environment, forestry & fisheries
Department: Environment, Forestry and Fisheries
REPUBLIC OF SOUTH AFRICA

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APPEAL RESPONSE REPORT

DECISION NAME/TITLE: Applications for postponement/suspension of compliance time-frames relating to the National Environmental Management: Air Quality Act 39 of 2004 Minimum Emission Standards in espect of Eskom Holdings SOC Ltd.

LOCATION: Mpumalanga & Gauteng Provinces – Highveld Priority Area

REFERENCE NUMBER: Eskom/postponements

DATE OF DECISION: 30 October 2021

DATE NOTIFIED OF DECISION: 14 December 2021

DETAILS OF THE APPELLANTS	DETAILS OF THE APPLICANT
Name of appellants: groundWork & Earthlife Africa	**Name of applicant:** Eskom Holdings SOC Ltd
Appellants representative (if applicable): Centre for Environmental Rights	**Applicant's representative (if applicable):**
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GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
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, 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. 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; 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 13 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.		
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/Nm3 is unlawful* 51. The First Respondent's decision denied Eskom's request for an alternative limit of 1400mg/Nm3 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/Nm3. This is even weaker than the existing plants standard for NOx, 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/Nm3 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/Nm3. 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, 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 '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". 59. Save for the recent amendments in November 2018, and increase of the SO2 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. 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.		
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/Nm3 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. *The direct adverse impacts on the surrounding environment caused by Eskom's emissions in the HPA is unlawful.* 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 PM2.5, we reiterate that Eskom's cumulative contribution to the formation of PM2.5 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 PM2.5, among other reasons, that we are gravely concerned about and oppose the First Respondent's decisions to maintain the weaker SO2 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 SO2 pollution in the HPA. It is not only the health impacts from exposure to SO2 that are at issue here, but the contribution to secondary PM2.5 as a result of the cumulative SO2 and NOx emissions from the power stations. 74. Eskom's significant contribution to the PM2.5 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.		
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.		

ARR comments by Case Officer

Name & Surname:

Date:

Signature:

Approved by Supervior

Name & Surname:

Date:

Signature:

Initial/s:

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