



# Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Your refs: 14/12/16/3/2/40  
12/9/11/L995/G/24G

Our ref: RH

Date: 21 June 2013

Dear Sirs and Mesdames

**APPLICATION BY ESKOM HOLDINGS SOC LTD (ESKOM) IN TERMS OF SECTION 24G OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (NEMA) IN RELATION TO THE CONSTRUCTION AND OPERATION OF INFRASTRUCTURE AND FACILITIES FOR THE RETURN TO SERVICE OF KOMATI POWER STATION, MPUMALANGA PROVINCE: ENFORCEMENT ACTION TO BE TAKEN**

1. We refer to the above, as well as to our letter dated 16 May 2013, and to your response dated 24 May 2013, for which we thank you. We refer also to the email from Ms Craigie on 5 June 2013, granting our request to make submissions by 21 June 2013.
2. We confirm that we act on behalf of groundWork, the Vaal Environmental Justice Alliance; the South Durban Community Environmental Alliance; Earthlife Africa Johannesburg, as well as the following community groups: Middelburg Environmental Justice Network and Greater Middelburg Residents' Association; Guqa Community Service Centre; Southern Africa Green Revolutionary Council; Greater Delmas Civic Movement; and Schoongesicht Community Movements.
3. Our clients are pleased to note from your letter that the activities that form the subject matter of Eskom's application in terms of s.24G of NEMA have not been permitted to continue, pending the decision in relation to this application. In this regard, please confirm whether this means, for instance, that the two illegal plants, the dam, the road and stockpile yard are not being used.
4. It is also heartening to note that, depending on the outcome of the investigation, the Department would still consider criminal prosecution. Our clients submit that, in circumstances where Eskom has a serious history of non-compliance with environmental legislation and s.24G fines do not appear to be deterring such serial violations, it is important that the Department pursue such prosecutions, not only to highlight the seriousness of these offences and to deter future non-compliance, but to make it clear that the individual decision-makers

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cannot hide behind the corporate shield of Eskom, and are, in fact, personally accountable and criminally liable for their decisions that, in this case, caused and continue to cause such severe environmental degradation. Our clients await the Department's report in this regard.

5. On behalf of our clients, we hereby make the representations set out below in relation to Eskom's application in terms of s.24G of NEMA. In this regard, the Department is required to be guided in its decision-making by the principles set out in s.2 of NEMA ("the NEMA Principles") - including the promotion of all interested and affected parties in environmental governance.<sup>1</sup> In addition, the Promotion of Administrative Justice Act, 2000 (PAJA), requires that all relevant considerations be taken into account by the decision-maker.<sup>2</sup>
6. In making these representations, we have used the factors or "indices" set out in your letter dated 24 May 2013. Thereafter, we make certain submissions relating to indices used in other contexts and jurisdictions to determine similar fines.<sup>3</sup> Our clients believe that these are important and relevant considerations that should also be considered by the Department. Among these additional factors are:
  - 6.1. the extent of the intention or negligence of the person who committed the offence;
  - 6.2. the behaviour of the person who committed the offence;
  - 6.3. the offender's ability to pay the fine;
  - 6.4. the severity of the offence in terms of its impact, or potential impact on health, wellbeing and the environment; and
  - 6.5. the monetary and/or other benefits which accrued to the person as a result of the commission of the offence.
7. We first consider the factors that the Department advises us it already takes into account when calculating an appropriate fine. Where we have no specific comments to make, we have not addressed that index.
8. Social and socio-economic benefits that may potentially accrue from the development
  - 8.1. It is not clear which specific social benefits might accrue from the development. In relation to socio-economic benefits, we note what is said in Sebata Institute's Final Environmental Impact Report (EIR or "the report") dated March 2013,<sup>4</sup> about "revitalisation" of "the village" as a result of the re-commissioning of the power station and "significant economic stimulation and development" being underway.<sup>5</sup> There is, however, no factual support for this allegation in the EIR.
  - 8.2. On the other hand, we submit that, if one is to consider the social and socio-economic benefits that may potentially accrue from the development in determining the fines, it is also necessary to consider the social and socio-economic costs incurred as a result of the violations. Given the extensive damage caused by the unauthorised activities, the costs to the health and livelihoods of affected communities as a result of the environmental degradation should also have been investigated and quantified, where possible. There does not appear to have been any assessment of the impacts on water resources for agriculture, local

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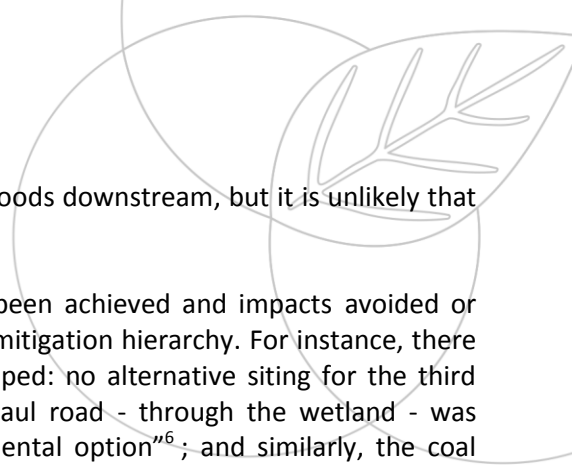
<sup>1</sup> s.2(4)(f) NEMA.

<sup>2</sup> s.6(2)(e)(iii) PAJA.

<sup>3</sup> See for instance: the US Environmental Protection Agency's Policy on Civil Penalties (<http://www.epa.gov/enforcement/documents/policies/epapolicy-civilpenalties021684.pdf>) and other documents relating to Civil Enforcement Penalty Policies (<http://www.epa.gov/enforcement/documents/index.html#models>); the UK Environment Agency's Enforcement and Sanctions Statement and Enforcement and Sanctions Guidance (<http://www.environment-agency.gov.uk/business/regulation/31851.aspx>); the factors for determining administrative penalties set out in s.59(3) of the Competition Act, 1998; the factors for criminal fines set out in s.52 of the National Environmental Management: Air Quality Act, 2004.

<sup>4</sup> The report and its appendices can be downloaded from [www.iliso.com](http://www.iliso.com) under the "public commentary" tab.

<sup>5</sup> s.7.8. All page and section references in the footnotes refer to the EIR, unless otherwise specified.



communities, local small and medium enterprises and other livelihoods downstream, but it is unlikely that these impacts would have been positive.

8.3. In any event, it would have been possible for benefits to have been achieved and impacts avoided or minimised through rigorous consideration of alternatives and the mitigation hierarchy. For instance, there should have been more appropriate siting of the facilities developed: no alternative siting for the third recovery dam was considered, the “least cost option” for the haul road - through the wetland - was adopted, rather than considering the “best practicable environmental option”<sup>6</sup>; and similarly, the coal stockyard expansion appeared to take no cognisance of the encroachment onto the wetland. It is submitted that it was reasonable and feasible to expect Eskom to take such constraints into account, and to seek less harmful alternatives from which significant social and socio-economic benefits may have accrued. This should be taken into account in the imposition of fines.

9. The impact on biodiversity that may be caused by the development and the pollution that has and which may potentially occur on the receiving environment in the event of failure of any mitigation measures implemented

9.1. We note that the Department’s indices only include biodiversity, heritage and sense of place impacts, as well as the pollution that has or may occur in the event of the failure of the mitigation measures implemented. Although it is submitted that the severity of the offence and its impact or potential impact on health, wellbeing and the environment should also be considered, we have attempted to address our clients’ other concerns also in this section.

9.2. In addressing these impacts, we have focused on the recovery dam, the haul road and the coal stockpile yard. These were constructed in March, April and May 2007, respectively. This means that there have already been more than six years of environmental, health and well-being impacts as a result of these activities.

9.3. The EIR identifies effects on air quality, water quality and wetland and aquatic ecology as the most significant impacts associated with the operation of the listed activities.<sup>7</sup> These are addressed next.

Air Quality

9.4. In relation to air quality, the EIR provides as follows:

*“Construction activities for the various listed activities are likely to have generated dust and gas emissions due to the clearing of groundcover, tipping of material to storage piles, levelling of areas, wind erosion from storage piles, vehicle and construction equipment activity, and tailpipe emissions from vehicles and construction equipment such as graders, scrapers and dozers. Impacts from the coal stockyard and haul road during operation are in the form of dust related to coal storage (i.e. wind erosion), handling and transfer of coal (especially tipping of coal), dust caused by transport vehicles travelling on the road, as well as vehicle exhaust emissions from truck transport.”<sup>8</sup>*

*“Air quality impacts are mainly associated with the supply of coal by truck and coal handling operations at the coal stockyard. Particulate matter emissions are considered to be the main impact in that regard. Dust is regarded as a nuisance for neighbouring communities and has a negative impact on fauna and flora as well. Dust emissions are high and exceed the daily limits set by the standard laid out in the National Environment Management: Air Quality Act. Although the annual emissions are below the limits set by this standard, it is recommended that the existing Fugitive*

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<sup>6</sup> As required by NEMA Principle s.2(4)(b).

<sup>7</sup> p.iii.

<sup>8</sup> p.ii.

*Emissions Management Plan be reinforced to include measures recommended by the air quality specialist.*<sup>9</sup> (our underlining)

- 9.5. The report points out that air pollution in the Mpumalanga Highveld is high.<sup>10</sup> The report indicates a 38% increase in daily particulate matter impacts a result of the use of the larger coal stockyard and haul road, with an increase of 44% for the annual concentrations. The estimated impacts from the original stockpile and haul road already exceeded the standards and the exceedance has increased with the expansion.<sup>11</sup> (our underlining)
- 9.6. The EIR considers residential, educational and recreational land uses to be sensitive receptors. The report indicates that there may be impacts on a number of small human settlements in the areas, as well as farmers and labourers on surrounding farms. Local fauna and flora are also identified as sensitive receptors with the possibility of dust settling on the leaves of plants, resulting in damage to plants and dust inhalation causing sickness and associated lung diseases for humans and wildlife in the vicinity of the power station.<sup>12</sup>

#### Wetland and aquatic ecology

- 9.7. The report indicates that:

*“Impact on wetlands and aquatic ecology include the encroachment by power station activities; seepage of dirty water; vehicles entering sensitive areas; ineffective rehabilitation; loss of ecological services; impacts due to sedimentation and erosion; impact on overall faunal biodiversity due to impact on habitat and migratory corridors; and impacts on aquatic community sensitivity and diversity”.*<sup>13</sup>

*“The construction of the haul road and coal stockyard within the 32 m wetland buffer zone as well as seepage from power station facilities have had a negative impact on wetlands and the aquatic ecology of the system. Despite the water management measures in place (e.g. separation of clean and dirty water, lining of dams and coal stockyard), the toxicological data indicates that the activities adjacent to the wetland system are having a severe impact on the water quality within the system and are highly likely to impact on the aquatic ecology of the system. Implementation of additional mitigation measures is therefore recommended. A list of such measures is included in the EMP.”*<sup>14</sup> (our underlining)

- 9.8. In relation to water quality and wetland issues, the report indicates that the riverine systems in the relevant catchment have a high diversity of habitat types, including wetlands. Several wetland features fall in close proximity to the power station. The catchment has a moderate importance in terms of conservation areas and conservation of biodiversity, and also a moderate importance in terms of faunal migration. The area is of high importance as a local source of refugia for aquatic species. The catchment is moderately sensitive to changes in water quality and water flow, and a moderate species/taxon richness.<sup>15</sup>
- 9.9. According to the report, “the aquatic community is severely impacted on by the alteration of natural habitat unit through the construction of the haul road within the 32m wetland buffer zone. Many

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<sup>9</sup> pp.iii-iv.

<sup>10</sup> p.7-5.

<sup>11</sup> p.10-6.

<sup>12</sup> p.11-1.

<sup>13</sup> p.ii.

<sup>14</sup> p.iv.

<sup>15</sup> s.7.3.

sensitive aquatic invertebrate species are often the first to be lost in situations where their habitat has been impacted on. Other aquatic species or amphibian species may be lost due to a habitat loss”.<sup>16</sup> (our underlining)

- 9.10. The report indicates that infilling and terracing may have occurred in order to develop the coal stockpile and associated haul road, which would have reduced the extent of the wetland and directly affected it.<sup>17</sup> It is indicated in the specialist wetland report that: “it is not possibly to determine the extent of the wetland that has been lost since all evidence of wetland areas is now covered within the terraced areas.” (our underlining)
- 9.11. The report indicates that “further construction or operational waste materials into wetland areas could occur and would affect the habitat integrity of these areas. The power station and its related infrastructure ... may have caused degradation of the overall wetland area, which, along with fragmentation and loss of wetland habitat would impact negatively on wetland integrity and aquatic health.”<sup>18</sup>
- 9.12. The recovery dam has had incidents of spillages which are against the Zero Liquid Effluent Discharge Philosophy and the water use licence and has a negative impact on compliance with environmental indicators and Department of Water Affairs (DWA) requirements.
- 9.13. The report points out that wetland destruction may lead to a loss of ecological service provision in terms of habitat provision, nutrient trapping, flood control and water purification, among others.
- 9.14. Many of the systems have already been significantly impacted upon through increased sediment loads in the system. These impacts can affect biodiversity and the functioning of the system.<sup>19</sup>

#### Water quality

- 9.15. In relation to water quality, the report states that:

*“Impacts on the quality of surface water may have occurred during the construction phases of the various activities due to clearing of vegetation, contamination of stormwater, spillages of hydrocarbons/dangerous goods and improper disposal of general waste. During operation negative impacts on water quality can occur due to spills and leaks during the transport, handling and storage of hazardous substances, infiltration of dirty water from the coal stockyard may cause surface and groundwater contamination. Operation of the desalination plant and RO plant may cause groundwater contamination through the discharge of brine in the ash water return dam.”<sup>20</sup>*

*“There is evidence of surface and groundwater contamination in the areas around the coal stockyard and the 3rd recovery dam, although the source of the contamination is uncertain. According to the monitoring data, sulphate and manganese are the main pollutants in those areas. Impacts were rated as medium. Overall, a decreasing trend was identified for sulphate and manganese concentrations over the period, suggesting that mitigation of impacts and management of storm water and effluent at the power station has improved.*

*Results from the surface water quality sampling conducted by the wetland and aquatic ecology specialist however indicated that [electrical conductivity] was very high and pH significantly acidic*

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<sup>16</sup> p.11-3.

<sup>17</sup> p.10-1.

<sup>18</sup> p.11-1.

<sup>19</sup> p11-2.

<sup>20</sup> p.ii.

*downstream of the coal stockyard. These impacts can potentially be attributable to runoff from the coal stockyard.*

*Based on results from the water quality monitoring, the discharge of brine on the ash water return dam has not caused any negative impacts on groundwater.”<sup>21</sup>*

- 9.16. In relation to the specialist studies, it is important to note that the report provides that the water quality data is not conclusive regarding pH and salinity, “as the monitoring results in this regard differ vastly from the data obtained by the specialist as part of the wetland and aquatic study”.<sup>22</sup> Data from Eskom’s own surface water quality monitoring reports were “at odds with the results from samples taken by the wetland and aquatic specialist regarding electrical conductivity (EC) and pH. This discrepancy did not allow for a conclusive statement to be made on water quality impacts and their significance. Impacts were therefore assessed conservatively.”<sup>23</sup>
- 9.17. Notwithstanding such conservative assessment, downstream water quality conditions were found to be “significantly acidic” with pH between the upstream and downstream site decreasing by just under 58%. This was noted to be a “serious concern”. Acidic conditions decrease aquatic biodiversity and can become toxic to fish and other sensitive aquatic species. (our underlining)
- 9.18. The water quality in the system for the downstream site exceeds the Olifants River Ecological Water Requirements Assessment standard by a factor of ten. A “significant impact” from osmotic stress and potentially some specific salts on the aquatic community of the system is regarded as likely. (our underlining)
- 9.19. The EC between the upstream and downstream site increased by over 77% - “significantly” exceeding the 15% change from reference conditions advocated by the DWA. The reference site has already deviated from the reference conditions expected in the catchment under natural conditions.
- 9.20. In relation to toxicity, there is a slight acute hazard in terms of toxicological class for the upstream site, whilst the downstream site is classed as a severe acute hazard. According to the report, this means that the water quality is “significantly impacted on and is toxic to the receiving aquatic environment and the water quality will not be suitable for aquatic invertebrates or other aquatic species. The aquatic ecology will thus not be able to maintain an adequate environment for sensitive and most likely even more resilient species.” (our underlining)
- 9.21. The report indicates that the toxicological data also suggest that the activities adjacent to the wetland system – including the coal stockyard and the haul road – are having a “severe impact on the water quality within the system and are highly likely to impact on the aquatic ecology of the system”. Although the coal stockpile is separated from the water area by trenches, “historical pollution or groundwater migration may thus be contributing factors.”<sup>24</sup>
- 9.22. The report indicates that the very high EC and significantly acidic pH downstream of the coal stockyard could potentially be attributed to runoff from the coal stockyard.<sup>25</sup>
- 9.23. The report highlights possible negative impacts on water quality due to spillages, leaks and infiltration of dirty water from the coal stockyard. Operation of the desalination and reverse osmosis plants might cause groundwater contamination through the discharge of brine in the ash water return dam.<sup>26</sup>

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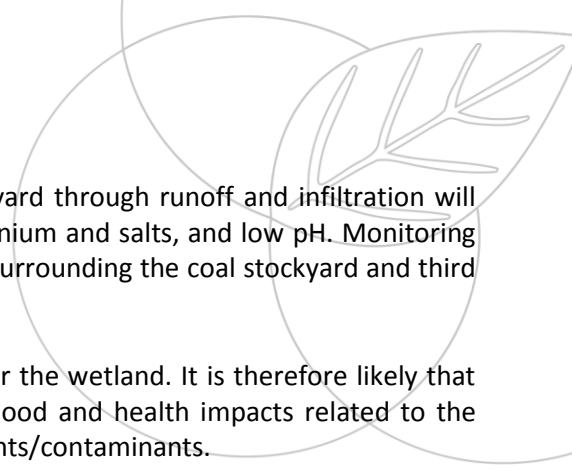
<sup>21</sup> p.iv.

<sup>22</sup> p.11-6.

<sup>23</sup> pp.14-1 – 14-2.

<sup>24</sup> s.10.1.1.

<sup>25</sup> p.14-2.

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- 9.24. Contamination of surface and groundwater from the coal stockyard through runoff and infiltration will result in high levels of sulphate, calcium, iron, manganese, aluminium and salts, and low pH. Monitoring data reveals high levels of sulphate and manganese in the areas surrounding the coal stockyard and third recovery dam in both surface and groundwater.<sup>27</sup>
- 9.25. According to the report, there are informal settlements very near the wetland. It is therefore likely that local people use this wetland and that they are probably livelihood and health impacts related to the highly acidic water and high EC, as well as the presence of pollutants/contaminants.
- 9.26. The report also assesses environmental impacts and their significance in tabular format. The tables indicate that, even with mitigation measures, there are likely to be regional impacts of low to medium or high severity in the medium to long term.<sup>28</sup> Given uncertainties in the findings of the report, our clients are not confident that the mitigation measures recommended will reduce the impacts to acceptable levels.
- 9.27. Some of our clients' concerns in this regard include that:

- 9.27.1. the wetland study did not look at impacts on the adjacent wetland of the recovery dam, but only at impacts of the haul road and coal stockpile. This is despite the fact that the recovery dam is located adjacent to a "slope wetland" and what appears to be relatively natural habitat. Without having addressed potential impacts on this wetland, it is probable that effects on water resources and natural habitat have been underestimated;
- 9.27.2. water quality data are unreliable and inconclusive because the monitoring results in this regard differ vastly from the data obtained by the specialist as part of the wetland and aquatic study. These results are therefore uncertain and have been assessed conservatively in the report;
- 9.27.3. the wetland study was completed in July 2012, i.e. several years after the unlawful activities had been undertaken. Despite this fact, it is noted that:

"By situating the coal stockpile and haul road infrastructure outside of wetlands and buffer zones... the significance of impacts on the receiving environment can be reduced."<sup>29</sup>

In the circumstances, such proposed mitigation is clearly not possible and cannot be implemented; and

- 9.27.4. remedies for water quality impacts are focused on above-ground measures, such as rehabilitation and setback lines; little if any measures are proposed for containing groundwater contamination or acid drainage, and there is no clarity or certainty as to the origin/ cause of the severe change in water quality noted downstream of the site by the wetland/ freshwater study.
- 9.28. Our clients submit that impact significance ratings in the EIR are inconsistent and thus questionable (e.g. regional, long term duration and medium severity rated as "medium" in places, "low medium" in others; likewise 'regional, long term duration and high severity' rated as 'high' and 'medium high' in places). Of particular concern is the fact that water quality impacts after mitigation during the operational phase are rated as being only of "medium" significance, although they are characterised as being "high"<sup>30</sup> (defined

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<sup>26</sup> pp.11-3 – 11-4.

<sup>27</sup> p.11-5.

<sup>28</sup> s.12.

<sup>29</sup> p.64 Wetland Study.

<sup>30</sup> p.12-26.

as meaning that “functioning of the affected environment is disturbed and can cease”<sup>31</sup>, and “regional” in the “long term”, assessed with “medium confidence”<sup>32</sup> (defined as meaning that “common sense and general knowledge informs the decision”).<sup>33</sup> (our underlining)

9.29. With regard to the effectiveness of the draft Environmental Management Programme (EMP) measures to remedy impacts, we submit that:

9.29.1. objectives/ targets such as “minimise impacts”<sup>34</sup> on wetlands and aquatic systems are inadequate for effective and measurable management and auditing or enforcement;

9.29.2. measures to manage contamination of surface water and groundwater comprise “mitigation measures recommended in water quality monitoring reports”<sup>35</sup>. Since there are clearly major discrepancies in the findings of water quality monitoring, this sole provision for addressing water quality provides little assurance of effective management; and

9.29.3. water monitoring<sup>36</sup> is not in and of itself a mitigation measure for water resources impacts. Moreover, although the recommendation to develop a “detailed wetland monitoring programme”<sup>37</sup> to measure wetland present ecological state and ecoservices of impacted wetlands on an annual basis in summer is useful in theory, implicit are time lags before any negative trends could be detected and measures to minimise impacts applied. That is, harm to these systems and ecosystem services will in all likelihood endure.

9.30. There is no information as to whether or not the ash water return dam is lined and, given the relatively short time period of dumping brine in that dam, and of monitoring effects, longer term impacts on groundwater quality are difficult to predict.

9.31. As has been set out above, the report indicates that the area in the vicinity of the coal stockyard as well as the associated haul road has been infilled and terraced. It is most likely that the extent of the wetland would have been broader prior to disturbance in the area occurring. There seems to have been loss of irreplaceable resources. It is also likely that impacts on wetland habitat and ecosystem services could endure in the long term if not permanently, in which case they would arguably constitute irreversible impacts.

9.32. It is submitted that it is clear from what has been set out above that these activities have had many severe impacts on air quality, wetland and aquatic ecology, and water quality – several of which are long-term, and irreversible. Some irreplaceable resources have been lost. In these circumstances, it is submitted that maximum fines should be imposed on Eskom.

## 10. Eskom’s history of compliance (or non-compliance)

10.1. As the Department is aware, and as reported in its latest National Environmental Compliance and Enforcement Report,<sup>38</sup> Eskom remains the organ of state with the highest rate of non-compliance with environmental legislation. It has several administrative enforcement interventions and criminal proceedings against it. Eskom has also submitted a large number of s.24G applications for unauthorised

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<sup>31</sup> p.4-2.

<sup>32</sup> p.12-26.

<sup>33</sup> p.4-2.

<sup>34</sup> p.10 EMP.

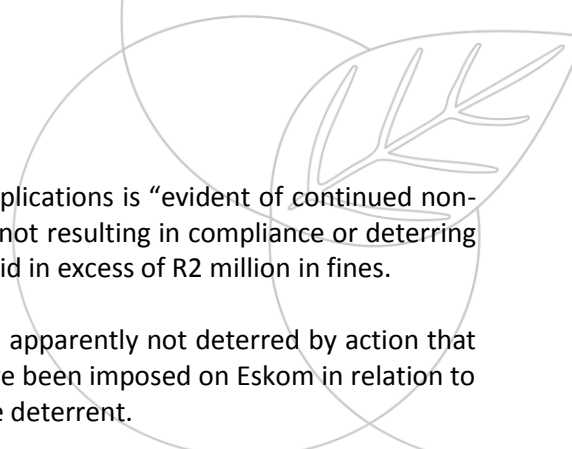
<sup>35</sup> p.13 EMP.

<sup>36</sup> p.13, 17 EMP.

<sup>37</sup> p.17.

<sup>38</sup> 2011-12 p.54.





activities. As the Department points out, the number of these applications is “evident of continued non-compliance and it would appear that the levying of these fines is not resulting in compliance or deterring the company from contravening the law.” For four cases, it has paid in excess of R2 million in fines.

10.2. Eskom’s compliance history is therefore extremely poor. It is also apparently not deterred by action that has already been taken against it. It is clear that the fines that have been imposed on Eskom in relation to s.24G contraventions are simply too low to amount to an effective deterrent.

11. As set out above, our clients are of the view that there are additional factors the Department should consider before determining appropriate fines. These are dealt with below.

## 12. Extent of intention or negligence

12.1. We submit that Eskom’s degree of culpability is an important consideration in deciding whether or not to grant a s.24G application; and the amount of the fines to be imposed under s.24G. According to the EIR, Eskom obtained a record of decision (RoD) Exemption for the return to service of the Komati Power Station on the 13th of December 2005. This RoD was issued for the return to service of the Komati Power Station “as is” (i.e. as the station was before mothballing). The RoD was subject to the condition that, should any listed activity be triggered, a separate application had to be submitted. Notwithstanding this RoD, certain of the activities initiated by Eskom as part of the return to service were not duly authorised.

12.2. The unlawful activities were the following:

- 12.2.1. construction of a desalination plant (activity commenced on 8 August 2008);
- 12.2.2. construction of third recovery dam (activity commenced on 26 March 2007);
- 12.2.3. upgrading and extension of a haul road (activity commenced on 16 April 2007);
- 12.2.4. upgrading of coal stockpile yard (activity commenced in May 2007); and
- 12.2.5. construction of a portable Reverse Osmosis plant (activity commenced on 4 June 2010).

12.3. The unlawful commencement of these activities amounts to serious contraventions of NEMA, the National Environmental Management: Waste Act, 2008 and the RoD. They are also criminal offences in terms of s.24F(2)(a) of NEMA.

12.4. It is submitted that Eskom either knew or should have known that these activities were listed activities that required environmental authorisation. As one of South Africa’s largest industrial concerns and moreover a state-owned entity, Eskom can reasonably be expected to be well aware of the environmental requirements associated with the operation of power stations, and in any event has ample resources to obtain advice on these matters should it be required. It also has extensive experience of these requirements as is evidenced by the multitude of applications for environmental and related authorisations underway for the many listed activities undertaken by Eskom at any one time. Nevertheless, in this case, Eskom went ahead with extensive unlawful activities over a significant period of time, without the requisite authorisation, thereby causing severe environmental degradation. It is difficult to see how this could be found to be anything less than wilful conduct and disregard for legal requirements. Certainly Eskom has made no attempt in the EIR to motivate for mere negligence on its part.

12.5. Instead, in the EIR, Eskom puts up factors like “electricity inadequacy”, avoiding the need for load shedding, and/or the need to use diesel or gas turbines should Komati not be allowed to run as motivations for Eskom being granted rectification under s.24G.<sup>39</sup> However, attempts to fix the consequences of poor planning through wilfully undertaking unlawful activities cannot be a justification

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<sup>39</sup> p.v.

for rectification under s.24G. Eskom has made no suggestion of any “emergency” or similar potentially mitigating factors in this regard.

12.6. It is submitted that the extent of Eskom’s fault in this regard should militate against its s.24G application succeeding. Its fault must also be taken into account in imposing heavier fines for its contraventions.

### 13. Eskom’s behaviour

13.1. Our clients do not know how Eskom has conducted itself subsequent to the discovery of the violations, but it is submitted that any failure to cooperate or assist authorities with the investigation should weigh heavily against them in determining whether or not to grant the application, and in calculating appropriate fines.

### 14. Ability to pay

14.1. There is no doubt that Eskom has the means available to pay the maximum s.24G fines. As far as we are aware, Eskom has not claimed an inability to pay any of the previous fines imposed.

14.2. According to Eskom’s Integrated Interim Report 2012,<sup>40</sup> it *“has achieved a group net profit for the six months to 30 September 2012 of R12.6 billion (September 2011: R12.8 billion). This profit is expected to decrease by year end, due to the seasonal nature of the business. Due to higher tariffs, higher energy demands and comparatively less maintenance activities conducted in winter, Eskom achieves higher profits in the first six months of the year. The operating profit for the six months to 30 September 2012 before fair value gains and losses on embedded derivatives and net finance costs for the Eskom group was R20.7 billion (September 2011: R19.7 billion). When compared to the same period last year, the 16.0% tariff increase (including the environmental levy) granted by NERSA with effect from 1 April 2012 for non-municipal customers and from 1 July 2012 for municipal customers, resulted in a 17.3% average increase in electricity revenue per kWh.*

14.3. *... Revenue for the group for the six months to 30 September 2012 was R73.4 billion (September 2011: R64.0 billion). Included in electricity revenue is the environmental levy of R2.9 billion (September 2011: R2.2 billion) charged to customers. ....The primary energy costs for the six months to 30 September 2012 for the group amounted to R25.0 billion (September 2011: R21.9 billion).The costs include the environmental levy of R3.8 billion paid to the government (September 2011: R3.2 billion).*

14.4. *...After capitalising borrowing costs and including unwinding of interest on provisions, the net finance charges for the group for the six months to 30 September 2012 was R3.8 billion (September 2011: R2.1 billion)..... The group’s cash and cash equivalents increased from R14.6 billion at 30 September 2011 to R27.4 billion at 30 September 2012.*

14.5. *....Cash and cash equivalents at the group level, together with liquid investment in securities, amounted to R46.3 billion as at 30 September 2012 (September 2011: R54.3 billion). The latest projections indicate that Eskom has sufficient cash from cash on hand, investments, projected net operational cash flows and current secured facilities available to fund the business through to at least June 2013.”<sup>41</sup>*

14.6. It is clear that Eskom is fully able to pay the maximum fines that may be levied under s.24G.

14.7. In this regard, our clients also wish to counter any potential argument that it is not appropriate to levy s.24G fines, and high s.24G fines, on Eskom on the basis that these fines would simply be passed on to the consumer. It would be highly inappropriate for Eskom to rely on costs that include such s.24G fines as

<sup>40</sup> [http://www.financialresults.co.za/2012/eskom\\_ar2012/](http://www.financialresults.co.za/2012/eskom_ar2012/)

<sup>41</sup> [http://www.financialresults.co.za/2012/eskom\\_ar2012/interim-report/fp-fin-perf.php](http://www.financialresults.co.za/2012/eskom_ar2012/interim-report/fp-fin-perf.php)

justification for electricity price increases. We therefore strongly entreat the Department to notify the National Energy Regulator of South Africa of its final decision in respect of the s.24G application and fines to be paid by Eskom.

#### 15. The monetary and other benefits that accrued to Eskom as a result of the commission of the offence

15.1. S.24(1) of NEMA provides that, in order to give effect to the general objectives of integrated environmental management, the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on. By its nature, the process of applying for environmental authorisations is rigorous and fairly time-consuming, and the application process has financial implications. Has Eskom undertaken the activities in question lawfully, it would have had to pay certain application fees, engage an environmental assessment practitioner and other specialists. By failing to follow this prescribed process, it is clear that Eskom gained a substantial advantage in terms of time, effort and money. This should be taken into account when determining appropriate fines for Eskom's s.24G violations.

15.2. Furthermore, Eskom would have needed significant investment to implement the activities in question lawfully (if the activities could have been lawfully undertaken at all), with appropriate management and mitigation measures. Not incurring these costs quite clearly meant that the cost of generating the necessary funds (such as interest) did not have to be spent by Eskom – a clear monetary benefit to Eskom as a result of the commission of the offence. Our clients do not have access to the information required to estimate this amount, but as a bare minimum one would have to have regard to the costs of the s.24G application itself, plus estimated investment required to implement the proposed measures in the EIR (with the necessary adjustment for the time value of money).

#### 16. Concluding remarks

16.1. By passing on what should have been its own internal costs to the environment and/or the public through its unlawful and culpable actions, Eskom effectively bypassed the “polluter pays” principle in NEMA (that the polluter must pay to remedy pollution, degradation and consequent health effects, and to prevent or minimise further impacts).<sup>42</sup> In this regard, it is worth noting that *The Economics of Ecosystems and Biodiversity* (TEEB) have this year estimated the value of ecosystem services from inland wetlands to be from 981 US\$ per ha per year to over 44000 US\$ per ha per year.<sup>43</sup> Had Eskom followed a lawful process before undertaking any of the activities, these costs to the environment and the public could have been avoided, or at least minimised. This should be considered by the Department in determining Eskom's applications and the appropriate fines to be levied against it.

16.2. Our clients also wish to point out the benefits of levying the maximum fines on Eskom for these violations. Firstly, a maximum fine should create a pressing incentive for Eskom, its management and employees to ensure greater compliance with environmental legislation in future. Secondly, a meaningful fine not only sends a strong message to Eskom management and employees of the consequences of violations, but it also empowers Eskom to take appropriate management action internally. Conversely, failure to do so disempowers Eskom and undermines measures put in place to avoid such violations in future.

17. For all of these reasons, it is submitted that maximum fines should be imposed in relation to the haul road, recovery dam and coal stockpile yard.

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<sup>42</sup> NEMA Principle s.2(4)(p).

<sup>43</sup> Russi D., ten Brink P., Farmer A., Badura T., Coates D., Förster J., Kumar R. and Davidson N. (2013) *The Economics of Ecosystems and Biodiversity for Water and Wetlands*. IEEP, London and Brussels; Ramsar Secretariat, Gland.

18. In addition, it is submitted that, given the damage to the wetland and associated ecosystem services that regulate water supply and quality to downstream users, a wetland offset should be considered that is commensurate with the residual negative impact. That is, such an offset should be designed to compensate fully for the harm caused by Eskom's activities on the Komati site. It is suggested that SANBI be approached for advice in this regard.

19. Should you have any queries or require more information regarding any aspect of these submissions, please let us know.

Yours faithfully

**CENTRE FOR ENVIRONMENTAL RIGHTS**

Per:



**Robyn Hugo  
Attorney**