"ANNEXURE A"

GROUNDWORK	**First Appellant**
EARTHLIFE AFRICA	**Second Appellant**
NATIONAL AIR QUALITY OFFICER	**First Respondent**
ESKOM HOLDINGS SOC LTD	**Second Respondent**

APPEAL PURSUANT TO SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998, AGAINST THE NATIONAL AIR QUALITY OFFICER'S DECISIONS REGARDING ESKOM'S APPLICATIONS FOR POSTPONEMENT AND SUSPENSION OF COMPLIANCE TIMEFRAMES, AND/OR ALTERNATIVE LIMITS, RELATING TO THE NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT 39 OF 2004 MINIMUM EMISSION STANDARDS

INTRODUCTION

1. This is an appeal to the Honourable Minister of the Department of Forestry, Fisheries and Environment (**DFFE**) in terms of section 43(1) of the National Environmental Management Act (**NEMA**), read together with Regulation 3(1) of the National Appeal Regulations, 2014 (the **"Appeal Regulations**") and the Guideline on the Administration of Appeals, 2015 (the **"Appeal Guidelines**"), in respect of a number of the National Air Quality Officer's decisions on Eskom's applications for postponement of compliance and suspension of compliance with the Minimum Emission Standards (**MES**), and/or weaker alternative limits, for its fleet of coal-fired power stations. These decisions are all dated 30 October 2021 (the "**decisions**").

2. In terms of Section 21 of the National Environmental Management: Air Quality Act, 2004 (**AQA**), the List of Activities came into force on 1 April 2010 and prescribes MES for various polluting activities, including for pollutants emitted from Eskom's solid-fuel (coal) combustion installations.

3. The purpose of the MES and the List of Activities is — as the full title of the List of Activities suggests — to control and reduce the emission of harmful pollutants which may have a significant detrimental impact on the environment, including health, social, and economic conditions, among others. Subject to its proper implementation and enforcement, the MES in the List of Activities is referenced as a reasonable legislative measure to give effect to section 24(a) and (b) of the Constitution of the Republic of South Africa, 1996 (the "**Constitution**").

4. This Appeal is lodged with the Appeal & Legal Review Directorate to dispute the following decisions issued by the First Respondent:

   4.1. the 5-year postponement of compliance granted to Majuba power station for the nitrogen oxide (**NO_x**) new plant standard from 1 April 2020 to 31 March 2025 and directing it to comply with a limit of 1300mg/Nm^3 that is above the existing plant standard of 1100 mg/Nm^3;

   4.2. the 5-year postponement of compliance granted to Kendal power station for the NO_x new plant standard from 1 April 2020 to 31 March 2025 and directing the station to comply with the existing plant limit of 1100mg/Nm^3;

   4.3. the 5-year postponement of compliance granted to Tutuka power station for the NO_x new plant standard from 1 April 2020 to 31 March 2025 and directing the station to comply with the existing plant limit of 1100mg/Nm^3; and

   4.4. 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.

5. At the outset, for the benefit of the Minister as the appeal authority, as well as any other relevant DFFE officials, we attach a summary table as "**Annexure A1**" which presents the application outcome per Eskom power station, along with the scheduled end-of-life dates, among other relevant information. The fleet of coal-fired power stations have been separated into four basic categories – 'old stations'; 'older stations; 'mid-life' stations; and 'new build' stations, namely Medupi and Kusile power stations.

6. In this appeal we address the following aspects in turn:

   A. The Parties;

   B. Request for Condonation;

   C. Background;

   D. The Relevant Legal Framework;

   E. Grounds of Appeal; and

   F. Conclusion and Relief Sought.

A. THE PARTIES

7. The First Appellant is groundWork Trust ("**groundwork**"), a non-profit environmental justice campaigning organisation working primarily in South Africa, in the areas of Climate & Energy Justice, Coal, Environmental Health, Waste, Environmental Justice Education and Environmental Justice Information. groundWork has its offices at 8 Gough Street, Pietermaritzburg, KwaZulu-Natal, South Africa.

8. The Second Appellant is Earthlife Africa, a non-profit organisation that seeks a better life for all people without exploiting other people or degrading their environment, by encouraging and supporting individuals, businesses and industries to reduce pollution, minimise waste and protect our natural resources.

9. The First and Second Appellants are jointly referred to as the "**Appellants**".

10. The First Respondent is the National Air Quality Officer (**NAQO**), the designated authority responsible for the decisions in question.

11. The Second Respondent is Eskom Holdings SOC Ltd.

B. REQUEST FOR CONDONATION

12. The Appeal is lodged in terms of section 43(1) of NEMA, which provides that "*any person may appeal to the Minister against the decision taken by any person acting under a power delegated by the Minister under* [NEMA] *or a specific*

environmental management act", read with the Appeal Regulations,[1] which provide for the submission of an appeal within 20-days from the date that the notification of the decision was sent to the registered interested and affected parties (**I&APs**) by the Applicant.[2]

13. Section 12 in the Appeal Guidelines, read with section 47C of NEMA, permits the application for condonation or the extension of time periods for a belated appeal or responding statement. In deciding a request for condonation or the extension of a time period, the Minister will consider the following factors:

    13.1 whether good cause is shown to extend a time period;
    13.2 the extent of the period requested, or the degree of lateness;
    13.3 the factual basis of the motivation for the request and the explanation thereof;
    13.4 whether factors outside of the control of the requesting party have played a role;
    13.5 potential prejudice in granting or refusing the request to any of the parties;
    13.6 whether it is in the interest of justice to grant or refuse the request; and
    13.7 prospects of success on the merits.

14. We refer to the letter from the Centre for Environmental Rights addressed to the Appeals & Legal Review Directorate, dated 21 January 2021, attached as "**Annexure A2**". This letter, on behalf of the Appellants, served to place the factual chronology on record, as well as concerns regarding the timing and manner in which the First Respondent's decisions have been shared with I&APs and that the Second Respondent's appeal has been withheld from I&APs. This factual chronology is as follows:

    14.1 the First Respondent's decisions, dated 30 October 2021, were communicated to the Second Respondent on 4 November 2021;
    14.2 section 4 of the Appeal Guidelines required the Second Respondent to notify the registered I&APs of the outcome of the decision within 12 days of receipt – by 16 November 2021;

[1] GN R 993 GG 38303 of 8 December 2014.
[2] Regulation 4(1)(a) NEMA National Appeal Regulations, 2014.

14.3 instead, registered I&APs only received the decisions on 14 December 2021 — almost a month later — and a day after the Second Respondent reportedly filed its appeal against the decisions;

14.4 at the time of receiving the decisions, a number of staff members from Earthlife Africa, groundWork, and CER, who have knowledge and expertise relevant to this matter, had already taken leave just prior to the offices of all three organisations closing on 15 December 2021 for the public holiday period;

14.5 staff members from the groundWork and CER started returning from leave on the 12th of January 2022, onwards. Staff from Earthlife Africa only returned to the office on the 17th of January 2022 (as is typical for this time of year when most organisations and institutions country-wide close for the festive season and summer holiday); and

14.6 despite regulation 4 of the Appeal Regulations, a copy of this appeal submission has still not been distributed to registered I&APs to consider the prospect of filing a responding statement and the time and resources this would demand.

15. We reiterate that this a matter of public interest and importance with far-reaching implications for constitutional rights, including people's health, and our constitutional value system in general. It warrants a careful techno-legal assessment of the decisions, amounting to 68 pages, surrounding factors, and consideration of the LAC's resource constraints. The consequence is that because of the timing of the publication of the decisions on the eve of the public holiday period — which were before the First Respondent for over a year — and the fact that the I&APs have not had sight of the Second Respondent's appeal, the Appellants were not provided with a reasonable period to duly consider the decisions and the prospect of an appeal and to resolve a way forward by 25 January 2022 – the adjusted appeal deadline.

16. In the time since our and our clients' return from the public holiday period we have endeavoured to consider the decisions, take instructions, and prepare this appeal as swiftly as possible. We maintain that filing this appeal 15 calendar days after the adjusted deadline, in the circumstances, is not an unreasonable delay.

17. We submit that there would be no prejudice upon either Respondent if this condonation request is granted, as the enforcement of the First Respondent's decisions is suspended pending the outcome of the Second Respondent's appeal. The administrative timeframes for both appeals would run concurrently, as I&AP's will have 20 days to file responding statements in reply to either/both appeals.

18. We submit that there are strong prospects of success on the merits of this appeal, especially the 5-year postponement of compliance granted to Majuba, Kendal, Tutuka power stations. In fact, we submit that the alternative NOx limit granted to Majuba — that is weaker than the existing plant limit — appears to be a patent error, considering the First Respondent's reasons in relation to the Majuba power station application and reasons for rejecting applications at other coal-fired power stations.

19. We further submit that due to the nature of these applications and the circumstances outlined above, good cause has been shown for the late filing of this appeal. Overall, the interests of justice favour the Minister's consideration of the grounds of appeal, as set out below, and accordingly, we request that condonation be granted.

C. BACKGROUND

20. During the course of the period 2018 – 2020, Eskom applied for a combination of 5-year postponements of compliance, suspensions of compliance, and alternative (weaker) limits in relation to the MES compliance timeframes, ultimately covering 14 of its coal-fired power stations (the "**applications**"), in addition to applications for its liquid-fuel stations.

21. The Life After Coal (LAC) Campaign[3] — comprising the Appellants and the Centre for Environmental Rights (CER) — submitted detailed written objections to all of Eskom's applications, namely:

    21.1. submissions on the background information document (bid) for Eskom's second postponement application in respect of the 2015 MES for Tutuka power station, submitted in February 2018;

    21.2. submissions on Eskom's bid and application for suspension of compliance, postponement of compliance, and/or alternative weaker limits for 10 of its coal-fired power stations (Lethabo, Majuba, Camden, Kriel, Matla, Kendal, Duvha, Arnot, Hendrina and Komati), submitted in September 2018 and February 2019, respectively;

    21.3. objections to Eskom's application for a once-off suspension of compliance with the new plant MES and variation request for the Grootvlei power station, submitted in July 2020; and

    21.4. objections to Eskom's applications for alternative weaker limits to the MES for the Medupi and Matimba power stations submitted November 2019 and in August 2020.

22. We reiterate and stand by all of the above-mentioned submissions and the expert analysis underpinning the various submissions. The Appellants central objections are set out in the February 2019 submissions, attached as "**Annexure A3**", for ease of reference.[4]

23. Based on email correspondence between CER and Second Respondent/it's Environmental Assessment Practitioner in July and August 2019, the Appellants understand that the Department requested "*additional information*" to support

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[3] Life After Coal campaign, a joint campaign by the Centre for Environmental Rights (CER), groundWork (gW), and Earthlife Africa Johannesburg (ELA) that aims to: discourage the development of new coal-fired power stations and mines; reduce emissions from existing coal infrastructure and encourage a coal phase-out; and enable a just transition to sustainable energy systems for the people. CER, gW, ELA, are registered interested and affected parties (I&APs) in relation to Eskom's applications for suspension of compliance, postponement of compliance, and/or alternative limits.

[4] To avoid overburdening this appeal submission, Annexures 1 – 3 to the 2019 objections are accessible here under '*Eskom's 2018 applications to delay compliance with the Minimum Emission Standards for 14 Power Stations'*; https://cer.org.za/programmes/pollution-climate-change/key-correspondence.

Eskom's applications covering 11 of its coal-fired power stations (Tutuka, Lethabo, Majuba, Camden, Kriel, Matla, Kendal, Duvha, Arnot, Hendrina and Komati) and that Eskom was in the process of generating the information required. No further details were provided regarding the nature of, or level of detail in, this additional information, and, to the extent that the Appellants are aware, this additional information was not shared with I&APs for consideration and comment. The Appellants invite the Second Respondent to demonstrate otherwise.

24. In a follow up email received from the Second Respondent in September 2020, it was confirmed that Eskom had submitted all "*outstanding information*" to the Department by 31 August 2020, as required. This included the "*additional technical information*" in respect the Eskom power stations located in the Highveld, and for Medupi and Matimba power stations, situated in the Limpopo province. We reiterate that we and our clients have still not had sight of this additional technical information, and request that it be made available to I&APs.

25. This email correspondence is attached as "**Annexure A4**".

26. Over a year later, on 30 October 2021, the First Respondent issued decisions in response to each of Eskom's applications covering 14 coal-fired power stations, as well as Eskom's liquid-fuel power stations. By and large, the Appellants accept the decisions, in accordance with the List of Activities, as amended, the AQA, NEMA, and the Constitution. As set out above, this appeal is limited to the decisions concerning Eskom's Kendal, Tutuka, Majuba, Camden, Hendrina, Arnot, Komati, Grootvlei, and Kriel power stations.

27. At this point in this submission, it is necessary to both emphasise and record that it is crucial that all relevant information is provided, at every stage of the application process, to facilitate transparent, informed, and fair public participation, as required by AQA, NEMA, and the Environmental Impact Assessment Regulations, 2014 (the "**EIA Regulations**"). Access to all relevant information to allow meaningful public participation is also essential in order to give effect to the right to administrative action that is lawful, reasonable and procedurally fair, as provided for in the Promotion of Access to Information Act, 2000, and section 33 of the Constitution.

28. In this regard, is it unacceptable that the additional technical information that the Second Respondent submitted in relation to the majority of its applications was not shared with registered I&AP's, with an opportunity to provide written comments to ensure that all relevant information was before the First Respondent for due consideration and response. Omitting to inform all registered I&APs of the First Respondent's request for further supporting information, and omitting to share the additional technical information as submitted, is plainly inconsistent with the AQA, the List of Activities, the 2017 Framework, NEMA, the EIA Regulations, and the Constitution.

D. RELEVANT LEGAL FRAMEWORK

The Constitution and National Environmental Management Principles

29. Section 24 of the Constitution of the Republic of South Africa, 1996, guarantees everyone the right to an environment not harmful to health or well-being, and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that: prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

30. As the Constitution is the supreme law, any law or conduct deemed to be inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[5] All law and conduct must be measured against, and give effect to, the environmental rights in section 24 of the Constitution, consistent with an open and democratic society based on human dignity, equality, and freedom.

31. The overarching environmental legislation which implements section 24 of the Constitution is NEMA,[6] including the environmental management principles in section 2 of NEMA (the "**NEMA Principles**"), to which any organ of state must

[5] Section 2 of the Constitution.
[6] Section 2(1)of NEMA.

adhere in all decision-making and when exercising other functions. Some of these *binding directive principles* are as follows (our emphasis):

a. the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage ("public trust doctrine);[7]

b. a risk-averse and cautious approach must applied, which takes into account the limits of current knowledge about the consequences of decisions and actions[8] ("precautionary principle");

c. negative impacts on the environment and on people's environmental rights must be anticipated and prevented, and where they cannot be altogether prevented, must be minimised and remedied ("preventive principle");[9]

d. pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied ("preventive principle");

e. environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons;[10]

f. responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its lifecycle;[11]

g. sensitive, vulnerable, highly dynamic or stressed ecosystems…require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure;[12]

[7] Section 2(4)(n) of NEMA.
[8] Section 2(4)(a)(vii) of NEMA.
[9] Section 2(4)(a)(viii) of NEMA.
[10] Section 2(4)(c) of NEMA.
[11] Section 2(4)(e) of NEMA.
[12] Section2(4)(r) of NEMA.

h. the cost of remedying the pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment ("polluter pays' principle");[13]

i. use and exploitation of non-renewable natural resources must be responsible and equitable, and take into account the consequences of the depletion of the resource;[14] and

j. the participation of all interested and affected parties in environmental governance must be promoted.[15]

National Environmental Management: Air Quality Act, 2004

32. Enacted in 2005 to give effect to section 24 of the Constitution and the NEMA Principles, the AQA aims to ensure that air pollution is not harmful to human health or well-being, and to enhance the air quality in South Africa.[16] The AQA provides that its interpretation and application must be guided by the NEMA Principles.

33. Accordingly, the NAQO, licensing authorities, and Eskom (an organ of state) must adhere to the NEMA Principles and legal provisions of the AQA in its decision-making and exercise of designated functions – including the consideration of Eskom's applications to further delay and/or completely avoid compliance with air pollution laws that primarily exist to protect people's health and well-being.

34. In terms of section 9 of the AQA, National Ambient Air Quality Standards (**NAAQS**) have been set for eight pollutants (nitrogen dioxide (NO_2), ozone (O_3), sulphur dioxide (SO_2), CO (carbon monoxide), benzene (C_6H_6), lead (Pb), PM_{10} (particles with aerodynamic diameter less than ten micron metres) and $PM_{2.5}$ (particles with aerodynamic diameter less than two-and-a-half micron metres). The NAAQS are intended to be health-based, and "*broadly accepted as a proxy for air that it not*

[13] Section2(4)(p) of NEMA.
[14] Section2(4)(a)(v) of NEMA.
[15] Section 2(4)(f) of NEMA.
[16] Section 2 of the AQA.

harmful to health and well-being",[17] or "*to objectively define what quality of ambient air South Africans agree is not harmful to their health and well-being*".[18]

35. In terms of section 18 of the AQA, three air-shed priority areas have been declared on the basis that NAAQS are being or may be exceeded in the area, or any other situation exists which is causing, or may cause, a significant negative impact on air quality in the area, and this requires specific air quality management action to rectify the situation. The Vaal Triangle Priority Air-shed Priority Area (VTAPA) was declared in 2006, the Highveld Priority Area (HPA) in 2007, and Waterberg-Bojanala Priority Area (WBPA) declared in 2012. All three priority areas are home to Eskom coal-fired power stations, 12 of which are situated in the HPA. Despite this priority status, the HPA, VTAPA, and WBPA were in non-compliance with the NAAQS at the time that these applications were submitted, and it is evident that this state of non-compliance is ongoing.[19]

36. Importantly the Preamble to the AQA appropriately frames the factual and regulatory setting for the implementation and enforcement of the statutory tools provided in the AQA. It is necessary to extract and the paste the entire Preamble below, as this ought to have been front of mind of the First Respondent in arriving at this set of decisions, as, we submit, it should be for the Minister as the appeal authority:

> "***WHEREAS*** *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;*
>
> ***And whereas*** *the burden of health impacts associated with polluted ambient air falls most heavily on the poor;*
>
> ***And whereas*** *air pollution carries a high social, economic and environmental cost that is seldom borne by the polluter;*

[17] Section 5.2.3.4 of the 2017 National Framework.
[18] Section 5.4.3.2 of the 2017 National Framework.
[19] Notwithstanding gaps in the monitoring data, this is based on the 2020 State of the Air Report, and a sample review of monthly monitoring reports between August 2021 – August 2020 for the VTAPA, HPA, and WBPA, respectively. No monthly monitoring reports appear to be available on SAAQIS for the three priority areas covering the months of September 2021 – January 2022.

And whereas *atmospheric emissions of ozone-depleting substances, greenhouse gases and other substances have deleterious effects on the environment both locally and globally;*

And whereas *everyone has the constitutional right to an environment that is not harmful to their health or well-being;*

And whereas *everyone has the constitutional right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—*

(a) prevent pollution and ecological degradation;

(b) promote conservation; and

(c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;

And whereas *minimisation of pollution through vigorous control, cleaner technologies and cleaner production practices is key to ensuring that air quality is improved;*

And whereas *additional legislation is necessary to strengthen the Government's strategies for the protection of the environment and, more specifically, the enhancement of the quality of ambient air, in order to secure an environment that is not harmful to the health or well-being of people*."

National Framework for Air Quality Management

37. The AQA provides for a National Framework for Air Quality Management to achieve the objects of the AQA.[20] The current iteration is the 2017 National Framework for Air Quality Management (the "2017 Framework"), which was published in October 2018.[21] It aims to achieve the objectives of the AQA and provides various norms and standards to control emissions, manage and monitor air quality, and provide

[20] Document available here: https://cer.org.za/wp-content/uploads/2018/10/National-Environmental-Managerment-Air-Quality-Act-39-2004-the-2017-National-20181026-GGN-41996-01144.pdf.
[21] Document available here: https://cer.org.za/wp-content/uploads/2018/10/National-Environmental-Managerment-Air-Quality-Act-39-2004-the-2017-National-20181026-GGN-41996-01144.pdf

mechanisms, systems, and procedures to attain compliance with the National Ambient Air Quality Standards (NAAQS).[22] The 2017 Framework forms part of the definition of "this Act" in the AQA,[23] and "*binds all organs of state in all spheres of government*".[24] The AQA requires that an organ of state "*give effect to the national framework when exercising a power or performing a duty in terms of the [AQA] or any other legislation regulating air quality management*".[25]

38. Paragraph 5.4.3.4 of the 2017 Framework provides that: "*given the potential economic implications of emission standards, and mindful that emission standard setting in South Africa was not based on comprehensive sector-based CBA (at least not for the initial group of Listed Activities), provision is made for specific industries to apply for possible extensions to compliance time frames for new plant standards. A proponent of a Listed Activity will be allowed to apply for a postponement or suspension of the compliance date and such an application will be considered based on the following conditions being met:*

    a. *an application is accompanied by a completed Atmospheric Impact Report (as contemplated in Section 30 of the AQA); and* ***demonstration that the industry's air emissions are not causing direct adverse impacts on the surrounding environment****;*

    b. *the application is accompanied by a concluded public participation process undertaken as specified in the NEMA Environmental Impact Assessment Regulations;*

    c. *the application is submitted to the National Department on or before 31 March 2019****;***

    d. ***ambient air quality in the area is in compliance with the applicable National Ambient Air Quality Standards****; and*

    e. *other requirements as may be specified by the National Air Quality Officer*" (our emphasis).[26]

[22] Section 7(1) of the AQA.
[23] Section 1(1) of the AQA.
[24] Section 7(3)(a) of the AQA.
[25] Section 7(4) of the AQA.
[26] Please refer generally to page 60 to 61.

39. Paragraph 5.4.3.4 of the 2017 Framework thus stipulates that an application to postpone or suspend compliance with MES may be considered, **provided NAAQS are in compliance and the air emissions are not causing direct adverse impacts on the surrounding environment, among other explicit criteria.** This phrasing is peremptory and allows for no discretion on the part of the decision-maker.

40. Paragraph 5.4.3.4 of the 2017 Framework also provides that:

> a. *Existing facilities may apply for a once-off postponement of compliance timeframes for new plant standards. A postponement if granted will be for a period not exceeding 5 years and no postponement would be valid beyond 31 March 2025;*
> b. *Existing facilities that will be decommissioned by 2030 may apply for a once-off suspension of compliance timeframes with new plant standards for a period not beyond 2030. An application must be accompanied by a clear decommissioning schedule and no such application shall be accepted after 31 March 2019;*
> c. *Existing facilities that will be granted a suspension of compliance timeframes shall comply with existing plant standards during the suspension period until they are decommissioned; and*
> d. *No postponement of compliance timeframes or a suspension of compliance timeframes shall be granted for existing plant standards.*
> e. *An existing facility may submit an application regarding a new plant standard to the National Air Quality Officer for consideration, if* ***the facility is in compliance with other emission limits but cannot comply with a particular pollutant or pollutants****. An application must* ***demonstrate previous reduction in emissions of the said pollutant or pollutants, measures and direct investments implemented towards compliance with the relevant new plant standards****. The National Air Quality Officer, after consultation with the Licensing Authority,* ***may grant an alternative emission limit or emission load provided there is compliance with the national ambient air quality standards in the area for pollutant or pollutants***

***applied for; or the Atmospheric Impact Report does not show increased health risk where there is no ambient air quality standard.*"**

41. In short, the following is made clear in the 2017 Framework:

    a. postponements of the 2015 MES are no longer permitted – all facilities must now, as a minimum, meet the 2015 MES;

    b. in limited circumstances, including demonstration of compliance with existing plant standards and NAAQS, 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);

    c. in limited circumstances, including demonstration of compliance with existing plant standards and NAAQS, along with a clear decommissioning schedule, facilities to be decommissioned by 31 March 2030 may receive a once-off suspension of compliance with the 2020 MES, no later than 31 March 2030; and

    d. a facility may apply for an alternative emission limit or emission load, provided it demonstrates compliance with the NAAQS and demonstrates previous reduction in emissions of the said pollutant or pollutants, and direct investments implemented towards compliance with the relevant new plant standards.

42. In light of the above, we reiterate that the 2017 Framework is the "*national Framework for achieving the objectives of [the AQA]*"[27] and it "*binds all organs of state in all spheres of government*".[28] Eskom may not lawfully apply for postponements, suspensions, or alternative emission limits, **unless and until the ambient air quality within air-shed priority areas where a power station is located, is compliant with the NAAQS.** As explained below, this is not the case; and for this reason alone an application should be summarily rejected.

[27] See paragraph 1.3 of the 2017 Framework.
[28] *Ibid*.

List of Activities and MES

43. In an effort to control 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"*, the Minister published the List of Activities, as well as, MES,[29] pursuant to section 21 of the AQA. The MES also serve as the primary tool to reduce point source pollution toward achieving compliance with NAAQS in a priority air-shed.

44. The List of Activities came into force on 1 April 2010 and prescribes MES for various polluting activities, including solid fuel combustion installations such as Eskom's coal-fired power stations, for particulate matter (PM), sulphur dioxide (SO_2), and NOx for both 'new plants' and 'existing plants'. Existing plants, including Medupi power station, had to comply with more lenient standards by 1 April 2015 and they have to adhere to stricter new plant standards by 1 April 2020, subject to successful applications to postpone or suspend compliance where the explicit criteria for these applications have been satisfied.

45. In essence, since the List of Activities was published on 31 March 2010, older plants (although, as indicated, this includes Medupi) were given a transitioning lead period of 5 years to come into compliance with a more lenient 2015 standard, and then a further period of 5 years to come into compliance with a stricter standard by April 2020. 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, requiring "*minimisation of pollution through vigorous control, cleaner technologies and cleaner production practices. . .to ensur[e] that air quality is improved".*

46. The applicable existing and new plant MES are set out below:

Pollutant Name	Limit Value (mg/NM^3)	Date to be achieved by	Average period
Particulate Matter (PM)	100	1 April 2015	Daily
	50	1 April 2020	
	3500	1 April 2015	Daily

[29] *GG* No. 37054 Government Notice 893, dated 22 November 2013.

Sulphur Dioxide (SO_2)	1000	1 April 2020	
Oxide of Nitrogen (NOx)	1100	1 April 2015	Daily
	750	1 April 2020	

47. Like the 2017 Framework, the List of Activities has also been revised on a few occasions. The most recent amendments to the List of Activities were published in November 2018,[30]and March 2020.[31] The amended List of Activities provides as follows in relation to applications for postponement and suspension of MES compliance, and alternative emission limit applications:

> *"(11) As contemplated in the paragraph 5.4.3.5 of the National Framework for Air Quality Management in the republic of South Africa, published in terms of Section 7 of this Act, an application may be made to the National Air Quality Officer for the postponement of the compliance timeframes …"*[32]
>
> *"(11A) An existing plant may apply to the National Air Quality Officer for a once-off postponement with the compliance timeframes for minimum emission standards for new plant as contemplated in paragraph (10). A once off postponement with the compliance timeframes for minimum emission standards for new plant may not exceed a period of five years from the date of issue. No once-off postponement with the compliance time frames will be valid beyond March 2025"*[33]
>
> *"(11B) An existing plant to be decommissioned by 31 March 2030 may apply to the National Air Quality Officer before 31 March 2019 for a once-off suspension of compliance timeframes with minimum emission standards for new plant. Such an application must be accompanied by a detailed decommissioning schedule. No such application shall be accepted the National Air Quality Officer after 31 March 2019"*[34]

[30] https://cer.org.za/wp-content/uploads/2005/09/Section-21-Activities.pdf.
[31] https://cer.org.za/wp-content/uploads/2020/03/NEMAQA-MES-Amendment-27.03.2020-2.pdf
[32] Paragraph 11 of the List of Activities.
[33] Paragraph 11A of the List of Activities.
[34] Paragraph 11B of the List of Activities.

"(11C) *An existing plant that has been granted a once-off suspension of the compliance timeframes as contemplated in paragraph (11B) must comply with minimum emission standards for existing plant from the date of granting of the application and during the period of suspension until decommissioning"*[35]

"*(11D)* ***No postponement of compliance timeframes or a suspension of compliance timeframes shall be granted for compliance with minimum emission standards for existing plant****"*[36]

"(12A)(a) *An existing plant may submit an application regarding a* ***new plant standard to the National Air Quality Officer for consideration if the plant is in compliance with other emission standards but cannot comply with a particular pollutant or pollutants****."*[37]

"(12A)(b) ***An application 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 standard****s."*[38]

"(12A)(c) *The National Air Quality Officer, after consultation with the Licensing Authority, may grant an alternative emission limit or emission load if:*

(i) there is ***material compliance with the national ambient air quality standards*** *in the area for pollutant or pollutants applied for; or*

(ii) *the Atmospheric Impact Report does not show a material increased health risk where there is no ambient air quality standard."*[39]

48. In summary, we emphasise that the following key points are patently clear:

48.1. 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 NAAQS compliance and reduce its impacts on public health.

[35] Paragraph 11C of the List of Activities.
[36] Paragraph 11D of the List of Activities.
[37] Paragraph 12A(a) of the List of Activities.
[38] Paragraph 12A(b) of the List of Activities.
[39] Paragraph 12A(c) of the List of Activities.

48.2. in limited circumstances, including demonstration of compliance with existing plant standards and NAAQS, 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;

48.3. Eskom may not lawfully apply to postpone its 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 power stations are located are in compliance with the NAAQS – this is not the case;

48.4. an Eskom power station 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;

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

48.6. an application for an alternative limit 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 [material] compliance with the NAAQS in the area for pollutant or pollutants applied for.

49. Based on the above legal framework, several aspects in a number of the First Respondent's decisions must be dismissed as unlawful and therefore set aside by the Minister as the appeal authority. Before turning to the grounds of appeal where it is demonstrated that the First Respondent has, with respect, erred in a number of the decisions issued, we highlight a part of the concluding paragraph in the First Respondent's cover letter that accompanied the decisions, also dated 30 October 2021:

> "*The Minimum Emission Standards (MES) were first published in 2010 and Eskom has made minimal effort to fully comply with the standards.*"

50. We submit that, in addition to assessing the following grounds of appeal against the applicable legal framework, this excerpt should be understood as the overriding

epilogue for the Second Respondent's approach to the MES over the past decade. The legal quagmire in which Eskom finds itself is almost entirely self-inflicted.

E. GROUNDS OF APPEAL

i. The decision to grant Majuba power station postponement of compliance with the NOx new plant standard from 1 April 2020 to 31 March 2025 and directing the station to comply with a limit of 1300mg/Nm^3 is unlawful

51. The First Respondent's decision denied Eskom's request for an alternative limit of 1400mg/Nm^3 from 1 April 2020 for the Majuba power station. It further denied Eskom's request for postponement beyond 31 March 2025. We do not dispute these decisions. However, the NAQO authorised Eskom's request to postpone compliance with new plants standards from 1 April 2020 to 31 March 2025 with a limit of 1300mg/Nm^3. This is even weaker than the existing plants standard for NO_x, which is 1100mg.

52. Allowing Eskom to emit at levels that undermine the existing plant standards is a blatant violation of Section 11D of the amended List of Activities. Section 11D of the List of Activities makes it clear that no postponement of compliance timeframes or a suspension of compliance timeframes shall be granted for compliance with MES for existing plant standards. The First Respondent's decision allows for an untenable position that would entitle any emitter to apply for and be granted an emission limit that is weaker than the already lenient standards for existing plants, notwithstanding the explicit intention in the Listed Activities and the MES — that the existing plant standards must be the bare minimum limit. The NAQO's decision renders redundant the already weak MES. It is a deliberate weakening, and therefore contravention, of the applicable laws that were put in place to protect public health and wellbeing. The NAQO's legal position is unlawful as well as contrary to section 24 of the Constitution.

53. It is also determinative that the Majuba power station is situated in the HPA, where after more than 14 years since the declaration, air quality in the HPA has not improved, and remains non-compliant with the NAAQS. Air quality monitoring data publicly available on the South African Air Quality Information System (SAAQIS) website shows that air quality in the HPA continues to be extremely poor and unsafe for its residents.

54. As contemplated in terms of paragraph 5.4.3.4 of the 2017 Framework, only in such cases where the areas in which the power stations are based are in compliance with NAAQS — which the HPA, is not — can postponement of compliance, suspension of compliance, or alternative limit applications even be considered. In terms of section 1(a)(ii) of PAJA, the powers to exercise administrative action are derived from the law and only extend insofar as the legislation allows. Therefore, we submit that granting any of these applications for coal-fired power stations in the HPA or any other priority area is *ultra vires* the Constitution, the AQA, the amended List of Activities, the 2017 Framework, and the provisions of NEMA.

55. Moreover, with reference to the table provided in **Annexure A1**, Majuba power station is categorised as a 'mid-life' station with a scheduled end-of-life of 2046. Although the Appellants oppose the running of this station to its end-of-life toward compliance with South African's increasing Nationally Determined Contribution, and Constitutional obligations, to limiting global warming to 1.5 C, Majuba power station should be fully compliant with the new plant MES for all three pollutants, by this stage of the MES compliance timeframe.

ii. The decision to grant Kendal power station postponement of compliance with the NOx new plant standard from 1 April 2020 to 31 March 2025 and directing the station to comply with a limit of 1100mg/Nm^3 is unlawful.

56. The First Respondent authorised Eskom's request to postpone compliance with the NOx new plant standard at Kendal power station from 1 April 2020 to 31 March 2025 with a limit of 1100mg/Nm^3. This would allow Eskom to only have to comply with the existing plant standard. This decision is unlawful.

57. As is the case with Majuba power station, Kendal power station is also located in the HPA. This alone bars the NAQO from authorising postponement applications for Kendal power station, in accordance with 5.4.3.4 of the 2017 Framework.

58. In addition, Eskom's reasons for its application, many of which, we submit, are specious and insincere,[40] do not reasonably explain why, despite over 10 years of notice, it delayed in taking meaningful steps to comply with the MES, especially at a

[40] The LAC February 2019 objections to Eskom's bid and application for suspension of compliance, postponement of compliance, and/or alternative weaker limits for 10 of its coal-fired power stations (including Kendal) challenge many of Eskom's stated reasons.

'midlife' power station with a scheduled end-of-life date of 2039. This failure runs contrary to the 2017 Framework's requirement that Eskom provide "a detailed justification and reasons for the application".[41]

59. Save for the recent amendments in November 2018, and increase of the SO_2 new plant limit in 2020, the MES in respect of solid fuel coal-fired power stations have not changed since 2010. The process of putting together the List of Activities commenced in about 2004 and over an approximate 5-year period, a multi-stakeholder process was convened to determine and set appropriate MES for the List of Activities. Eskom was integral to this process. Eskom knew of the impending emissions limits and inevitable compliance action during the mid-2000's, giving it many years' advance warning that it would need to make the necessary plans and investments to come into compliance with MES.

60. 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, based on the 2006 studies referred to in LAC's February 2019 submissions; these provided sufficient reason for Eskom to ensure that it was implementing the necessary abatement measures to effectively mitigate the impacts of its coal-fired power stations, in compliance with its section 28 NEMA duty of care. Indeed, as an organ of state, it had and continues to have, a duty to respect, protect, promote and fulfill the rights in the Constitution; in particular, but not limited to, section 24.[42] In other words, Eskom was legally compelled to act well before the MES were even published in 2010.

61. In summary, Eskom provides no reasonable explanation as to why it has waited more than 8 years since the List of Activities came into force, or more than 3 years from when the 2015 postponement application was granted, to begin – and/or adequately progress and plan for - the abatement equipment installations which would allow it to comply with the new plant MES at Kendal power station, as well as Majuba and Tutuka (addressed below) power stations.

[41] Section (12)(b).
[42] Section 7 of the Constitution.

iii. *The decision to grant Tutuka power station postponement of compliance with the NOx new plant standard from 1 April 2020 to 31 March 2025 and directing the station to comply with a limit of 1100mg/Nm^3 is unlawful.*

62. Similarly, Tutuka power station is also a 'midlife' station with a scheduled end of life date of 2035, and Tutuka power station is also located in the HPA. We reiterate the above submissions in this regard.

iv. *The decision to grant suspension of compliance for Camden, Hendrina, Arnot, Komati, Grootvlei, and Kriel power stations without detailed and clear decommissioning schedules accompanying the applications is unlawful.*

63. As already mentioned above, Eskom as an organ of state and a significant emitter is bound by the 2017 Framework, the List of Activities, AQA, NEMA, and the Constitution

64. Paragraph 11B of the List of Activities provides that "*an existing plant to be decommissioned by 31 March 2030 may apply to the National Air Quality Officer before 31 March 2019 for a once-off suspension of compliance timeframes with minimum emission standards for new plant. Such an application* ***must*** *be accompanied by a* ***detailed decommissioning schedule****. No such application shall be accepted the National Air Quality Officer after 31 March 2019*".

65. This explicit requirement is not only re-enforced in the 2017 Framework, in relation to an application for a once-off suspension of compliance timeframes with new plant MES ,, but it goes further, requiring that an Eskom power station **must** provide a "***clear*** *decommissioning schedule*". If an existing facility is granted a suspension of the compliance timeframes — which we submit Eskom ought not to have been granted — it is required by the List of Activities and the 2017 Framework to comply with existing plant MES during the suspension period until decommissioning by 31 March 2030, at the latest

66. The First Respondent granted Eskom's application for the suspension of compliance until decommissioning by 2030 for six coal-fired power stations namely: Hendrina; Arnot; Camden; Komati; Grootvlei; and Kriel – the 'old' stations, per **Annexure A1**.

67. We refer to Eskom's Summary Motivation Report, in particular Figure 1 in the report, which presents the "decommissioning dates" per Eskom power station. We submit that as legally required by the List of Activities and the 2017 Framework, it is not a "detailed" or "clear" decommissioning schedule. It is our firm stance that it is not permissible for the First Respondent, with the licensing authorities, to consider the suspension applications in the absence of clear detailed decommissioning schedules stations, let alone grant the applications. This is unlawful and the suspension of compliance decisions must be set side. We submit that Eskom's decommissioning dates do not constitute a "detailed" or a "clear" decommissioning schedule per station for the following reasons:

67.1. The decommissioning information in Figure 1 and/or the explanatory text around it should specify the commencement dates/planned commencement dates, in addition to the key actions and timelines to enable the decommissioning of at least the 6 stations included in the suspension application.

67.2. As a minimum, Figure 1 and/or the explanatory text around it ought to specify the commencement date/planned commencement date of the necessary regulatory requirements to authorise the decommissioning process, including, *inter alia*:

67.2.1. as a Listed Activity, the closure of an existing Eskom coal-fired power station must conduct a basic impact assessment in accordance with the amended EIA Regulations, 2014. This should include details of any financial provision for the rehabilitation, closure, and ongoing post decommissioning management of negative environmental impacts, particularly the coal ash dumps; and

67.2.2. considering the social impact of decommissioning an Eskom power station, and Eskom's duties as an organ of state, we submit that it is both necessary and appropriate that an inclusive and transparent social and labour closure plan is developed for the decommissioning process. This should account for, among other critical issues, the redeployment of staff employed at the station.

67.3. The processes identified above require both lead-time and budget – Eskom's decommissioning table addresses neither. The Hendrina power station was supposed to commence with decommissioning from 2018 and Camden power station from the beginning of 2020, yet there appears to be no decommissioning schedule, plan, or financial resources allocated to these processes. In fact, we note with extreme concern in **Annexure A1**, that the decommissioning dates for both Hendrina power station and Camden power station have reportedly been pushed out; Camden by as much as 5 years.

67.4. In addition, we submit that Eskom ought to have provided a detailed and clear decommissioning schedule that at least reflects the plans and process referred to above, under the following conditions before or at the time of its application for suspension:

67.4.1. the clear detailed decommissioning schedule should have been made available for public comment as part of this application process and ought to be available every 6 months through to 2030 for the purposes of progress monitoring; and

67.4.2. the five oldest plants that have reached their schedule end of life dates, namely: Komati; Arnot; Hendrina; Camden; and Grootvlei ought to have provided evidence of decommissioning arrangements, as required by law or otherwise, a;

67.5. We therefore submit that the decommissioning table in Figure 1 does not satisfy the List of Activities and 2017 Framework requirements for a detailed and clear decommissioning schedule. Notwithstanding the NAAQS non-compliance requirement and the anticipated health impacts attributed to Eskom's 'old' power stations, the suspension applications should be dismissed on this basis.

67.6. We further submit that the condition that decommissioning schedules must be submitted a year from the date of issue of the decisions — by 30 October 2022 — does not cure the invalidity of the First Respondent's decisions, when the List Activities and the 2017 Framework require clear and detailed decommissioning schedules to be submitted as a pre-requisite for the suspension applications to be considered in the first instance. The granting of the suspension of compliance to the six 'old' stations is unlawful and should be set aside.

v. <u>The direct adverse impacts on the surrounding environment caused by Eskom's emissions in the HPA is unlawful.</u>

68. We submit that the above grounds of appeal in relation to the postponements granted to Majuba, Kendal, and Tutuka power stations, and the suspension of compliance granted to the six 'old' stations, provide a sufficient basis to set aside these decisions, in terms of the List of Activities and the 2017 Framework.

69. An additional and compounding ground of appeal is the major contribution of the cumulative emission load from these nine stations to the high concentration of harmful air pollution in the HPA. Along with the criteria that the area in which a station is located must be in compliance with NAAQS, paragraph 5.4.3.4 in the 2017 Framework also requires Eskom to demonstrate that its emissions are not causing direct adverse impacts on the surrounding environment. We submit that, based on the documentation available to I&APs for comment, Eskom was unable to satisfy this specific requirement in its applications.

70. We refer to section B in the February 2019 submissions — *Impact on ambient air quality in the Highveld Priority Area (HPA) and Vaal Triangle Airshed Priority Area (VTAPA)* — paragraphs 41-46, in particular. Without detracting from the rest of the except from the Second Respondent's Summary Motivation Report set out under paragraph 41, we repeat the following segments:

"*The general conclusions of the analysis indicate that the quality of air will be in compliance with NO2 National Air Quality Standards (NAAQS), but noncompliance with the daily and annual SO2 standards in several areas*

across the Highveld. Daily and annual average PM10 and PM2.5 concentrations could be in noncompliance and for extended periods of time. The effect of the above is that PM ambient levels currently result in increased health risk for a large part of the Highveld."

Dispersion modelling results based on individual and combined power station emissions, excluding all other sources; indicate a negligible contribution to PM pollution. In addition the diurnal pattern in PM concentrations based on monitored ambient data clearly indicate a morning and early evening peaks, typical of low level source contributions. However, a combination of SO2 and NOx emissions from all the Highveld power stations is predicted to form a significant component of the PM2.5 load especially over Emalahleni area, which is in noncompliance with PM standards, is a cause for concern."

In addition, the combined SO2 emissions from all Eskom power stations are predicted to contribute a significant amount to the pollution in and around the Emalahleni and Middelburg areas and even extending south towards Komati Power Station. However analysis indicates that the non-compliance is not only due to Eskom Power Stations but a function of a multitude of sources in the Highveld."

71. Firstly, we reiterate that Eskom's reliance on the contribution of other less significant (by percentage) sources of emissions - which must, of course be reduced and, where possible, eliminated through other appropriate policy and legal means - is, however, an obfuscation of the immediate issue of compliance with the law and should be dismissed.

72. Secondly, in light of the severe health impacts associated with $PM_{2.5}$, we reiterate that Eskom's cumulative contribution to the formation of $PM_{2.5}$ in parts of the HPA — largely caused by the nine power stations, which are the subjects of this appeal — is fatal to Eskom's applications. This not only has direct adverse impacts on the environment, but, it is also acknowledged in the above excerpt that the effect of this accumulation will be an increasing health risk for the residents across a large part of the Highveld. This will more than likely only sustain the state of non-compliance

with NAAQS in the HPA, in particular, and the continued breach of section 24 of the Constitution. If these adverse, and unacceptable, impacts on the environment and public health were duly considered by the First Respondent, the only reasonable and rational conclusion would be to dismiss these applications as unlawful.

73. Thirdly, it is due to the cumulative health impacts of secondary $PM_{2.5}$, among other reasons, that we are gravely concerned about and oppose the First Respondent's decisions to maintain the weaker SO_2 limits from April 2020 to 31 March 2025 for all of the 'midlife' stations – Majuba, Kendal, Tutuka, Lethabo (located in the VTAPA) and Matimba (located in the WBPA), as well as Duvha and Matla power stations. As we have illustrated in the February 2019 submissions, Eskom's coal-fired power plants are the major source of SO_2 pollution in the HPA. It is not only the health impacts from exposure to SO_2 that are at issue here, but the contribution to secondary $PM_{2.5}$ as a result of the cumulative SO_2 and NOx emissions from the power stations.

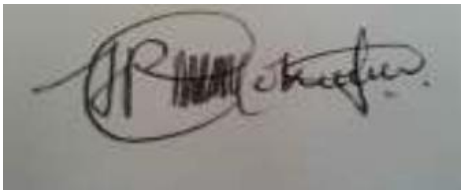
74. Eskom's significant contribution to the $PM_{2.5}$ load in parts of the HPA for another and the resultant severe health impacts is simply untenable in light of the purpose and requirements of MES and the 2017 Framework, read with the Constitution. We emphasise once more that these 'mid-life' stations, in particular, have had ample time to transition into compliance with the new plant MES for the remainder of their operating lives and their cumulative emissions above the MES should not be condoned any longer.

F. CONCLUSION AND RELIEF SOUGHT

75. The First Respondent's decisions grant postponement of compliance decisions to the Majuba, Kendal, and Tutuka 'midlife' power stations, and suspensions of compliance to the six 'old' stations in the absence of detailed and clear decommissioning schedules, are contrary to, *inter alia*, the amended List of Activities, the 2017 Framework, NEMA, and the Constitution.

76. For all of aforementioned reasons, the Appellants submit that good cause has been shown for the late filing of this appeal to be condoned, and that the specified decisions issued by the First Respondent are unlawful and should be set aside.

DATED at Pietermaritzburg on this the **8th** day of **FEBRUARY 2022**.



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