Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

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19 November 2018

Dear Sir

PUBLIC PARTICIPATION IN RESPECT OF THE DRAFT INTEGRATED RESOURCE PLAN FOR ELECTRICITY 2018

1. We write to you on behalf of: the Life After Coal Campaign[1] - a joint campaign of Earthlife Africa,[2] groundWork,[3] and the Centre for Environmental Rights (CER);[4] Vukani Environmental Movement and Khuthala Environmental Care Group – community-based organisations in the Mpumalanga Highveld; the South Durban Community Environmental Alliance;[5] and the Vaal Environmental Justice Alliance.[6]

2. We refer to the draft Integrated Resource Plan for Electricity published for comment on 27 August 2018 ("draft IRP 2018").

3. CER's comments[7] on the draft IRP 2018 submitted to the Department of Energy (DoE) on 26 October 2018 highlighted, amongst other things, concerns around the public participation process followed by DoE, including the failures: to hold public consultation meetings in relation to the draft IRP 2018; to consult with communities in areas of the country most impacted by South Africa's electricity decisions (namely communities in the

[1] https://lifeaftercoal.org.za/. The Life After Coal Campaign seeks to: discourage the development of new coal coal-fired power stations and mines; reduce emissions from existing coal infrastructure and encourage a coal phase-out; and enable a just transition to sustainable energy systems for the people.
[2] http://earthlife.org.za/.
[3] http://www.groundwork.org.za/.
[4] https://cer.org.za/.
[5] https://sdcea.co.za/.
[6] http://www.veja.org.za/.
[7] Available at https://cer.org.za/wp-content/uploads/2018/10/CER-IRP-2018-Comment-DoE_26-10-18.pdf.

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Mpumalanga Highveld, the Vaal, and the Waterberg); and the failure to make crucial modelling data, on which the draft IRP 2018 was based, publicly available. In these comments we also stated that "*at the very least, insofar as NERSA's consultation and decision-making in respect of the IRP are required, adequate and full public participation in relation to the IRP must be conducted*".[8]

4. We note with concern that NERSA has not conducted or called for any public participation in relation to the draft IRP 2018, despite it being required to do so. The purpose of this correspondence is to call upon NERSA to conduct such public participation.

5. Regulation 4(1)(a) of the Electricity Regulations on New Generation Capacity, 2011 ("New Generation Regulations")[9] states that "*the integrated resource plan shall - (a) be developed by the Minister **after consultation with the Regulator** (NERSA) …"* (emphasis added).

6. We also refer to section 10(1)(d) of the National Energy Regulator Act, 2004 (NERA), which states that every decision of NERSA must be in writing and be "***taken within a procedurally fair process** in which **affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator***" (emphasis added). This is also confirmed in NERSA's own Guidelines on Public Consultation.[10] The guidelines state:

> "*The Energy Regulator, when taking a decision, in complying with the provisions of section 10 of the Act [NERA] will follow the following processes:-*
> *(a) Notice and comment procedure;*
> *(b) Notice and comment procedure and public hearing; or*
> *(c) Public hearing*"[11]

7. A **decision taken by NERSA to concur with the Minister of Energy in terms of regulation 4 must therefore be subjected to a public participation process by NERSA – affording stakeholders an opportunity to make submissions to NERSA** in accordance with section 10 of NERA and the Guidelines on Public Consultation.

8. In this regard, we refer also to the Western Cape High Court case of *Earthlife Africa Johannesburg and Another v Minister of Energy and Others,*[12] which challenged determinations issued by the Minister of Energy in terms of section 34 of the Electricity Regulation Act, 2006 (ERA) for the procurement of nuclear power ("the nuclear case"), in which NERSA is cited as the third respondent. This case confirmed that all NERSA decisions are administrative action and must be subject to public participation.

9. Although the nuclear case focused on the interpretation of section 34 of the ERA, which pertains to determinations specifically, the relevant wording and obligations imposed on NERSA in section 34 are the same as those of regulation 4 of the New Generation Regulations, referred to above and addressed in this letter. Section 34 of the ERA, similarly to regulation 4, also expressly requires a decision to be taken by the Minister "*in consultation with the Regulator*".

10. In this regard, it is notable that the judgment in the nuclear case states the following in relation to NERSA's obligations to conduct public participation when it comes to decisions that must be taken by NERSA in consultation with the Minister of Energy:

    10.1. "*There is nothing to suggest that the decision taken by NERSA to concur in the Minister's proposed 2013 sec 34 determination was one which fell outside the ambit of sec 10 of NERA [National Energy Regulator*

[8] Para 202, CER comments on the draft IRP 2018.
[9] GNR399, GG 34262 of 4 May 2011.
[10] http://www.nersa.org.za/Admin/Document/Editor/file/Guidelines%20on%20Public%20Consultation.pdf.
[11] S3, NERSA Guidelines on Public Consultation, 2011.
[12] *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* (19529/2015) [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (26 April 2017) available at http://www.saflii.org/za/cases/ZAWCHC/2017/50.html.

Act]. An independent requirement for a valid decision of this nature was thus that it be taken 'within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator'. Section 10(3) specifically provides for judicial review of administrative action by NERSA."[13]

10.2. "*Against this background, when regard is had to the definition of administrative action in PAJA it is clear that all its elements are satisfied at least as far as NERSA's role in the sec 34 determination. NERSA is undoubtedly an organ of state which, in taking the decision to concur with the Minister's proposed determination, was 'exercising a public power or performing a public function' in terms of legislation, namely, sec 34 of ERA and sec 10 of NERA. That decision had a direct, external legal effect and, at the least, adversely affected the rights of energy producers outside the stable of nuclear power producers. None of the exemptions or qualifications referred to in sec 1(b)(aa) – (ii) of PAJA are met*."[14]

10.3. "*The power exercised by the Minister in terms of sec 34(1) of ERA is unusual in that any decision on his part is inchoate until such time as NERSA concurs therein and the sec 34 determination is thereby made*."[15]

10.4. "*Although internal decisions of NERSA which fall outside the requirements of sec 10 can readily be imagined, its decision to concur in the Minister's proposed determination can hardly be categorised as a rote, everyday decision. Indeed the decision to formally expand the nuclear procurement programme to 9 600MW must surely rank as one of the most important decisions taken by NERSA in the recent past. Section 3 of PAJA echoes sec 10 of NERA to the effect that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. It stipulates that a fair administrative procedure will depend on the circumstances of each case*."[16]

10.5. *"In my view, in light of these considerations,* ***a rational and a fair decision-making process would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence to NERSA before it took a decision on whether or not to concur in the Minister's proposed determination***" (emphasis added).[17]

10.6. "*For these reasons,* ***I consider that NERSA's decision to concur in the Minister's proposed 2013 determination without even the most limited public participation process renders its decision procedurally unfair and in breach of the provisions of sec 10(1)(d) of NERA read together with sec 4 of PAJA***" (emphasis added).[18]

11. Similarly to the nuclear case, a decision to develop the IRP is certainly an important one, with far-reaching implications for all in South Africa. We submit that, based on the findings of the Western Cape High Court, and in accordance with section 10 of the NERA, NERSA is clearly obliged to ensure that a decision to concur with the Minister of Energy in developing the IRP, as required by regulation 4 of the New Generation Regulations, is subject to a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to NERSA.

12. As far as we are aware, NERSA has **not** – to date – conducted any such process in relation to the draft IRP 2018, and has not called for any input from, or consultation with, interested and affected parties. NERSA must conduct such a process before making any decisions to concur with the Minister in developing the IRP. **We therefore ask that you advise what steps NERSA has taken and/or plans on taking - and by when – in order to ensure adequate consultation with interested and affected parties in relation to the draft IRP 2018.**

[13] Para 36.
[14] Para 37.
[15] Para 40.
[16] Paras 41 and 42.
[17] Para 45.
[18] Para 46.

13. Insofar as NERSA alleges that adequate public participation has already been conducted or that it is not obliged to conduct such a process, kindly provide us with the relevant information and reasons to support this.

14. We await your response.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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