



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Copied to:

The Minister of Environmental Affairs

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Chief Director: Integrated Environmental Authorisations
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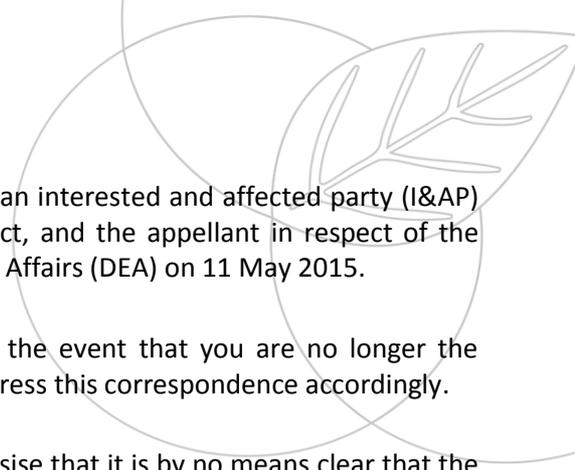
DEA ref: 14/12/16/3/3/3/40
Our ref: CER12.4
23 March 2016

Dear Sir

DECISION ON THE APPEAL OF THE AMENDED ENVIRONMENTAL AUTHORISATION GRANTED TO NEWSHELF 1282 (PTY) LTD FOR THE PROPOSED THABAMETSI POWER STATION

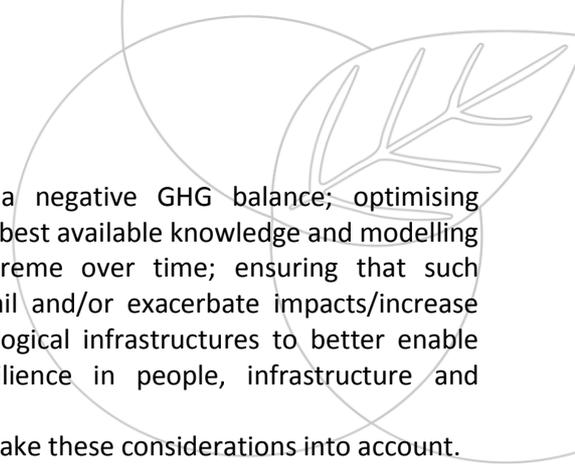
1. We refer to the 7 March 2016 decision on the appeal of the integrated environmental authorisation (EA) granted to your client, Newshelf 1282 (Pty) Ltd (now Thabametsi Power Project (Pty) Ltd) on 25 February 2015, for the proposed establishment of a 1200MW coal-fired power station and associated infrastructure near Lephallale, Limpopo – the Thabametsi power station (“the project”).

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2. We confirm that we act for Earthlife Africa Johannesburg (“our client”), an interested and affected party (I&AP) in respect of the environmental impact assessment (EIA) for the project, and the appellant in respect of the above appeal, which was submitted to the Department of Environmental Affairs (DEA) on 11 May 2015.
 3. We trust that you still act for Thabametsi Power Project (Pty) Ltd. In the event that you are no longer the instructed attorney for this matter, kindly let us know so that we can address this correspondence accordingly.
 4. We are still in the process of considering the appeal decision. We emphasise that it is by no means clear that the decision was lawful. We have written separately to the Minister seeking clarification of certain aspects of the decision – a copy of that letter has been sent to you. The issues raised in that letter are not exhaustive of our client’s concerns regarding the decision.
 5. We write to you for the sake of clarity and to ascertain your client’s intentions in relation to the decision.
 6. We note that the appeal decision requires your client, *inter alia*, to:
 - 6.1. undertake a climate change impact assessment, “*prior to the commencement of the project, which is to commence no later than six months from the date of signature of the appeal decision. The climate change impact assessment must thereafter be lodged with the Department for review and the recommendations contained therein must be considered by the Department*” (new condition 10.5);
 - 6.2. ensure that surface water monitoring points are established and approved by the DEA, prior to commencement of the Project (amended condition 17.5.4); and
 - 6.3. prepare and submit a paleontological impact assessment report (PIAR) to the Department for consideration “*prior to the commencement of the project and within six months of the appeal decision. The PIAR must be lodged with the Department for review and it must also be lodged with the South African Heritage Resource Agency (SAHRA) for official commenting in terms of section 38(8) of the National Heritage Resources Act. The PIAR must be based on a field assessment, and must be prepared by a suitably qualified palaeontologist*” (new condition 10.6).
 7. In relation to the above, please advise:
 - 7.1. who will be conducting the climate change impact assessment (CCIA) and the PIAR;
 - 7.2. what the scope of the CCIA and the PIAR will be – in other words, what will each of the assessments consider and what impacts will be assessed;
 - 7.3. whether any of the assessments have commenced, and if so, what progress has been made with the assessments and when does your client anticipate their completion;
 - 7.4. when your client anticipates making the CCIA and the PIAR available to I&APs for consideration and comment, as required by the National Environmental Management Act (NEMA) and the EIA Regulations;¹ and
 - 7.5. whether our client will be notified of and have an opportunity to consider and comment on the proposed surface water monitoring points, required by amended condition 17.5.4.
 8. In relation to the scope of the CCIA, we point out that the impacts of climate change are much broader than global greenhouse gas (GHG) emissions. In this regard we submit that:
 - 8.1. It is necessary that the required CCIA, at the very least, assess the impacts of climate change for, in particular, water resources estimated to be available for this project, as well as the impacts of the project on GHG emissions and adaptation to a changed climate;²
 - 8.2. It appears to us – as submitted in the appeal - that the assessment for the project should provide for, *inter alia*: maximising reduction in direct and indirect GHG emissions; maximising potential for further

¹ See regulation 56 of the EIA Regulations, 2010.

² Paragraph 65.1.17 of the appellant’s appeal.



mitigation, including 'sequestration offsets', ideally seeking a negative GHG balance; optimising adaptation to impacts over the full life of the development, using best available knowledge and modelling projections of future impacts, which will become more extreme over time; ensuring that such adaptations are not misdirected 'maladaptations' which will fail and/or exacerbate impacts/increase vulnerability over time; and contributing to restoration of ecological infrastructures to better enable ecosystem-based adaptation, namely building improved resilience in people, infrastructure and ecosystems;³ and

- 8.3. It is fundamental that any assessment of climate change impacts take these considerations into account.
9. We note that the decision states that *"the Atmospheric Impact Report, which will form part of the AEL (atmospheric emission licence) application process, will provide details of the facility's impact on human health and the receiving environment. Since this application was not submitted as an integrated application, information in this regard will consequently be required during the AEL application process"*.⁴ We emphasise that our client disputes that this dispenses with the requirement in the (EIA process to assess the health impacts of the project. Furthermore, we are advised that the AEL application was already submitted to the relevant licensing authority, the Limpopo Economic Development Environment and Tourism Department (LEDET) in July 2014 – although this did not come to our client's attention and we and our client have therefore not seen the application nor commented on it. LEDET have advised that the AEL application is incomplete and that they are awaiting additional information from your client. Please advise whether the application already includes the necessary atmospheric impact report referred to in the decision and whether our client will have an opportunity to consider and comment on this.
10. We note that the decision instructs the DEA to issue an amendment to the EA to give effect to the above amendments and insertions. Kindly ensure that our client, and all I&APs, are furnished with a copy of the amended EA as soon as it is issued.
11. In the interests of transparency, we further request that you advise:
- 11.1. whether your client submitted a bid under the first bid submission phase of the coal baseload independent power producer procurement programme (CBLIPPPP) – and, if so, whether your client has been selected as a preferred bidder;
 - 11.2. when your client intends to submit its water use licence application and when this will be made available to I&APs for consideration and comment; and
 - 11.3. when your client intends to submit its corrected and final AEL application and when this will be made available to I&APs for comment in terms of s 38(3) of the Air Quality Act, 2004 (AQA).
12. We trust that your client will honour the suspension of the EA in terms of s 43(7) of NEMA until such time as the CCIA and the PIAR have been submitted and considered by the DEA (following a reasonable comment period being afforded to I&APs), and a decision made by the DEA on the status of the EA. Any steps taken by your client pursuant to the appeal decision and/or the EA would be unlawful. In any event, and leaving aside questions of lawfulness, any steps taken by your client pursuant to the appeal decision and/or the EA in the interim would be entirely at your client's own risk. In this regard, we emphasise that this letter will be placed before an appropriate court should the need arise.
13. We reiterate that this letter is not to be construed as an acceptance of the lawfulness of the decision and our client's rights are fully reserved.
14. We ask that you please respond to our queries by no later than 8 April 2016. Kindly keep us informed on the progress of the CCIA, PIAR and determination of surface water monitoring points, as well as the EA amendment.

³ Paragraph 96 of the appeal.

⁴ Page 17 of the decision.

We also ask that we be copied in all future correspondence with the DEA and Minister in relation to this matter and that we be advised when the PIAR and CCIAR will be available for consideration and comment by I&APs.

15. We await your response.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS



per:

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