



# Centre for Environmental Rights

## Advancing Environmental Rights in South Africa

Mr Vusi Mahlangu  
Air Quality Officer  
Nkangala District Municipality  
By email: [mahlangumv@nkangaladm.gov.za](mailto:mahlangumv@nkangaladm.gov.za)

Ms Mpho Nembilwi  
Assistant Manager: Pollution Control  
Nkangala District Municipality  
By email: [nembilwim@nkangaladm.gov.za](mailto:nembilwim@nkangaladm.gov.za)

### Copied to:

Mr Thivhonali Khomola  
Control Environmental Officer: Priority Area Implementation  
Department of Environmental Affairs  
By email: [tkhomola@environment.gov.za](mailto:tkhomola@environment.gov.za)

Mr Abdul Ebrahim  
EScience Associates (Pty) Ltd  
By email: [abdul@escience.co.za](mailto:abdul@escience.co.za)

Dr Jenny Hall  
Environmental Counsel CC  
By email: [jhall@envirocounsel.co.za](mailto:jhall@envirocounsel.co.za)

Our ref: CER51.1/RH  
Date: 29 April 2015

Dear Sirs

### RE: PRELIMINARY SUBMISSIONS ON THE DRAFT NKANGALA DISTRICT MUNICIPALITY AIR QUALITY MANAGEMENT PLAN AND DRAFT AIR QUALITY MANAGEMENT BY-LAWS

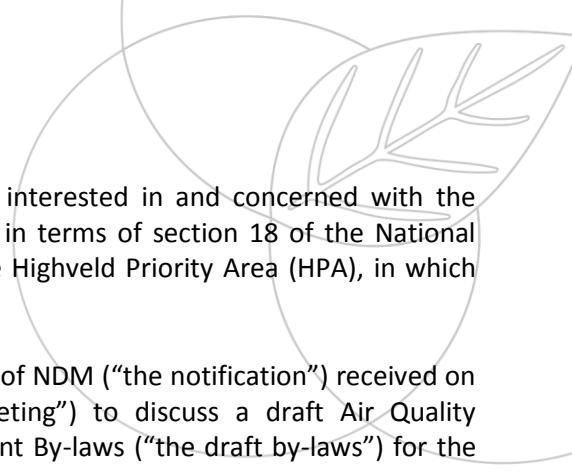
1. We address you on behalf of the Highveld Environmental Justice Network (HEJN),<sup>1</sup> groundWork (gW)<sup>2</sup> and Earthlife Africa (ELA)<sup>3</sup> ("our clients").

<sup>1</sup> HEJN is a community organisation aimed at raising awareness on key health and environmental issues within the Highveld region and improving the quality of life of vulnerable people living in the Highveld. HEJN is founded by and represents the following organisations: Ekurhuleni Environmental Organisation; Greater Middelburg Residents Association; Movement for Environmental Defence; EarthNoGenesis; Mpumalanga Youth Against Climate Change; Schoongezicht Residents Committee; Wonderfontein Resettlement Forum; Guide the People; Khuthala Environmental Care; SANCO Tokologo; SANCO Emalahleni; Outrageous Courageous Youth; Carolina Environmental Crisis Association; and Iguqa Environmental Community Service.

<sup>2</sup> gW is a non-profit environmental justice service and developmental organisation aimed at improving the quality of life of vulnerable people in South Africa, through assisting civil society to have a greater impact on environmental governance.

<sup>3</sup> ELA is an environmental justice organisation which promotes sustainable solutions to South Africa's challenges, without exploiting people or degrading the environment.

2<sup>nd</sup> Floor, Springtime Studios,  
1 Scott Road, Observatory, 7925  
Cape Town, South Africa  
Tel 021 447 1647, Fax 086 730 9098  
Email [info@cer.org.za](mailto:info@cer.org.za), [www.cer.org.za](http://www.cer.org.za)



2. Our clients represent various community members and organisations interested in and concerned with the management and implementation of the three priority areas declared in terms of section 18 of the National Environmental Management: Air Quality Act, 2004 (AQA), including the Highveld Priority Area (HPA), in which the Nkangala District Municipality (NDM) falls.
3. We refer to the notification from the Municipal Manager (MM Skosana) of NDM ("the notification") received on 16 March 2015 advising of a meeting with stakeholders ("the meeting") to discuss a draft Air Quality Management Plan ("the draft AQMP") and draft Air Quality Management By-laws ("the draft by-laws") for the NDM, *"to provide a broad management approach towards improving air quality in the area"*.
4. We confirm that the meeting took place on Thursday 26 March 2015 at the offices of NDM, and that Sylvia Kamanja and Nicole Löser of the Centre for Environmental Rights (CER) were present, as were various representative members of HEJN and other organisations and stakeholders with an interest in improving air quality within the Nkangala district.
5. We note that, in terms of section 15(2) of AQA, NDM is obliged to have an AQMP. Such AQMP must, in terms of section 16(1)(b), describe how NDM will give effect to it. Section 16(1)(a) provides that AQMPs must seek, amongst other things:
  - 5.1. to give effect, in respect of air quality, to Chapter 3 of the National Environmental Management Act (which deals with co-operative governance) to the extent that that Chapter is applicable to it;
  - 5.2. to improve air quality;
  - 5.3. to identify and reduce the negative impact on human health and the environment of poor air quality;
  - 5.4. to address the effects of emissions from the use of fossil fuels in residential applications;
  - 5.5. to address the effects of emissions from industrial sources;
  - 5.6. to address the effects of emissions from any point or non-point source of air pollution other than those contemplated above;
  - 5.7. to implement the Republic's obligations in respect of international agreements; and
  - 5.8. to give effect to best practice in air quality management.
6. While the NDM has evidently delayed in the fulfilment of its legal obligations, it is essential that the process of drafting the AQMP and by-laws be given proper attention for the reasons set out below.
7. The NDM falls within the HPA and it is common knowledge that the air quality within the NDM is a cause for concern. We therefore regard this process and the draft AQMP and by-laws as essential means for addressing the air quality concerns within the area, and a fundamental stepping-stone towards addressing, *inter alia*, the following urgent needs:
  - 7.1. for better regulation of industrial emissions such as particulate matter (including dust), sulphur dioxide, nitrogen oxides, hydrogen sulphide and other harmful pollutants in the NDM;
  - 7.2. for regulation and reduction of poor air quality within dense low-income settlements; and
  - 7.3. to improve the health of members of communities within the municipality's jurisdiction and in the HPA.
8. In light of the above, it is essential that due consideration and attention be given to the process of drafting the AQMP and by-laws and that stakeholders be given an adequate, reasonable opportunity to participate in the process. This is required by the Promotion of Administrative Justice Act, 2000, which recognises the right to administrative action that is lawful, reasonable and procedurally fair and requires that our clients be given adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations. Furthermore, the 2012 National Framework for Air Quality Management ("the National Framework") notes that vulnerable groups and communities have capacity constraints - such as the lack

of technical and human resources and other specific needs - that impact on their ability to participate effectively in air quality decisions, and these must be taken into consideration when setting time lines for public comment.<sup>4</sup>

9. While we do not herein intend to make extensive comments on the processes followed thus far by NDM in relation to the drafting and stakeholder engagement in respect of the draft AQMP and draft by-laws, we wish to place on record the following:
  - 9.1. We received the notification on 16 March 2015, a mere 10 days prior to the meeting;
  - 9.2. We received copies of the draft AQMP and the draft by-laws on Friday 20 March 2015, less than 4 working days prior to the meeting. Both documents are fairly voluminous and contain extensive technical detail along with various questions and points for consideration – in other words, both documents are very much still in draft form, and the period afforded for consideration of the documents was insufficient to allow for proper preparation prior to the meeting. Some stakeholders only received the draft AQMP and draft by-laws 1 day prior to the meeting, while others did not receive them at all;
  - 9.3. No meeting agenda was circulated prior to the meeting;
  - 9.4. The meeting commenced at 10h00 and was scheduled to end at 12h55. The agenda presented at the meeting proposed to deal with a baseline assessment conducted by EScience, the draft AQMP and the draft by-laws. We note that less than 3 hours were allocated in the meeting to cover a baseline assessment and 2 extensive important draft documents;
  - 9.5. Hard copies of the draft AQMP and draft by-laws to be considered were not provided at the meeting;
  - 9.6. The consultants presenting on the draft AQMP and draft by-laws did not have sufficient time to finish their presentations, and stakeholders were not given an adequate opportunity to raise all their questions. Many of the questions which were asked were not answered;
  - 9.7. At the end of the stakeholder engagement meeting, stakeholders were told that they had 14 days to comment on the draft AQMP and draft by-laws. Stakeholders protested about the short comment periods, given the importance of these documents, and were then given 30 days from the date of the meeting to submit comments on the draft AQMP and draft by-laws. We reiterate that our clients regard this as an insufficient and unreasonable period of time, given factors which include: the several public holidays during this period; the technical nature of the documents – which requires that experts be consulted; that fact that we and our clients have limited access to technical expertise; the fact that the documents are, in several respects, incomplete; that fact that the AQMP, in particular, is voluminous; the importance of these documents for meeting the requirements of the HPA; the time required not only for the drafts to be considered, but also for consultation with our clients and affected community members to explain the contents of the drafts and to allow time for them to consider the contents of the drafts;
  - 9.8. On 31 March 2015, we addressed correspondence to NDM in which we referred to the 30 day commenting period afforded to stakeholders and requested that NDM send out a notification to stakeholders confirming the date by which submissions on the drafts should be submitted.
  - 9.9. On 7 April 2015, a list of questions on the draft AQMP and the draft by-laws was sent by email to Abdul Ebrahim of EScience and Jenny Hall of Environmental Counsel CC. Mpho Nembiliwi and Vusi Mahlangu of NDM were copied in the email, attached hereto as annexure A. To date we have not received any responses to the questions listed in and attached to this email.
  - 9.10. Further emails were sent to Mpho Nembiliwi and Vusi Mahlangu of NDM on 7 April 2015, 10 April 2015 and 21 April 2015, all requesting confirmation of the deadline for the submission of comments and/or requesting an extension of time within which to submit such comments.
  - 9.11. There were also numerous attempts, during this period, by the CER to contact NDM telephonically to obtain confirmation of the date for the submission of comments. No such formal confirmation was received. Owing to factors that include those set out above, it has proved impossible to obtain comprehensive instructions from clients or technical expert input for purposes of commenting on two

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<sup>4</sup> Page 87 National Framework.

extensive documents by 28 April 2015 (30 days calculated from 26 March 2015). In the aforementioned email of 21 April 2015, CER requested that its clients be afforded until 11 May 2015 to submit comments on the draft AQMP and draft by-laws;

- 9.12. During telephone discussions between Vusi Mahlangu and Nicole Löser of the CER and Robyn Hugo of the CER on 22 and 23 April 2015 respectively, Mr Mahlangu was unable to confirm the date for the submission of comments, but undertook to revert.
- 9.13. On 28 April 2015 (the deadline for the submission of comments), in a telephone discussion between Robyn Hugo and Vusi Mahlangu, Mr Mahlangu advised that:
  - 9.13.1. NDM was willing to accept our submissions on the draft documents on 29 April 2015 (one day after the deadline);
  - 9.13.2. NDM intends to publish further drafts of the AQMP and by-laws for comment, on 30 April 2015 – these drafts will apparently address the submissions made herein, in annexures B and C referred to below;
  - 9.13.3. Stakeholders will have 21 days from 30 April 2015 to submit comments on the new draft AQMP and by-laws;
  - 9.13.4. There will be a public meeting on 12 May 2015 to discuss the draft AQM and by-laws; and
  - 9.13.5. They intend to publish the final drafts of the AQMP and by-laws by end of May 2015.
- 9.14. We reiterate that the process of developing an AQMP and by-laws are fundamental to improving air quality in the area. As such, we anticipate that there will be fair and reasonable opportunities to comment on additional drafts of these documents. Our clients and other stakeholders have been waiting, in particular, for the AQMP – which is required by legislation - and is important for meeting the HPA objectives and constitutional rights.

10. It is submitted that, since we were only advised on 28 April 2015 that the deadline for comment would be extended and only by one day; and given: that the draft AQMP and draft by-laws are currently still very much in a draft format; that various issues are left open for consideration in the drafts; the limited period of time afforded for the making of submissions; and our inability to consult meaningfully with our clients and technical experts on the drafts during this short period of time allocated, our comments and submissions hereunder are preliminary and should not be construed as a complete record of our clients' views on the draft AQMP and draft by-laws. Our clients' rights in this regard remain fully reserved.
11. We hereby make submissions on the draft AQMP and the draft by-laws for your consideration. Our submissions on the draft AQMP are attached hereto as annexure **B**, while our submissions on the draft by-laws are attached as annexure **C**, for your ease of reference. The relevant background information concerning the draft AQMP and draft by-laws is contained in this letter, and will not be repeated in the relevant annexures, which contain solely our clients' preliminary submissions on the draft AQMP and draft by-laws respectively.
12. Please be advised that any failure by us to make submissions on certain aspects of the draft AQMP and draft by-laws should not be construed as an acceptance of those provisions and we reserve our clients' rights to make further submissions and/or to amend any submissions made hereunder at a later stage; including once the drafts are published for comment.
13. Our clients value their entitlement to be involved in this process of developing a meaningful, useful and binding AQMP and by-laws to contribute to achieving improved air quality within the NDM and consequently the HPA.
14. We trust that you will give due consideration to the above submissions and we look forward to making further submissions on the draft AQMP and draft by-laws further on in the process.
15. Should you require more information regarding any aspect of the submissions made in the annexures, please let us know.

Yours faithfully

**CENTRE FOR ENVIRONMENTAL RIGHTS**

  
per:  
**Robyn Hugo**  
**Attorney & Programme Head: Pollution and Climate Change**  
Direct email: [rhugo@cer.org.za](mailto:rhugo@cer.org.za)

