environmental affairs
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REPUBLIC OF SOUTH AFRICA

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APPEAL RESPONSE REPORT

PROJECT NAME/TITLE: Eskom Applications for Postponements from the Minimum Emission Standards

PROJECT LOCATION: Mpumalanga, Gauteng and Limpopo Provinces – Highveld Priority Area, Waterberg-Bojana Priority Area and Vaal Triangle Airshed Priority Area

PROJECT REFERENCE NUMBER: Eskom/postponements

DATE OF DECISION: 30 October 2021

Initial/s:

DETAILS OF THE APPELLANT / APPLICANT	DETAILS OF THE RESPONDENT
Name of appellant/applicant: Eskom Holdings SOC Limited	**Name of respondent:** groundWork and Earthlife Africa
Appellant's representative (if applicable): N/A	**Second and Third Respondent's representative (if applicable):** Centre for Environmental Rights
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GROUNDS OF APPEAL	RESPONDING STATEMENT BY GROUNDWORK AND EARTHLIFE AFRICA (SECOND AND THIRD RESPONDENTS)	COMMENTS BY THE DEPARTMENT
1.1.Eskom Holdings SOC Limited ("**Eskom**") submitted applications for postponement from the Minimum Emission Standards, (the "**MES**"), in terms of the National Environmental Management: Air Quality Act 39 of 2004 ("**NEMAQA**") in respect of its coal-fired power stations ("**Postponement Applications**"). 1.2. On 4 November 2021, Eskom received a copy of the decisions of the National Air Quality Officer ("NAQO") of the Department of Forestry, Fisheries and the Environment ("DFFE") in response to Eskom's Postponement Applications. The decisions comprised positive decisions, adverse decisions and partial refusals. 1.3. *Positive Decisions* 1.3.1. Eskom's Postponement Applications for	**Response:** 1. On 9 February 2022, the Second and Third Respondents lodged their appeal in terms of section 43(1) of the National Environmental Management Act, 1998 ("**NEMA**"), read together with Regulation 3(1) of the Appeal Regulations and the Guideline on the Administration of Appeals, 2015 (the "**Appeal Guidelines**"), in respect of a number of the NAQO's decisions on Eskom's applications for postponement of compliance and suspension of compliance with the MES, and/or weaker alternative limits, for its fleet of coal-fired power stations. That appeal was lodged in respect of the decisions concerning Eskom's **Kendal**, **Tutuka**, **Majuba**, **Camden**, **Hendrina**, **Arnot**, **Komati**, **Grootvlei**, and **Kriel** power stations. Neither of the appeals has yet been decided.	

Grootvlei, Arnot, Komati, Camden, Hendrina, Acacia and Port Rex were granted. These power stations will be decommissioned before 31 March 2030, and consequently, positive decisions were granted in respect of these power stations pursuant to regulations 11B and 11C of the MES (the "**Positive Decisions**"). 1.4. *Adverse Decisions* 1.4.1. Postponement Applications for Matla, Duvha, Matimba, Medupi and Lethabo were all refused by the NAQO in their entirety ("**Adverse Decisions**"). 1.5. *Partial Refusals* 15.1 Postponement Applications for Majuba, Tutuka, Kendal, and Kriel were all partially granted ("**Partial Refusals**"). 1.5.2. In respect of **Majuba**, Eskom's request for postponements from existing plant standards (1400 mg/Nm^3 monthly from 1 April 2020) was partially granted from 1 April 2020 to 31 March 2025 with the emission limit of 1300 mg/Nm^3 in respect of NOx. In respect of SO2,	2. The Second and Third Respondents submit that Eskom failed to adhere to Regulation 4(1) of the Appeal Regulations by not providing Interested and Affected parties with copies of its appeal submissions. The Second and Third Respondents' representatives, the CER, received a copy of the appeal through the NECA MES Forum. After receiving the Appeal, the CER enquired with the DFFE on the timeframes for submitting the responding statement, in light of the appeals being held in abeyance due to the establishment of the NECA MES Forum. On 6 April 2023, the DFFE informed the CER that the 20-day time period for submitting the responding statement would begin to run on 6 April 2023. It is on the basis of this communication from the DFFE and regulations 2 and 3 of the NEMA Appeal Regulations that the CER hereby submits the responding statement on behalf of groundWork and Earthlife Africa. 3. We support the NAQO's refusal of Eskom's applications relating to Matla, Duvha, Matimba, Medupi and Lethabo, save for the instances where we disagree with the alternative limits granted in respect of some power stations and where	

		postponement from existing plant standards (3500 mg/Nm^3 from 1 April 2020 until 31 March 2025) was permitted at a level of 3200 mg/Nm^3 in terms of an existing postponement. The postponement from new plant standards from 1 April 2025 until decommissioning was refused.		suspension applications were granted in the absence of clear decommissioning schedules as required. In this regard, we refer to Eskom's appeal of the NAQO's decision partially granting its applications in respect of **Tutuka**, **Majuba**, **Kendal** and **Kriel** power stations. The alternative NOx limit granted to **Tutuka, Majuba and Kendal** is unlawful, and it was unlawful for **Kriel** to be granted a suspension from compliance without a detailed and clear decommissioning schedule accompanying the application.
	1.5.3.	In respect of **Tutuka**, Eskom's request for a postponement from NOx new plant standards (1200 mg/Nm^3 from 1 April 2020 until 31 March 2026) was partially granted (1100 mg/Nm^3 from 1 April 2020 to 31 March 2025). Postponements in respect of PM and SO2 were refused.[3]	4.	Further with regards to Kriel**,** we note that Eskom applied for a suspension of compliance and not a postponement as erroneously stated in its Appeal document. The Kriel suspension was partially granted. Suspension of compliance was granted for PM (100 mg); SO2 (2800 mg) and NOx (1100 mg); Decommissioning plan by November 2022.
	1.5.4.	Regarding **Kendal**, Eskom's request for a postponement from NOx new plant standards (1100 mg/Nm^3 from 1 April 2020 until 31 March 2026 and 750 mg/Nm^3 monthly thereafter) was partially granted (1100 mg/Nm^3 from 1 April 2020 to 31 March 2025). Postponements in respect of PM and SO2 were refused.[4]	5.	**Response to condonation application**: Eskom's application for condonation is noted. We reiterate that Eskom failed to adhere to Regulation 4(1) of the Appeal Regulations, in that it did not provide the Second and Third Respondents, as Interested and

1.5.5. Finally, in respect of **Kriel**, Eskom's request for postponement from new plant standards (125 mg/Nm^3 from 1 April 2020 until 31 March 2025) for PM on the North Stack was rejected. The postponement for NOx at 1600 mg/Nm^3 was also rejected. Postponement in terms of SO2 was granted. 1.6. Eskom hereby lodges an appeal against the Adverse Decisions and the Partial Refusals (as defined above) (hereinafter referred to as the "Decisions"). 2. On 19 November 2021, Eskom requested condonation / an extension to submit its appeal by 15 December 2021 in terms of the NEMA Appeal regulations.	Affected Parties, with copies of its appeal submissions.	

3. **Points in limine (Conciliation)** 3.1. Eskom submits that the provisions of section 17(1) of NEMA are applicable in the circumstances of this appeal and that it is consequently appropriate for the Minister to refer the matter for conciliation before reaching a decision on this appeal. 3.2. In the alternative, Eskom submits that section 17(2) of NEMA is applicable and hereby requests the Minister to appoint a facilitator to call and conduct meetings of interested and affected parties (including relevant organs of state) with the purpose of reaching an agreement and to refer the present difference or disagreement (as set out below), to conciliation.	**Response to point in limine (Conciliation):** 6. Eskom's point in limine lacks merit. The NAQO's mandate is very clearly set out in the List of Activities as the authority to which applications for postponement of compliance with the MES must be made. The NAQO exercised her discretion to decide on the postponement and suspension applications – as she was required and entitled to do – applying the very clear provisions and requirements for granting postponements as set out in the regulations. Eskom's applications did not satisfy the legal requirements set out in the List of Activities for the granting of postponements for MES compliance. There is no question of disagreement between the parties. 7. The mandate and core function of the	

	DFFE is to manage, protect and conserve South Africa's environment and natural resources. The mandate is informed by section 24 of the Constitution. The DFFE's mandate is further clarified in the 2017 Framework where the role of the DFFE is to be the "lead agent for environmental management and hence air quality management, and must therefore, provide national norms and standards to ensure coordinated, integrated and cohesive air quality governance".	

The meaning of sustainable development and a just energy transition are in dispute 3.3. This appeal ultimately turns on the meaning of sustainable development, the environment and what constitutes a just energy transition in South Africa. A difference or disagreement has arisen with the NAQO in relation to the exercise of the DFFE's functions which may significantly affect the environment, and/or regarding the protection of the environment in the context of the MES Postponement Applications. 3.4. The Reasons for the Decisions suggest that the NAQO has adopted a strict interpretation of the MES that is allegedly based on the protection of the environment as a sole consideration. The NAQO claims in the Reasons for the Decisions that considerations such as "insufficient water, gypsum and financial costs of implementing the decisions; closure of seven (7) stations; and associated 19 000MW of supply to the national grid" fall outside of the DFFE's mandate.	**Response to the meaning of a sustainable development and a just energy transition are in dispute** 8. The MES and 2017 Framework contain an unambiguous set of legal requirements for applications for postponement and suspension of compliance with the MES. Eskom failed to meet these requirements. The NAQO has limited flexibility regarding the decisions she can make in light of these legal requirements. The cover letter of the Decisions ("**cover letter**") states that the Decisions are based on the requirements of the current legal framework, in addition, it states that "the NAQO does not have the prerogative to issue decisions that are outside the current legal provisions or are in noncompliance with the law." 9. Eskom's contention that a "strict" interpretation of the MES was undertaken is especially untenable in light of the purpose of the List of Activities and the MES, which	

3.5. It is submitted that the NAQO's Decisions are at odds with the abovementioned environmental principles for a number of reasons, including: 3.5.1 The principles in section 2(2) and section 2(3) of the NEMA contemplate that people and their needs must be at the forefront of environmental management and that development must be socially, environmentally and economically sustainable. The NAQO has failed to place people and their needs at the forefront of environmental management in that, on her own version, she neglected to consider the fact that her Decisions would result in the closure of power stations and an associated 16 000 to 30 000 MW of supply to the national grid. This lack of capacity cannot practically be provided for and as a result Eskom would be required to implement stage 8 load shedding immediately and stage 15 load shedding by 2025. The right to electricity is implied due to the fact that, it is virtually impossible to realise many of the other rights contained in the Constitution without electricity.	is reflected in the full title of the notice. The MES were developed in line with the principles of sustainable development. 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 first published the List of Activities and associated MES, in terms of section 21 of the AQA on 31 March 2010. The purpose of the MES is in the long form of its title – which indicates that several factors were at play in setting the limits. Different stakeholders, including big industrial polluters such as Eskom were consulted in a multi-stakeholder process over several years. 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. 10. Section 5.4.3.4 of the 2017 Framework	

3.5.2 The NAQO's interpretation of the MES inhibits South Africa's achievement of its developmental goals and aspirations. Without electricity, it is impossible to realise many of the socio-economic rights in the Constitution. 3.5.3. The Constitutional Court judgment in *Fuel Retailers*[1] clearly demonstrate the relevance of sustainable development to decision-making processes in terms of NEMA. 3.5.4. Eskom's entire fleet of coal-fired power stations, which makes up 90% of the electricity generated by Eskom, predate the introduction of the MES, and even these stations (i.e. Medupi and Kusile) received initial environmental authorisations and commenced construction prior to the introduction of the MES (2007 and 2008 respectively). 3.5.5. The NAQO failed to give due consideration to what is required by the JET. To interpret the MES in a strict manner that	states that the Department shall rely on the BPEO when setting standards in relation to listed activities. The BPEO has been defined as "the option that **provides the most benefit or causes the least damage to the environment as a whole**, at a cost acceptable to society in the long-term as well as in the short-term". 11. it is clear that the MES (and the Air Quality Management Legal Framework as a whole) was developed through the consideration of sustainable development and the different aspects of it. In making the Decisions, the NAQO was required to consider the legal requirements for postponements and suspension of compliance with the MES. Therefore, a "strict interpretation of the MES" based on the protection of the environment as a sole consideration" is simply not plausible as the requirements are clearly set out in the legal instruments.	

[1] Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others 2007 (6) SA 4 (CC)

disregards these fundamentals of the sustainability enquiry is unlawful. 3.5.6 The Reasons for the Decisions are incorrect insofar as they assert that the MES "*were first published in 2010 and Eskom has made minimal effort to fully comply with the standards*." This is factually incorrect, as is illustrated in Eskom's MES applications themselves, in quarterly updates on MES commitment progress which Eskom provides to DFFE and in the recent JET and COP26 discussions which Eskom and DFFE have been involved in. 3.5.6 Eskom has committed in its MES application to an emission reduction plan which takes a phased and prioritised approach to compliance to the MES and emission reduction. The plan involves the focused implementation of emission reduction technologies at stations and the shutting down of older, more polluting stations to reduce the pollution load associated with Eskom's operations.	12. We strongly object to the notion that Eskom's existing and intentional mode of operation, including its approach to compliance with air pollution laws over the past decade (at least), has "attained" - or even contributed towards - sustainable development in South Africa. Eskom has failed to show good faith and a genuine effort to comly with the MES. This is evidenced by the criminal prosecution regarding Kendal power station as well as the fact that FGD installation at Medupi remains incomplete despite Eskom allegedly having been granted loans for this as early as 201o. 13. It is submitted that sustainable development is integrally linked with the principle of "intergenerational justice". This is a rejection of short-termism as it requires the state to consider the long-term impact of pollution on future generations.[2] 14. We submit that the poor air quality in the	

[2] Deadly Air judgment at paragraph 45.

3.5.7 The reduction of PM emissions has been prioritised, as PM is considered to be the ambient pollutant of greatest concern in South Africa. Eskom will continue with PM reduction projects at Duvha, Kendal, Kriel, Lethabo, Matla, and Tutuka power stations. In the MES application, Eskom also indicated NOx projects would be undertaken at Majuba, Tutuka, Matla and Lethabo power stations. 3.5.8 Implementing the present Decision will require the installation of costly retrofits for FGD and NOx and PM on 8 power stations leading to a cost of at least R300 billion and a tariff increase of 10% for this infrastructure. FGD will require an additional 67 million cubic metres of water per annum from the already strained Vaal River and will result in an increase of over one million additional tons of CO2 emissions (for wet FGD) which compromises South Africa's climate change commitments and will have financial costs for Eskom (and the country). As a result of increased CO2 emissions Eskom will be exposed to additional tax in terms of the Carbon	HPA has persisted for years, and was furthermore held to be a violation of residents' rights in terms of section 24 of the Constitution. Eskom and other industrial polluters' non-compliance with the MES goes against the element of "development that pays attention to the costs of environmental destruction" referred to in the above-mentioned *Fuel Retailers* judgment. We submit that Eskom's understanding of sustainable development in a constitutional society appears to be flawed in this context. 15. According to the 2017 Framework, when deciding the postponement and suspension applications, the DFFE and NAQO must, amongst other things, consider the state of the air quality in order to uphold the objectives of the Air Quality Act: to give effect to section 24 of the Constitution, minimize pollution through vigorous control, cleaner technologies and cleaner production practices. The purpose of the Air Quality Act encompasses the NEMA principles including the public trust doctrine,	

Tax Act. **Eskom's JET Strategy** 3.5.9 The implementation of the JET strategy will see an accelerated closure of existing coal-fired stations, with 22 Gigawatts to be closed between 2022 and 2035. This will reduce CO2 emission by 50% by 2035 and PM, NOx and SO2 by 58%, 46% and 66%, respectively. 3.5.10 Energy modelling suggests that South Africa will need to build >20GW of Gas by 2030 if the DFFE MES decision is implemented. The large amount of Gas required to accommodate the DFFE's decision on MES compliance does not only pose a risk to the clean energy transition associated with JET as discussed above but would also drive up electricity tariffs. 3.5.11 The occurrences of NAAQS non-compliance in the Highveld and Vaal Priority areas are not a result of Eskom alone, but that the power stations are significant contributors to the emissions across the Highveld. Dispersion modelling and ambient monitoring illustrate that	precautionary principle, preventive principle, the "polluter pays" principle and environmental justice. 16. We further submit that regardless of the presence of other sources and factors of ambient air pollution, Eskom is the main cause of air pollution in the HPA.[57] Therefore, MES compliance is crucial in order to improve the air quality and essentially secure the health and well-being of the residents in compliance with the High Court judgment in the *Deadly Air* case. **Response to Eskom's JET Strategy.** 17. Eskom's JET Strategy is noted; however, we submit that this strategy does not constitute the legally required emission reduction efforts as Eskom seems to want to contend. Eskom failed to fulfil the requirement of demonstrating previous reduction in emissions of the said pollutant or pollutants. 18. We object to a "phased-in approach" to	

while there are elevated pollution levels in the Highveld, there is generally "material" compliance with the standards.	compliance with the longstanding legal requirements, especially in light of the High Court judgment confirming the immediately realisable nature of the right in section 24.	
Intergovernmental co-ordination and co-ordination between organs of state	19. The timeframes for applications for postponement and suspension of compliance with the MES has passed according to paragraph 5.4.3.4 of the 2017 Air Quality Framework and paragraph 11A of the MES. Furthermore, Paragraph 11B of the MES, makes it clear that an application for suspension of compliance will not be accepted, let alone considered, after 31 March 2019. It is therefore unclear on which basis Eskom submitted its updated MES application centered on its ERP2022. The Department cannot consider this application, which appears to have been submitted on 9 November 2022, because it is substantially past the timeframes in the 2017 Air Quality Framework and the MES.	
3.6. Eskom submits that the Decisions do not result in the coordination and harmonisation of policies, legislation and actions relating to the environment. In this regard, the Decisions, if upheld, would jeopardise sustainable development and the JET.		
3.7. Wet FGD requires increased water supply and will increase CO2 emissions. Contradicting policies and legislation on sustainable development and the JET have the potential to undermine the objectives of environmental management, with irreversible consequences. The JET must be planned, coordinated and harmonised.		
3.8. The issues that arise in this appeal raise actual or potential conflicts of interest between various	20. Eskom is encouraged to accelerate the coal phase-out, as well as the roll-out of solar PV	

organs of state, including, but not limited to, the DFFE, the Department of Mineral Resources and Energy, National Treasury, the Department of Water and Sanitation, the Department of Public Enterprises and Eskom. 3.9. Eskom therefore respectfully submits that this is a matter that would be appropriate and necessary for the Minister to refer to conciliation prior to making a decision on the appeal. The referral to conciliation should be done in terms of section 17(1)(b)(i)(bb) or (cc)26 of NEMA. In the alternative, Eskom submits that section 17(2) of NEMA is applicable.	and/or wind power generation demand off the grid and therefore reduce loadshedding. This would reduce energy poverty and outdoor and indoor air pollution, thereby saving lives and health costs. Eskom and the government need to do much more and much faster to deploy clean renewable electricity alternatives to enable these polluting facilities to come offline. 21. Eskom fails to consider the other NEMA principles in making its contentions on sustainable development, in addition, even the principles which they have quoted go against their argument. For instance, Eskom relies heavily on section 2(2) of the NEMA which provides "*[e]nvironmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.*" In this regard, we refer to evidence indicating the health impacts of coal-fired power stations.	

	22. With regards to Eskom's concerns on the impacts of Wet FGD on water supply and climate change, we refer to the report of the expert SO2 Panel ("**SO2 Report**"), which considers a number of technologies available to reduce SO2 emissions from listed activities, each with its own advantages and disadvantages. It is noted that none of the NAQO Decisions required Eskom to specifically install Wet-FGD. Eskom is encouraged to explore and research the other available abatement options. 23. Any claimed economic, energy supply and other benefits deriving from MES non-compliance would far be outweighed by the social and economic harm likely to be caused by the health impacts of air pollution resulting from noncompliance and adoption of the ERP2022. 24. There is no need for the issues arising out of the Decisions to be referred to conciliation or arbitration as requested by Eskom. We note	

	that Eskom has also been participating in the MES Forum process referred to above. Although this process is not a conciliation or arbitration process, it has been established as a consultative forum to assess all the relevant issues and provide the Minister with a report thereafter.	
First Ground of Appeal: Decisions unlawful, irrational and unreasonable – relevant considerations were not considered 4. Eskom submits that the following considerations should have been considered by the NAQO: 4.1. multiple units at the coal-fired stations will not be able to operate in compliance with the limits imposed in the NAQO Decision. As a result, South Africa will experience Stage 8 loadshedding for every hour that the units are down and 30GW shutdown by 2025, resulting in Stage 15 load-shedding. 4.2. the installation of FGD will result in the emission of CO2 and water scarcity. The increased CO2 emissions will place Eskom and South Africa in breach of the country's international climate change commitments	**Response to First Ground of Appeal** 25. Eskom appears to be misdirecting itself, compliance with the MES is a legal issue and complying with the law is something that cannot be negotiated or evaded. It appears that throughout its Appeal, Eskom takes the position that the environment is being considered above all factors but fails to address or even acknowledge the very serious and deadly human health impacts of its noncompliance, or the very clear legal requirements that leave decision-makers with little discretion. None of the Decisions direct Eskom to install FGD. As mentioned already, there are other SO2 abatement methods available that Eskom can make use of.	

and will subject Eskom (and the country) to increased tax in terms of the Carbon Tax Act, 2019. 4.3. Requiring FGD means that the transport of the sorbent would result in environmental impacts, notably greenhouse gas emissions and fugitive dust emissions. 4.4. It is impossible to construct FGD for Eskom's fleet of facilities by 2025. 4.5. The scenario options considered in the development of the Eskom 2035 Plan "*do not revolve around whether there is emissions compliance or not – they revolve around the timing of the achievement of a reduction in various levels of emissions*." 4.6. On the Minister/DFFE's own version in the papers of the *Deadly Air* case, cost and technical feasibility play a role in relation to the MES. Therefore, the NAQO's Decision is not in line with the Minister's approach as set out in the court papers. The Reasons for the Decisions neglected to consider the acceptable margin of safety, which the NAQO is required to consider. 4.7. A minimum of 5 500 direct jobs would be lost	26. This is merely about compliance with the law, laws adopted by Parliament and regulations promulgated by the Minister. Compliance with the law is not negotiable. Prior to promulgation, these laws and MES were negotiated over many years together with polluting industry. Since then, not only has industry been granted enormous leniency in relation to these laws, but it has succeeded in significantly weakening some of them. 27. South Africa is founded on a number of democratic values, including the supremacy of the Constitution and the rule of law. In terms of section 1(a)(ii) of the Promotion of Administrative Justice Act, the powers to exercise administrative action are derived from and only extend insofar as the legislation, in this case the Air Quality Act, allows. It also requires all organs of state, juristic persons and individuals to comply with the laws promulgated to give effect to the Constitution. Compliance with the rule of	

by 2025 as a result of the decision. With an estimated 93 000 indirect jobs being lost. 5. The fact that the NAQO did not consider if the decisions are reasonably implementable is a further example of the irrationality of the Decision. Eskom has consistently indicated to the NAQO that installing FGD is a ten year plus process given design, governance and construction processes. 6. By neglecting to consider the consequences or implications of the Decisions (including megawatt losses to the grid, which will have other consequences, including job losses and significant impacts to South Africa's economy), the Decisions are rendered irrational and/or unreasonable.	law is mandatory and not subject to negotiation or discretion. 28. In relation to human health, there are no safe levels of exposure to several pollutants. Applying a margin of safety as a determining factor (although we again submit that the law is quite clear here on the requirements) is even more reason to refuse Eskom's Appeal, in considering the thousands of lives that could be saved in enforcing the NAAQS (and by consequence the MES), by the DFFE's own admission. 29. We acknowledge the alleged possible economic and social consequences of MES compliance, however, we emphasise that the consideration of people's needs also requires consideration of the impacts of such decisions on human health in circumstances also where human rights are violated as a result of unacceptable levels of air pollution, directly related to noncompliance with MES. The findings in the *Deadly Air* judgment must also be	

	considered. 30. Eskom was consulted in the development of the MES. Further, the feasibility of cleaner energy technology alternatives has always been available, and Eskom should have looked into this much earlier. We submit that the subject of this appeal relates to compliance with the law, and that this is not negotiable.	
Second Ground of Appeal: Decisions unlawful, irrational and unreasonable – failure to give adequate consideration to the Atmospheric Impact Report, fact that ambient air quality generally complies with the applicable National Ambient Air Quality Standards and acceptable margin of safety 7. Compliance with the ambient air quality standards in the HPA and VTAPA with respect to NO2 and SO2 are variable and, in general, there is compliance with the NAAQS. In the WBPA, there is compliance with the NAAQS for PM, NOx and SO2. Furthermore, implementing the Eskom JET programme will see a reduction of some 50% of Eskom's CO2 emissions by 2035.	**Response to the Second Ground of Appeal** 31. Importantly, Eskom intends to apply for a postponement of compliance with the new plant standards for SO2 at Kusile due to a recent malfunction on the West Stack. Eskom's claim that "*the decommissioning of the older stations and increased use of the newer, less emitting Medupi and Kusile will also result in a substantial decrease in Eskom's emissions over time*" now even more strongly lacks merit. Furthermore, it is projected that the proposed bypass stacks at Kusile will result in a 6-fold increase in SO2 emissions, causing highly aggravated	

	and intensified health impacts. 32. The acceptable margin of safety is not a legal standard or requirement that the NAQO ought to have considered by virtue of her statutory duties – we reiterate that all such requirements are contained in the List of Activities and the 2017 Air Quality Framework. 33. In addition to non-compliances, Eskom has a staggering track record of exceedances of limits in its Atmospheric Emission Licences – a number of which go unreported and underestimated. A 2019 report by air pollution expert, Dr Ranajit Sahu, demonstrated that for the period April 2016 through December 2017, 14 operating coal fired power stations reported 3 217 exceedances of applicable daily AEL limits for PM, SO2, and NOx. The two most frequent exceedances occurred at Lethabo (PM and NOx), Matla (NOx), Matimba (SO2), Kriel (PM), Duvha (PM), and Kendal (PM) – all of these power stations form the	

	subject of this Appeal. 34. We refer to a recent report by Earth Justice, attached to this statement, which presents numbers of exceedances of AEL limits for PM, SOx and NOx from April 2021 through March 2022, and compares these to numbers of exceedances from April 2016 through March 2017. We refer also to the High Court judgment in the *Deadly Air* case, and to the reports by the NAQO (the State of the Air Reports), which paint a dire picture for NAAQS compliance within the priority areas, particularly the HPA, contrary to Eskom's contentions.	

Third Ground of Appeal: Decisions unlawful – conditions imposed are irrational	**Response to Third Ground of Appeal**	
8. Eskom submits that the Decisions, although partial or negative, nevertheless impose conditions requiring offset programmes to be implemented and reporting requirements. Eskom submits that in circumstances where the Postponement Applications were refused, it is inappropriate and unlawful to attach binding conditions to adverse Decisions. This is clear from regulation 13(b) of the MES, which does not empower the NAQO to impose conditions in a negative Decision.	35. Our position on offsets is simply that we do not object to measures being taken to supply households with cleaner energy sources, but this can in no way replace current regulatory and legal requirements. 36. Offsetting air pollution by reducing some sources of emissions while failing to reduce others fails to protect the rights and health of all the people of South Africa, as vulnerable communities living closest to the power stations, coal mines and trucking routes will continue to be severely harmed by these sources (whether or not some of them have gas stoves in their homes to reduce indoor fuel burning). 37. Eskom's continued 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 -	

	however, is a muddying of the immediate issue of compliance with the law.	