs of state, interested persons, and the public, in accordance with section 59(3) of AQA.
 6. We briefly address each of these issues below.

Exemption from compliance with the MES is unlawful

7. As you may be aware, member organisations of the LAC campaign, along with various other environmental justice organisations, have maintained since 2014 that consecutive postponement applications – or the use of ‘rolling postponements’ of compliance through to plant decommissioning – are tantamount to exemptions from compliance with the MES – and the AQA. This approach undermines the rule of law and the legitimate government purpose behind the listing of activities and prescribed emission limits, in terms of sections 9 and 21 of the AQA (List of Activities).³
8. We reiterate that exemptions from compliance with the MES are impermissible, whether through the use of rolling postponement applications, ‘alternative emission limits’ that are weaker than the existing plant MES, or formal exemption applications in terms of section 59 of the AQA, which expressly precludes exemptions from national emission standards (section 9) – see below. The LAC campaign therefore, wholly and unequivocally, objects to Eskom’s intended exemption applications.
9. Eskom is the largest air polluter in South Africa with at least hundreds of deaths, per year, attributable to the emissions from its 15 coal-fired power stations. Moreover, all of its coal-fired power stations are located in South Africa’s 3 priority areas,⁴ declared in terms of section 18 of the AQA. These areas continue to be in non-compliance with the National Ambient Air Quality Standards (NAAQS) despite their long-standing priority area status. Granting exemptions from compliance with the MES to Eskom would be *ultra vires* the Constitution of the Republic of South Africa, 1996, the AQA, the List of Activities, the 2017 National Framework for Air Quality Management (2017 National Framework), and the provisions of the National Environmental Management Act, 1998.

Exclusions from section 59 of the AQA

10. Section 59 (1) of the AQA provides that:

³ https://cer.org.za/wp-content/uploads/2014/02/CER-submissions-on-Eskom-s-postponement-applications_12-Feb-2014_final1.pdf at paragraphs 97-99.

⁴ Vaal Triangle Airshed Priority Area (2006), the Highveld Priority Area (2007), Waterberg-Bojanala Priority Area (2012).

“(a) Any person or organ of state may, in writing, apply for exemption from the application of a provision of this Act to the Minister.

(b) No exemption from a provision of section 9, 22 or 25 may be granted in terms of paragraph (a).”

11. It is explicitly clear that no exemption applications are permitted for section 9 (national standards), section 22 (consequences of listing), and section 25 (consequences of declaration) in the AQA. Accordingly, the Department of Environmental Affairs (the “Department”), as it was at the time, stipulated in a 2013 media release that *“it is clear that no exemptions may be granted from the provisions of section 22 (Atmospheric Emission License), among others”*. This is attached marked **Annexure “A”**.
12. In a recent response to the LAC campaign’s reference to the above declaration, Eskom has confirmed that *“it 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 in the MES”*.
13. We dispute the legality of Eskom’s approach in relation to section 22. Importantly, we submit that Eskom is also prohibited from applying for exemption from compliance with the MES, as the MES are national emission standards that fall under section 9 of the AQA, which is specifically excluded from the application of section 59(1) of the AQA.⁵
14. Sub-section 9(1)(c) provides that the Minister *“may, in respect of each of those substances or mixtures of substances, establish national standards for emissions from point, non-point or mobile sources”*. This is what the MES are. This is supported by the 2017 National Framework, under the heading ‘Standard drafting’ – *“[a]ccording to AQA, the Minister must (or MEC or municipality may) identify substances or mixtures of substances in ambient air (Section 9(1)(b)), emitted pollutants (Section 9(1)(c)), controlled emitters (Section 23(1)) or controlled fuels (Section 26(1)) that present a threat to health, well-being or the environment through any means”*.⁶ In addition to the NAAQS and controlled emitter regulations established to date, the Department has established national standards for emissions from point sources in the form of the Listed Activities, published in 2010. The Listed Activities apply nationally⁷ and prescribe minimum emission standards in respect of a substance or mixture of substances resulting from a listed activity (point source) that may have a significant detrimental impact on health and the environment. This includes the combustion of solid-fuel at Eskom’s coal-fired power stations.⁸
15. In any event, it cannot be that Parliament intended for an entity to be barred from applying for exemption from the application of the NAAQS, but an entity is permitted to apply for exemption from compliance with the MES, which is currently the only legislative measure that exists to reduce point-source pollutants from large industrial emitters to ensure compliance with the NAAQS. This is especially so where that entity is Eskom.

Listing of activities resulting in atmospheric emissions⁹

16. Sections 21 and 22 of the AQA go hand-in-hand. Eskom is required to operate in compliance with an AEL by virtue of the fact that it conducts listed activities that ‘have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage’. The Listed Activities are accompanied by the MES set out in part 3 of the notice. The purpose of including the MES in the AEL is to reduce and mitigate the significant detrimental effects of the pollutants emitted from Eskom’s coal-fired power stations. Therefore, to remove compliance with the MES (or other national emission limits) from an AEL is to nullify a, if not the, core function of an AEL. This is fundamentally about the substance of the AEL, not its form.

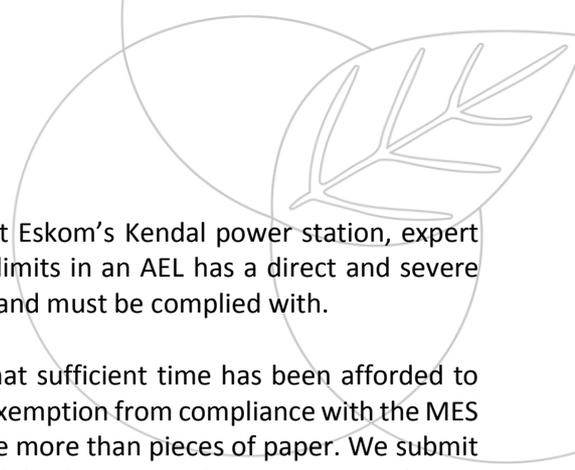
⁵ Contained in Chapter 2, part 2, of the AQA titled ‘National, provincial and local ambient air quality and emission standards’.

⁶ Page 52 of the 2017 National Framework.

⁷ Section 21 (2) of AQA; page 55 of the 2017 National Framework.

⁸ Subcategory 1.1: Solid Fuel Combustion Installations

⁹ Chapter 4, part 2, of the AQA.

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17. As you know from the ongoing compliance enforcement process against Eskom's Kendal power station, expert evidence has illustrated that non-compliance with prescribed emission limits in an AEL has a direct and severe impact on people's health.¹⁰ Such emission thresholds are indispensable and must be complied with.
 18. The Department has rightfully acknowledged in the 2017 Framework that sufficient time has been afforded to industry towards compliance with the initial MES by 2020.¹¹ Granting an exemption from compliance with the MES would be a regressive measure, effectively reducing Eskom's AELs to little more than pieces of paper. We submit that such a decision would therefore be unlawful and unconstitutional, while also setting dangerous precedent in two ways:
 - 18.1 as we highlighted in our 2014 objections to Eskom's initial compliance postponement applications,¹² non-compliance with the MES, or exemption in this case, would have a ripple effect with other industry players seeking to be exempt from the application of the MES, contrary to the object of the AQA. Granting an MES exemption would also be patently unfair to other existing facilities that have incurred the costs of taking timely steps to comply with the MES, and it would mean no level playing field for industries with detrimental atmospheric emissions for decades to come; and
 - 18.2 Eskom is responsible for 40% of South Africa's carbon emissions. The publication of the Climate Change Act is imminent and its effective implementation will be dependent on imposing carbon dioxide emission limits on Eskom, along with other Greenhouse Gas (GHG) emitters in South Africa. Allowing Eskom, South Africa's largest atmospheric polluter, to be exempt from compliance with the *minimum* atmospheric pollution standards would not only undermine the AQA regime, but it will open the door to Eskom, and other large GHG emitters, to seek the same unlawful treatment in response to GHG emission limits under the forthcoming climate change legislative regime. This cannot be permitted.
 19. Based on the abovementioned reasons, we implore you not to entertain any applications from Eskom for exemption from compliance with the MES.
 20. In the event that you do allow Eskom to submit an exemption application/s and intend to consider such applications, which we maintain is impermissible, we ask that you require Eskom to take appropriate steps to bring the application to the attention of relevant organs of state, interested persons, and the public, in accordance with section 59(3) of AQA. Considering the detrimental impact that would most likely result from Eskom's exemption from compliance with the MES, especially to public health, we submit that Eskom is obliged to inform the public, and that there should be an opportunity for interested and affected persons to submit written comments. Any submissions must be taken into account when considering an exemption application.
 21. **We request that you respond to this letter confirming the Department's position on the legality of Eskom applying for exemption from compliance with the MES, in terms of section 59 of the AQA.**
 22. Please contact us if you require any further information in this regard. We await your response.

¹⁰ <https://cer.org.za/news/eskom-resists-enforcement-while-new-evidence-on-deaths-by-kendals-pollution-emerge>

¹¹ At page 61.

¹² See footnote 3 above at paragraphs 92-3.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS

per:



Timothy Lloyd
Attorney

Direct email: tlloyd@cer.org.za

