EARTHLIFE AFRICA, JOHANNESBURG **Appellant**

CHIEF DIRECTOR: INTEGRATED ENVIRONMENTAL AUTHORISATIONS, DEPARTMENT OF ENVIRONMENTAL AFFAIRS **First Respondent**

NEWSHELF 1282 (PTY) LIMITED **Second Respondent**

APPELLANT'S ANSWERING STATEMENT IN TERMS OF REGULATION 63(2)(b) ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS, 2010 GN R543

INTRODUCTION

1. This is an Answering Statement in response to the Responding Statement filed by the Second Respondent, Newshelf 1282 (Pty) Limited, in the above matter on 10 June 2015.

2. The Responding Statement was submitted in response to the Appeal by Earthlife Africa, Johannesburg ("the Appellant") to the Minister of Environmental Affairs ("the Appeal"), against the decision of the Chief Director: Integrated Environmental Authorisations of the Department of Environmental Affairs (DEA) to grant an integrated environmental authorisation ("the Authorisation") to Newshelf 1282 (Pty) Ltd for the establishment of a 1200 megawatt (MW) coal-fired power station and associated infrastructure, namely the Independent Power Producer (IPP) Thabametsi power station near Lephalale, Limpopo Province under authorisation register number 14/12/16/3/3/3/40 ("the Project").

3. In accordance with regulation 63(2)(b) of the National Environmental Management Act, 1998 (NEMA) Environmental Impact Assessment Regulations,

2010[1] ("EIA Regulations, 2010"), the Appellant herein replies to new information raised by the Second Respondent and seeks to clarify any points raised by the Second Respondent in its Responding Statement, as set out below.

4. Insofar as the Appellant omits to respond to any submissions made by the Second Respondent, it must be inferred that the Appellant disputes such submissions – unless the context would indicate otherwise – and that it stands by its original submissions, as made in the Appeal.

THE OBJECTION TO THE ALLEGED LATE FILING OF THE APPEAL

5. The Second Respondent submits that "*the Appellant's Notice of Intention to Appeal … should have been submitted by 17 March 2015*", this date being 20 days from 25 February 2015 - the date of the decision – in terms of regulation 60(1) of the EIA Regulations 2010. This is denied.

6. It is submitted that, as at 25 February 2015, and the date on which the Appellant was notified of the decision (9 March 2015), the Appeal provisions, including regulation 60(1) of Chapter 7 of the EIA Regulations, 2010, were no longer in effect and had been repealed by the NEMA National Appeal Regulations, 2014[2] ("the Appeal Regulations, 2014"). The Authorisation was therefore incorrect in prescribing these appeal procedures in sections 4.2.2 and 4.4 of the Authorisation.

7. The Appeal Regulations 2014, provided that "*an appeal lodged after the commencement of … [the Appeal Regulations, 2014] must be submitted, processed and considered in terms of [those] Regulations*".[3] The appeal process prescribed in these regulations is different to that prescribed by Chapter 7 of the EIA Regulations, 2010 – which was the process the Authorisation prescribed. For instance, the Appeal Regulations, 2014 provide that an appeal must be

[1] Published under Government Notice R543, Government Gazette 33306 of 2 August 2010.
[2] Published under Government Notice R993, Government Gazette 38303 of 8 December 2014. See Regulation 9 read with Annexure 1.
[3] Regulation 10(2) NEMA National Appeal Regulations, 2014.

submitted within 20 days of the notification of an authorisation,[4] and do not provide for the filing of a notice of intention to appeal.

8. The Second Respondent was therefore incorrect in submitting that the Appellant's notice of intention to appeal was due on 17 March 2015, as, in terms of the appeal procedure prevailing at the time, the Appellant would not have been permitted to file a notice of intention to appeal, and the *dies* would, in terms of regulation 4(1)(a) of the Appeal Regulations, 2014, run from the date of notification of the decision (being 9 March 2015), and not the date of the decision (being 25 February 2015). However, the fact that the Authorisation stipulated that interested and affected parties (I&APs) were required to follow the appeal procedures of repealed legislation rendered the Authorisation and notification materially defective.

9. The Appellant could not have been expected to submit an Appeal against an authorisation where the appeal procedures prescribed were incorrect and no longer in force. Applying the EIA Regulations, 2010 appeal procedure from the date of issue of the Authorisation would have been in contravention of the Appeal Regulations, 2014.

10. Nor could the Appellant have been expected to have followed the Appeal Regulations, 2014 from the date of notification of the Authorisation - which were the procedures which should have been prescribed in the Authorisation – as the Authorisation and the Authorisation notification gave contrary instructions.

11. There was a further defect in the Authorisation in that it failed to refer to the latest version of section 43(7) of NEMA, which provides that an appeal suspends an environmental authorisation. This was a material omission with important implications both for the Second Respondent and for I&APs. The details of this are dealt with in the Appeal and need not be repeated for purposes of the present submissions.

[4] Regulation 4(1) NEMA National Appeal Regulations, 2014.

12. The Appellant does not intend to repeat the detail of the events surrounding the incorrect Authorisation – as this is all contained in the Appeal[5] – but it points out that the error in the Authorisation was brought to the attention of the Department of Environmental Affairs (DEA) and the Second Respondent, by way of a letter – attached to the Appeal as annexure 8 – dated 12 March 2015, wherein the Appellant advised that the Authorisation and notification were materially flawed, and requested that an amended Authorisation be issued, which prescribed the correct appeal procedures to be followed.

13. Subsequently, on 12 March 2015, the Appeal Regulations, 2014 were amended by the National Appeal Amendment Regulations[6] ("the Appeal Amendment Regulations"). The Appeal Amendment Regulations stipulate, *inter alia*, that an appeal lodged after 8 December 2014 against a decision taken in terms of the EIA Regulations, 2010 must, despite the repeal of those regulations, be dispensed with in terms of the EIA Regulations, 2010, as if they had not been repealed.

14. Accordingly, as from 12 March 2015, the legal position regarding NEMA environmental impact assessment (EIA) appeal procedures had changed and Chapter 7 of the EIA Regulations, 2010 became the correct appeal procedure for the Appellant to follow. The fact remains that this was not the case as at 25 February 2015 or 9 March 2015 - the respective dates of the issue and notification of the Authorisation. The 20 day *dies* for the filing of a notice of intention to appeal could not retrospectively run from the date of the Authorisation – this would be unlawful and highly prejudicial towards I&APs.

15. The Appellant had requested in its letter of 12 March 2015 that the Authorisation be amended to provide for the correct appeal procedures and for the provisions of section 43(7) NEMA to be included in the Authorisation.

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[5] See paragraphs 42 to 63 of the Appeal.

[6] Published under Government Notice R205 in Government Gazette No. 38559 of 12 March 2015 in terms of NEMA.

16. On 14 March 2015, an email was sent by the Appellant's attorneys, the Centre for Environmental Rights (CER) to the First Respondent stating that "*In order for us to advise our client and ensure that we comply with legislated time periods, please could you advise us by 10am on Tuesday, 17 March whether the environmental authorisation and its cover letter will be amended to correctly reflect the contents of section 43(7) of NEMA. If so, please confirm: when interested and affected parties (IAPs) will be notified of this amended authorisation and cover letter and provided with a copy of these; and that the appeal time periods will run from the date that IAPs receive the amended authorisation and cover letter."* The First Respondent replied, stating that the Appellant would "*certainly have a response by then*". A copy of this correspondence is attached as annexure "**A**". No correspondence confirming the above position was sent, but telephonic discussions on the issue did take place between the Appellant's attorneys and the First Respondent, in which the DEA confirmed that the appeal time periods would run from the date of issue of the amended environmental authorisation in terms of the EIA Regulations, 2010.The amended Authorisation was issued soon after, on 17 March 2015. On 18 March 2015, a further email was sent to the DEA by the Appellant's attorneys confirming, as per a telephonic discussion, a request that it "*confirm that the appeal of the authorisation is governed by Chapter 7 of the EIA Regulations, 2010; and that the date of the decision is 17 March 2015 ie the date of the amended authorisation*." A copy of this email correspondence is attached marked "**B**".

17. On 17 March 2015, the Authorisation was amended by the DEA. The amendment included the provisions of NEMA section 43(7); however, in light of the Appeal Amendment Regulations, it was not necessary that the Authorisation be expressly amended to reflect the appeal procedures to be followed. This was because Chapter 7 of the EIA Regulations, 2010 was the correct appeal procedure to follow as from 17 March 2015, when the Appeal Amendment Regulations were promulgated. The Appellant construed the amended Authorisation as a tacit amendment and confirmation of the appeal procedures to be followed. The amended Authorisation provided the necessary certainty as to the appeal procedures which should be followed by an appellant seeking to

appeal the Authorisation, as amended. At no stage did the DEA (or the Second Respondent until the filing of its Responding Statement) dispute this position.

18. Accordingly, the Appellant applied the 20 day period for the filing of a notice of intention to oppose in terms of the EIA Regulations, 2010 from the date of the issue of the amended Authorisation (17 March 2015), which correctly prescribed which appeal provisions to follow. This was the correct legal approach.

19. In accordance with the EIA Regulations, 2010, the notice of intention to appeal was therefore due on 9 April 2015, and was duly submitted by the Appellant on this date.

20. The DEA confirmed receipt of the notice of intention to appeal and thereafter confirmed that the Appeal submissions were due on 11 May 2015 - on which date the Appeal was duly submitted.

21. The Appellant therefore submits that the Appeal was not filed late as alleged by the Second Respondent.

22. The Second Respondent, in its Responding Statement, appears to have completely disregarded the fact that - although the Appeal Amendment Regulations now prescribe the EIA Regulations, 2010 appeal process – at the time that the Authorisation was issued (25 February 2015), the Appeal Amendment Regulations and thus the EIA Regulations, 2010 were not in effect. There is therefore no legal basis for calculating the appeal process time periods from 25 February 2015, as the Second Respondent alleges should have been the case.

23. It is further submitted that it would be unlawful to require an appellant to appeal an authorisation prior to an amendment of such authorisation being issued, as it is the amended authorisation which is to be appealed. Applying the time periods for the appeal process from the date of issue of an authorisation which is defective, would contravene an appellant's rights to procedural fairness and the provisions of the Promotion of Administrative Justice Act, 2000 (PAJA).

24. This is exacerbated by the considerable lack of clarity regarding the applicable legislative appeal regime – as appears from the Appellant's submissions on the events that occurred between the date of issue of the authorisation on 25 February 2015 and the date of issue of the amended authorisation on 17 March 2015.

Request for Condonation, if required

25. In the event that it is found the Appellant was late in filling its Appeal – which is denied - the Appellant hereby requests condonation for the late filing of the Appeal in terms of NEMA section 47C, regulation 60(4) and/or regulation 62(2) of the EIA Regulations, 2010.

26. The Appellant submits that it would be in the interests of justice that condonation be granted as the Authorisation in this instance has the potential to significantly impact upon the lives of communities living in the vicinity of the Project, as well as on the environment. As the Appellant represents the interests of these community members, and itself is an I&AP, it is essential that it be given an opportunity to make submissions on the Authorisation and to appeal the Authorisation.

27. Dismissing the Appeal on a technical point such as this – particularly bearing in mind the uncertainty regarding the appeal procedures to be followed (occasioned by the First Respondent's error) – would amount to a significant regard for the fundamental rights of I&APs.

28. The relevant facts have been set out above and in the Appeal itself. To the extent that condonation is required – which the Appellant again disputes – the degree of lateness is minor – three weeks in respect of the notice of intention to appeal, discounting the public holidays during this time, which would, as the EIA Regulations, 2010 (and the Appeal Regulations, 2014) provide, reduce the number of days. It is also submitted that the explanation for the delay is reasonable, and that the Appeal was filed as soon as was reasonably possible. There was no wilful disregard on the Appellant's part for the legislated time period for launching the Appeal.

29. Irrespective of the above, the subject matter of the Appeal is complex and involves issues of significant importance for the Appellant, other I&APs, the Second Respondent and the competent authority The Appellant had to obtain expert scientific assistance, as well as legal assistance in order to submit the Appeal. It is also pointed out that, as non-profit organisations, the CER and Appellant have limited access to technical expertise.

30. It is submitted, for the reasons set out in the Appeal - including the fact that the Project falls within the Waterberg-Bojanala Air Quality Priority Area (WBPA) and an area known for its scarcity of water resources, the Project has potential to impact significantly on human health and the environment, particularly air quality and water - yet these impacts were not properly assessed, as well as the fact that some of the heritage impact assessments and reports were excluded from the Final Environmental Impact Report (FEIR) - that this matter is important and that the Appellant's prospects of success are at least reasonable.

31. It is pointed out that, although, on the Second Respondent's version, the Appellant was already out of time when it filed its notice of intention to appeal on 9 April 2015, the first time it made this allegation was in its Responding Statement filed more than two months later. This is despite the fact that the Second Respondent alleges that it assumed on 17 March 2015 that no appeal would be lodged, and the additional fact that a letter was sent to the Second Respondent on 12 March 2015 wherein the Appellant advised that the Authorisation and Appeal notification were materially flawed, that they provided for incorrect appeal procedures under NEMA, and requested that a new, correct Authorisation be issued - thereby clearly stating the Appellant's position regarding the Authorisation and any consequential appeals.

32. The Appellant submits that any prejudice for the Second Respondent would be outweighed by prejudice to the Appellant if it were deprived of its right to appeal the Authorisation and to protect and enforce its rights.

33. In the circumstances, to the extent that the Appellant requires condonation for the late filing, it is submitted that it has shown good cause to be granted such condonation, and that it would be in the interest of justice to do so.

THE OBJECTION TO THE CONTENT OF THE APPEAL

34. The Second Respondent submits, in paragraph 4.2 of the Responding Statement, that "*only the conditions of the Thabametsi [environmental authorisation] EA Amendment (dated 17 March 2015) could be appealed*." This is denied.

35. It is not clear why the Second Respondent makes this allegation. At no stage has the Appellant indicated that it only appeals the amendment of the Authorisation. The Appellant reiterates that it is the amended Authorisation that is the subject of the appeal, not the amendment of the Authorisation. This is clear both from the notice of intention to appeal, the cover email thereto, and from the Appeal itself – all of which were sent to the Second Respondent. At no stage did the First Respondent query the Appellant's intention to appeal the Authorisation or its amendment thereof.

36. The Appellant reiterates its submissions above that it was within the allowed timeframes in terms of Chapter 7 of the EIA Regulations, 2010 for the submission of its notice of intention to appeal and its Appeal of the Authorisation.

37. On 9 April 2015, the Appellant submitted a notice of intention to appeal, wherein it was clearly set out that the Appellant intended to appeal the integrated environmental authorisation – as amended on 17 March 2015 - for the establishment of the IPP Thabametsi power station. This was confirmed in the cover email accompanying the notice, a copy of which is attached marked "**C**". Nowhere was it stated that the Appellant only intended to appeal the amendment.

38. It was the Appellant that pointed out the errors in the Authorisation and requested that it be amended. It is also clear from the letter of 12 March 2015 and further correspondence with the DEA, attached hereto as annexures A and B, that the Appellant, at all times, intended to appeal the Authorisation. It had requested, on numerous occasions, confirmation that the date of the decision was the date of the amended Authorisation, namely 17 March 2015. It is clear that the Appellant at all times intended to appeal the Authorisation. There is no basis for the Second Respondent's argument that the Appellant intended to appeal the amendment of the Authorisation. It is submitted that neither Respondent could, at any point, have been under this impression.

39. In any event, if the Appellant had intended to appeal only the amendment of the Authorisation and not the Authorisation itself, it would have been required to do so in terms of regulation 4 of the Appeal Regulations, 2014. These regulations do not provide an opportunity for the filing of a notice of intention to appeal and simply require that the appeal submissions be submitted within 20 days from the date of the notification of the decision.[7] The DEA would not have accepted the notice of intention to appeal, or advised the Appellant of the date on which to submit the appeal submissions, if it had been under the impression that the Appellant was appealing the Amendment, as this would have been contrary to the process of the Appeal Regulations, 2014 as prescribed by it for an appeal of the amendment.

40. To the extent that the Second Respondent's submission is that only the <u>conditions</u> of the Authorisation amendment could be appealed, rather than the Authorisation as a whole, this is denied. It is submitted that there is no basis on which to allege that only conditions can be appealed. In terms of section 43 NEMA, "*any person may appeal to the Minister against a decision taken by any person acting under a power delegated by the Minister under this Act or a specific environmental management Act*." It is thus the Authorisation in its entirety - not merely the conditions and/or the amendment - which is being appealed in this instance. In terms of NEMA's section 43(6), the Minister may, after considering such an appeal, confirm, set aside or vary the decision,

[7] Regulation 4(1)(a).

provision, condition or directive or make any other appropriate decision, including a decision that the prescribed fee paid by the appellant, or any part thereof, be refunded. In other words, nothing limits an appeal only to the conditions of an authorisation.

APPELLANT'S SUBMISSIONS ON THE RESPONSE TO THE ISSUES RAISED IN THE APPELLANT'S APPEAL

41. As submitted above, the Appellant will not respond to all the submissions made by the Second Respondent. Where the Appellant does not respond to a submission or address a particular issue, it is submitted that it stands by the submissions made by it in the Appeal.

42. It is noted that the Second Respondent does not respond to all submissions made by the Appellant in the Appeal. It submits, in many instances that "*the Appellant's submissions … are made directly against the DEA and its decision-making process that was applied in approving the Thabametsi EA. Newshelf has therefore not commented in detail on these issues. However, many of the allegations overlap to some extent with issues that were within Newshelf's control and or the responsibility and/or its consultants and are therefore dealt with where relevant, in other parts of this response*".

43. The Appellant replies below:
    43.1. first to some of the submissions, which contain new information, made by the Second Respondent in response the Appellant's submissions in the Introduction and Background sections of the Appeal; and
    43.2. secondly to some of the submissions, which contain new information, made by the Second Respondent in response to the Appellant's Grounds of Appeal.

Introduction and Background

44. Ad paragraph 5.2.1: In reply to the Second Respondent's submission that Newshelf's registration number is 2011/011416/07 and its stipulated registered

address is Block E, Lincolnwood Office Park , 6-10 Woodlands Drive, Woodmead, Gauteng, 2080, the Appellant submits that:

44.1. a CIPC search through Searchworks, for the above registration number and address showed that Newshelf 1282 (Pty) Ltd is in fact registered under the name of Thabametsi Power Project (Pty) Limited, with a name change being effective from 10/02/2014. A copy of the search document is attached hereto as annexure "**D**"; and

44.2. the Second Respondent should have brought the name change to the attention of the relevant authorities and I&APs, including the Appellant.

45. Ad paragraph 5.3.1.2:

45.1. the Second Respondent submits that:

45.1.1. the Project will source its water from the Mokolo Crocodile Water Augmentation Project (MCWAP) Phase 2, which, it submits, is scheduled for completion by 2019/20; and

45.1.2. "*Should the Thabametsi Project require water earlier than this date for the construction and early production, the water will be sourced from Exxaro Resources who has an allocation for MCWAP Phase 1*".

45.2. In reply, the Appellant points out that the environmental impact assessment (EIA) process for Phase 2 of MCWAP has not yet commenced and, in the circumstances, it is unlikely that this will be completed by 2020. The Appellant submits further that it has not been established that there will be sufficient water available in this allocation to meet the needs of both Exxaro and the Project, and refers to its submissions below in paragraph 52.2 in this regard.

46. Ad paragraph 5.5.2: The Second Respondent advises that Newshelf is currently 100% owned by GDF Suez Energy International Global Developments BV ("Engie") which forms part of the Engie Group. The Appellant points out that CEO of the Engie Group, Gerard Mestrallet, has publically announced that

Engie "*won't be involved in a new coal plant in South Africa*".[8] A copy of the article is attached marked "**E**".

47. Ad paragraph 5.5.7: The Second Respondent submits that "*[t]he Appellant alleges that it made submissions on the Draft EIA on 23 April 2014 and that such comments were ignored*". In reply, the Appellant points out that this is in fact not what was submitted by the Appellant in this paragraph of the Appeal, nor anywhere in the Appeal.

48. Ad paragraph 5.6.4: The Second Respondent submits that "*The Appellant alleges that despite requests, it was not included in the AEL, WML and WUL processes*." It is recorded that this is not what has been submitted by the Appellant in paragraph 38 of the Appeal submissions. Paragraph 38 simply records that "*In addition to the environmental authorisation addressed herein, Newshelf will be required to obtain a water use licence (WUL) in terms of NWA and an atmospheric emission licence (AEL) in terms of AQA, in order to undertake many of the activities envisaged as part of the project*" and continues by recording steps taken by the Second Respondent with regard to the AEL and WUL. No mention is made in this paragraph of the WML process nor is any allegation made of the Appellant's exclusion from any of these processes.

49. Ad paragraph 5.9.1: The Second Respondent submits that "*Newshelf will follow the amended Appeal Regulations … the amended appeal regulations state that 'an appeal lodged after 8 December 2014 against a decision taken in terms of the EIA Regulations, 2010 must, despite the repeal of those regulations, be dispensed with in terms of the EIA Regulations, 2010 as if they had not been repealed, unless otherwise informed by the DEA. The DEA's amendment noted that the appeals on the amendment should be lodged in terms of the 2014 Regulations. Thus there was a degree of uncertainty as to which Regulations applied. Nevertheless, Newshelf has been directed to follow the EIA Regulations, 2010 by the decision-maker, which it is doing*." The Appellant confirms that it has appealed the environmental authorisation as amended and

[8] http://www.bloomberg.com/news/articles/2015-07-01/coal-trading-an-awkward-contradiction-for-climate-talks-sponsor.

not the amendment of the authorisation. The Appellant refers to its submissions in paragraphs 5 to 40 above in this regard.

Grounds of Appeal

Appellant's Submissions on the Response to the First Ground of Appeal - The First Respondent Failed to Comply with Section 24 of the Constitution and the Provisions of NEMA

50. With regard to the Appellant's submissions regarding the health impacts of coal-fired power stations, the various health impact studies and reports which the Appellant referred to in this regard and the negative health impacts that would be felt by communities living in the area as a result of atmospheric emissions that would arise from the Project:

50.1. the Second Respondent submits, inter alia, that:

50.1.1. Ad paragraph 5.13.1.2: "*The Air Quality and Health Risk Specialist Study which formed part of the FEIR [Final Environmental Impact Report] considered these issues in detail. Mitigatory measures are proposed in the Air Quality and Health Risk Specialist Study and the study concludes that the risk index for exposure to air pollutants associated with the Thabametsi project is low*.";

50.1.2. Ad paragraph 5.13.1.3: "*The Air Quality and Health Risk Specialist Study was undertaken as part of the EIA process. Newshelf believes that this was done in accordance with the law and the study indicates that the health risk impact of air pollution is low*"; and

50.1.3. Ad paragraph 5.13.1.5.1: "*It was concluded that the human health risk for development of acute and chronic adverse effects from exposure to PM10 from the stack, stockpile and ash dump and SO2 and NO2 from the stacks is low at all three communities of concern (Lephalale, Onverwacht and Marapong)"*.

50.2. In reply, the Appellant submits that:

50.2.1. The FEIR makes no mention of people residing outside of the specified communities and in close proximity to the Project who would be exposed to the pollutants;

50.2.2. Furthermore, it is disputed that any risk, even if it is low, is acceptable where human health is concerned;

50.2.3. The FEIR Cumulative Impact Assessment states that the impact could not be quantified due to a lack of information from other developments, but nevertheless that *"the risk of cumulative impacts is indicated as being potentially significant*". Therefore it cannot be said that the cumulative air quality impacts of the Project have been assessed and properly considered as they should have been;

50.2.4. In any event, the Air Quality and Specialist Health Study ("the Specialist Study") and the FEIR do not contain adequate assessments of the health impacts of the Project, and the Appellant refers to its detailed submissions in paragraph 59.2 and its subparagraphs in this regard;

50.2.5. Recent research by the International Monetary Fund (IMF) reveals the enormous costs of air pollution, with coal-fired power stations accounting for the majority of these health impacts. The 2015 report, entitled 'How Large are Global Energy Subsidies?' states, *inter alia*, that "*coal accounts for the biggest subsidies, given its high environmental damage*" and "*the considerable size of coal subsidies reflects the substantial undercharging for its environmental impacts*";[9] and

50.2.6. Although a health impact assessment was conducted by the Second Respondent for purposes of the FEIR, it is submitted that, in light of the severity of the health impacts and inevitable cumulative impacts that the Project would

[9] http://www.imf.org/external/pubs/ft/wp/2015/wp15105.pdf at pages 7 and 20. See also pages 18, 19, 20, 21, 23, 27, 30 and 31.

contribute to in an already-declared priority area, the DEA should have required that additional health assessments be conducted before granting the authorisation in order to more accurately assess the health impacts of the Project, and thereby meet its obligations under the Constitution, NEMA and AQA. This is especially so in the current circumstances, where the assessments that were conducted by the Second Respondent (which, for the reasons set out below and in the Appeal, were inadequate) identified the risks of cumulative impacts and health risks from the Project.

51. With regard to the Appellant's submissions that the positive effects - such as, *inter alia*, job creation and increase in household income - of the project would not materialise, that the Project is not socially, environmentally or economically sustainable and that the development would negatively impact on the economy in the medium to long term due to the global trend towards divestment from fossil fuels:

51.1. the Second Respondent submits, *inter alia,* that:

51.1.1. Ad paragraph 5.13.1.4: "*the positive impacts associated with increase in national electricity, economic development, job creation, increase in household income and government revenue will definitely occur as detailed in the socio-economic impact assessment";*

51.1.2. Ad paragraph 5.13.1.5: the relevant impact assessments for air quality and health found the risks for exposure to various pollutants to be low; The Project will source its water from MCWAP Phase 2 and Exxaro Resources' allocation under MCWAP Phase 1 should the Second Respondent require water earlier; heritage and biodiversity impact assessments were undertaken and "*no specific impact was identified that would render the proposed development as an unacceptable threat to the*

biological environment or any specific aspect or species"; and

51.1.3. Ad paragraphs 5.13.1.4 and 5.13.1.5.4: "*the IRP [Integrated Resource Plan] includes a mix of generation technologies, including … 6.3 GW of coal*" and "*Although it is agreed that the development of renewables will mitigate climate change concerns to a certain extent, the need for coal-based energy has been identified by the DoE in order to meet the country's urgent baseload power needs*."

51.2. In reply, the Appellant submits that:

51.2.1. It is disputed that the Project will give rise to the envisaged socio-economic benefits and refers, for example, to the IMF report referred to in paragraph 50.2.5 above in this regard, as well as the Energy Research Centre report referred to in paragraph 51.2.5 hereunder;

51.2.2. Its submissions in paragraphs 50.2, 59.2, 61.2 and 63.2, and their respective subparagraphs, regarding the air quality and health impacts; in paragraphs 45.2 and 52.2, regarding the water availability; and in paragraphs 53.2, 55.2 and 62.2, and their respective subparagraphs, regarding heritage impacts are referred to and confirmed in reply to the Second Respondent's submissions in paragraph 5.13.1.5 referred to above;

51.2.3. The Integrated Resource Plan (IRP) 2010-2030 was promulgated in March 2011. It was indicated at the time that the IRP should be a "living plan" which would be revised by the Department of Energy (DoE) every two years i.e. an update was required in 2013. The draft IRP 2010-2030 Update Report 2013 has not yet been finally accepted by the DoE;

51.2.4. The IRP has expired and no longer accurately reflects the position in South Africa as far as the country's energy needs are concerned;

51.2.5. The Energy Research Centre (ERC) has confirmed, in a 2013 report entitled 'Towards a New Power Plan' that the IRP 2010 assumptions are out of date and no longer valid. The report points out that electricity demand growth was much lower than forecast and that very little further investment is needed before 2025;[10]

51.2.6. A further report of 2014 titled 'Pathways to Deep Carbonisation: South Africa Chapter'[11] published by the Sustainable Development Solutions Network (SDSN) confirms the need to move away from carbon-intensive coal power generation and states that "*Achieving the required 14 GtCO2eq cumulative emissions, while maintaining a feasible energy supply to industry as per economic development assumptions requires early retirement of coal-fired electricity generation and deployment of low-carbon technologies to meet additional demand*"[12] and that "*[a]voiding lock-in to large emissions intensive energy system assets with long economic lifetimes is crucial. Emissions from coal-fired electricity generation will take up emissions space required by other sectors and maintain a level of emissions in electricity that will cause induced emissions from other sectors to limit their potential to contribute to socio-economic development in a carbon-constrained world*";[13]

51.2.7. In addition, the Organisation for Economic Co-operation and Development (OECD) – an international economic grouping of 34 countries, which has traditionally been pro-

[10] Page 2, Executive Summary, Towards a New Power Plan, Energy Research Centre, 2013. Available at http://www.erc.uct.ac.za/Research/publications/13ERC-Towards_new_power_plan.pdf

[11] P167 SDSN Deep Carbonisation Report. http://unsdsn.org/wp-content/uploads/2014/09/DDPP_Digit.pdf.

[12] P174 SDSN Deep Carbonisation Report: South Africa, 2014.

[13] P177 Ibid.

fossil fuels – has recently released a report indicating that countries must stop building new coal-fired power stations. The 2015 report entitled 'Aligning Policies for a Low-Carbon Economy'[14] warned that coal-fired power stations would emit more than 500-billion tonnes of carbon dioxide by 2050. That is half of the total amount – the "carbon budget" – that the entire world can release before reaching 2°C of warming becomes irreversible;

51.2.8. This OECD Report presents the first broad diagnosis of misalignments between overall policy and regulatory frameworks and climate goals. It states that "*identifying and addressing these misalignments systematically in each country will enhance the responsiveness of economic and social systems to the climate change agenda";*[15]

51.2.9. While warning of the future dangers of coal plants, the OECD Report also pointed out that the current dominance of coal had to be changed.[16] It notes that "*wholesale electricity markets born from the wave of electricity sector liberalisation will be increasingly challenged as the decarbonisation of electricity systems becomes an imperative."*[17] Moving to a low carbon economy therefore requires countries to change their regulatory framework to make different types of energy compete equally, and with cognisance of their environmental impact.[18] The report further stated that "*low carbon development can contribute to more sustainable management of the natural resources on which developing economies depend and*

[14] P6 OECD Report- Aligning Policies for a Low Carbon Economy. http://www.keepeek.com/Digital-Asset-Management/oecd/environment/aligning-policies-for-a-low-carbon-economy_9789264233294-en#.
[15] P24 and p27 Ibid.
[16] P159-166 Ibid.
[17] P172 Ibid.
[18] P171-172 Ibid.

reduce the pollution that can undermine long-term prosperity";[19]

51.2.10. The OECD's Secretary General is reported[20] to have stated that: "*'Governments need to be seriously sceptical about whether new coal provides a good deal for their citizens.' Instead of building new plants that would release more carbon into the atmosphere, he said countries needed to be serious about their climate commitments. If average global temperature increases were to be kept below 2°C, he said, 'Not all coal assets will be able to run for their full economic lifetime.' This meant new stations plans should be scrapped, and old plants wound down before time, he said. Countries that did not do this would be faced with a much steeper cost in the future, as carbon reductions would have to be quicker and on a much larger scale. … he said. 'Coal is not cheap, due to the damage done by significant land disturbance, water contamination, [air] pollution, damage to ecosystems, and dust and noise pollution.' He cited the case of China, where the cost of the health impact of air pollution – just from energy use – was $1.4-trillion in 2010 (R17-trillion in current prices*)";

51.2.11. The IRP can, in the circumstances, not be relied upon as a viable justification for the Project to proceed;

51.2.12. Furthermore, the provision for 6.3 GW of coal is in contradiction of South Africa's commitment to combat climate change as evidenced in the National Climate Change Response White Paper, which is addressed in detail in the Appeal. It also contradicts South Africa's commitment, at the 2009 15th session of the United Nations Conference of the Parties to the UNFCCC (COP) Climate conference in Copenhagen, to lower its carbon

[19] P58 Ibid.
[20] http://mg.co.za/article/2015-07-07-countries-must-reconsider-building-coal-power-stations-oecd

emissions by 42% by 2025. The Appellant points out that South Africa is in the process of determining its Intended Nationally Determined Contribution (INDC) - this is the pledge that South Africa will make to reduce its greenhouse gas (GHG) emissions in the global effort to curb climate change, ahead of the upcoming COP in Paris in December 2015. It is submitted that the Project is unlikely to be compatible with this national commitment;

51.2.13. A recent article in the Guardian points out that "*Energy companies are making a 'strategic mistake' and could waste billions of dollars of investment by thinking they are immune to climate policy*".[21] The article quotes Fatih Birol, chief economist of the International Energy Agency, as saying that "*Any energy company in the world, whatever they do - oil, gas, renewables, efficiency, coal - climate policies will impact their business," said Birol. "So in order not to make the wrong investment decisions, in terms of making the investment decisions which may not bring the right returns, or in terms of missing investment opportunities, businesses may need to take climate policies and the impact for their businesses more seriously. Without solving the carbon [emissions] in the energy sector, we have no chance to solve the climate change problem*";

51.2.14. In short, the IRP and DoE provision for coal are outdated considerations which contradict the need to curb GHG emissions; and

51.2.15. The development of renewables will not only serve to mitigate climate change, but it will also be a step in the right direction for South Africa's socio-economic development and will contribute to improved air quality with the aim of ensuring that air quality in the WBPA is

[21] http://www.theguardian.com/environment/2015/jul/09/fossil-fuel-firms-risk-billions-ignoring-climate-change-iea.

and remains in compliance with national ambient air quality standards. In addition, the development of renewables, as opposed to fossil fuels, will reduce the negative impact on the scarce water resources in the area, thereby contributing to the improvement of the health and well-being of communities and individuals residing in the area.

52. With regard to the Appellant's submissions that the Project will have an irreparable impact on the scarce water resources in the area:

52.1. the Second Respondent submits that:

52.1.1. Ad paragraph 5.13.1.5.2: "*The Thabametsi project will source its water from MCWAP Phase 2 … should the Thabametsi Project require water earlier than this date for the construction and early production, the water will be sourced from Exxaro Resources who has an allocation for MCWAP Phase 1*".

52.2. In reply, the Appellant reiterates that the Second Respondent, in its response, has not addressed the issue of the scarce water sources or how the Project will derive its water if there is insufficient water for MCWAP phase 2 to proceed or if it does not obtain the necessary approval.

53. With regard to the Appellant's submissions that the Project would irreparably impact upon the heritage and biodiversity resources on the site:

53.1. the Second Respondent submits, inter alia, that:

53.1.1. Ad paragraph 5.13.1.5.3: "*Heritage Impact Assessment was undertaken in accordance with the requirements of the National Heritage Resources Act (refer to Appendix G of the FEIR). Two ruins and a grave site were identified on the power station development site … Potential impacts on a heritage site of significance (Nelsonskop) are associated with the proposed power line alternative 3,*

which passes in close proximity to this site. Specific management in this area would be required to minimise the risk of any impacts on this area should this alternative be selected as the preferred option. Alternative 3 was however concluded to be the least preferred alternative for the power line in terms of all aspects. Power line Alternative 1 was recommended as the preferred alternative for implementation. No fatal flaws were identified in the heritage impact assessment study for the power station site."

53.2. In reply, the Appellant points out that:

53.2.1. The Interim report by the South African Heritage Resources Agency (SAHRA) states that "*the geology of the area is considered of high palaeontological sensitivity, as such a desktop study is required and based on the outcome of the desktop study, a field assessment is likely*". This does not refer specifically to Nelsonskop, but to the area in general. It is therefore unacceptable that the FEIR does not contain a comprehensive palaeontological assessment;

53.2.2. The mere fact that the proposed alternative 3 power line route, which has potential to impact upon Nelsonskop, has not been recommended does not guarantee that this alternative will not be implemented;

53.2.3. The FEIR[22] states that "*from the assessment of the alternative power line alternatives, Alternative 1 is considered to be the alternative which would result in the lower impact on the environment. However,* ***as all alternatives are considered to be acceptable from an environmental perspective*** *the final determination of the preferred power line alternative should be made on the*

[22] Page 21, Executive Summary, FEIR

basis of technical considerations in consultation with Eskom" (Appellant's emphasis);

53.2.4. The SAHRA Final Report indicates that it is not only power line route alternative 3 but also alternative 2, which is located in an area of high archaeological and palaeontological significance. The Report states that "*the central section of Alternatives 2 and 3 is underlain by the Karoo Supergroup (Swartrant Formation), which is expected to contain Glossopteris flora";*

53.2.5. The SAHRA final report concludes that "*Regular monitoring by an ECO should be undertaken for the sediments of the Karoo Supergroup and Cenozoic regoliths. If any new evidence of fossil material is identified, work must halt immediately in the area and a palaeontologist must be contacted to inspect the findings. If the newly discovered findings are of palaeontological significance, the specialist will require (sic) to apply for a permit in terms of s. 35(4) of the NHRA*"; and

53.2.6. Furthermore, the ruins on the site have yet to be dated – if, according to the SAHRA final report, they are found to be older than 60 years - "*a permit for the impact of the power station on them must be issued by the Limpopo Provincial Heritage Resources Authority*."

54. With regard to the Appellant's submissions that the DEA should have required a detailed health impact assessment and detailed climate change studies and that I&APs should have been granted an opportunity to make submissions on health impact and climate impact studies:

54.1. The Second Respondent submits that:

54.1.1. Ad paragraph 5.13.1.7.1: "*health impacts were assessed in the air quality and health risk specialist study undertaken as part of the EIA*";

54.1.2. Ad paragraph 5.13.1.7.2: "*A detailed climate change assessment was not undertaken. The impacts of*

…[GHG] emissions were considered in the Air Quality Impact assessment. It must be noted that the issue of the impacts on climate change was not raised by any I&AP (including the Appellant) or the DEA throughout the process";

54.1.3. Ad paragraph 5.13.1.7.3: "*Numerous opportunities were provided for interested and affected parties (I&APs) to submit their comments in the EIA process … the Health Impact Assessment and AQ impact assessment (which considered climate change) were included within the EIA which was made available for public comment*."

54.2. In reply, the Appellant submits that:

54.2.1. the Appellant's view is that the health impact study and the alleged assessment of climate change considerations in the FEIR (see paragraphs 50.2, 59.2 and 64.2, and their respective subparagraphs, below in this regard) are insufficient and do not adequately assess the impacts that the Project will have on the health of communities living in the vicinity and do not at all assess the impacts of the Project on climate change;

54.2.2. Climate change impacts, or any particular environmental impact for that matter, need not be specifically raised by an I&AP or the DEA in order for an applicant to be under an obligation to assess such impacts. As already submitted above - and as is dealt with in paragraph 58.2.2 below - according to regulation 31(2)(l) of the EIA Regulations, 2010, an FEIR must contain an assessment of each identified potentially significant impact, and section 24(4)(a)(iv) of NEMA requires that an EIA process ensures investigation into the potential consequences for or impacts of the activity on the environment. As the Project will no doubt give rise to significant GHG emissions, it will contribute to climate change impacts. It is

proven that climate change impacts are significant impacts and it is submitted that it should have been obvious to the EAP and the Second Respondent that it was required to address climate change risks, and that the DEA should have required such risks to be adequately evaluated;

54.2.3. Furthermore, and in any event, it must be emphasised that there is nothing prohibiting the submissions concerning the climate change impacts of the Project from being considered *de novo* during this appeal process. In other words, the Minister is in a position to exercise the widest appellate jurisdiction, by essentially conducting a re-hearing of the matter and taking into account any new information or changes in circumstances – this being a "wide appeal";[23] and

54.2.4. The studies which the Appellant refers to in its submissions referred to in paragraph 5.13.1.7.3 are the "detailed health impact studies" and the "detailed climate impact studies" which the Appellant submits, in paragraph 65.1.17 of the Appeal, should have been conducted and required by the First Respondent.

55. With regard to the Appellant's submissions regarding the failure of the First Respondent to give effect to the general objective of integrated environmental management as provided for in chapter 5 NEMA, particularly with regard to the assessment of heritage impacts and the Appellant's submission that the FEIR, as it stands, is incomplete and inaccurate in that it fails to reflect the final comments and recommendations of SAHRA and the palaeontological assessment, and that I&APs did not have an opportunity to consider and comment on this new information:

55.1. the Second Respondent submits that:

[23] See, for example: *Seafront for All & Another v The MEC: Environmental and Development Planning, Western Cape Provincial Government and 3 Others* 2011 (3) SA 55 (WCC) at [23] and [28].

55.1.1. Ad paragraph 5.13.3.3: "*SAHRA did not state that the palaeontological study must be undertaken prior to an EA being issued*";

55.1.2. Ad paragraph 5.13.3.5: *"Potential impacts on a heritage site of significance (Nelsonskop) are associated with the proposed power line alternative 3, which passes in close proximity to this site. Specific management in this area would be required to minimise the risk of any impacts on this area should this alternative be selected as the preferred option. Alternative 3 was however concluded to be the least preferred alternative for the power line in terms of all aspects. Power line Alternative 1 was recommended as the preferred alternative for implementation. Therefore this requirement of SAHRA is not relevant"*;

55.1.3. Ad paragraph 5.13.3.6: "*The palaeontological study was therefore undertaken in order to obtain SAHRA's final comment on the Thabametsi Project and not in support of the application for an environmental authorisation*"; and

55.1.4. Ad paragraph 5.13.8: "*The comments were submitted to the DEA once received, it is therefore assumed that DEA considered these comments in their decision-making*."

55.2. In reply, the Appellant refers to its submissions in paragraphs 53.2, and 62.2 and their subparagraphs, and submits that:

55.2.1. According to Regulation 31(2) of the EIA Regulations, 2010, "*An environmental impact assessment report must contain all information that is necessary for the competent authority to consider the application and to reach a decision contemplated in regulation 35, and must include- …*

(j) a summary of the findings and recommendations of any specialist report or report on a specialised process;

(k) a description of all environmental issues that were identified during the environmental impact assessment process, an assessment of the significance of each issue

and an indication of the extent to which the issue could be addressed by the adoption of mitigation measures;

(l) an assessment of each identified potentially significant impact, including- …(ii) the nature of the impact; … (iv) the probability of the impact occurring; (v) the degree to which the impact can be reversed; (vi) the degree to which the impact may cause irreplaceable loss of resources; and (vii) the degree to which the impact can be mitigated …";

55.2.2. The fact that the FEIR does not include the final comments of SAHRA or the palaeontological assessment, renders it in breach of the above requirements for an FEIR, as set out in the EIA Regulations, 2010;

55.2.3. To "assume" (as Second Respondent apparently does) that the DEA would have considered the outstanding information in their decision-making does not render the FEIR or the application for environmental authorisation in compliance with the requirements of NEMA or the EIA Regulations, 2010;

55.2.4. Not affording the I&APs an opportunity to have sight of this information and comment thereon is highly prejudicial to their rights and interests, and it essentially means that they have not been given an opportunity to consider and comment on a complete and final FEIR. This is contrary also to PAJA; and

55.2.5. The Appellant refers further to its submissions above in paragraphs 53.2.2 to 53.2.4, and reiterates that, although power line alternative 3 was not selected as the preferred option, this does not render the potential impacts of this alternative irrelevant.

56. With regard to the Appellant's submissions that the "no-go" option should have been considered as a suitable alternative in the FEIR to implementing the Project:

56.1. The Second Respondent submits that:

56.1.1. Ad paragraph 5.13.4.2: "*The "no-go option" was considered in the EIA. In this regard the following was stated: The … [IRP] … has identified the need for power generation from coal as part of the technology mix for power generation in the country in the next 20 years. The need for the project on a national scale has therefore been determined. The 'do nothing' option will therefore not address this national need and may result in electricity demands in the country not being met in the short term. This has serious short-to-medium implications for socio-economic development in South Africa. Without the new proposed coal-fired power station in Lephalale, an alternative means of generating an additional 1200 MW capacity would be required to be sought from another power generation source or a similar source in another area. However, as more than 50% of the remaining coal reserves in the country are located in the Waterberg area, and optimal grid connection opportunities are available, not developing the project on the proposed site would see such an opportunity being lost. At a local level, the level of unemployment will remain the same and there will not be any transfer of skills to people in terms of construction and operation of the power station. This power station is intended to be an IPP project to alleviate pressure on Eskom's base-load power supply in the short-medium term through independent power generation. Without the implementation of this project, this will not be achieved, and the greater power supply in the country will be compromised in the near future. This has potentially significant negative impacts on economic growth and social well-being. In addition, limitations on electricity supply may impact the environment in general due to local air quality impacts due to use of low quality coal for*

domestic purposes, collection of wood from natural areas."

56.2. In reply the Appellant submits that:

56.2.1. In relation to the submission that the IRP has identified the need for power generation from coal, the Appellant refers to its submissions in paragraphs 51.2.3 to 51.2.14 above as well as the ERC, SDSN and OECD reports referred to in these paragraphs, which confirm that, *inter alia*, there is a strong socio-economic need for South Africa to move away from coal energy – that coal-fired power is no longer a sustainable or economically viable option, and that the IRP is woefully outdated and does not accurately reflect the current economic and social position in South Africa or the country's energy needs and the best means of achieving these. The Second Respondent is therefore not justified in relying on the IRP in its submissions;

56.2.2. In response to the submission that doing nothing would result in South Africa's energy needs not being met and the country's energy needs being compromised, the Appellant refers to paragraphs 51.2 and 57.2, and their respective subparagraphs, and confirms that with the already planned and confirmed coal energy generation (Medupi and Kusile) as well as the trend towards reduced energy consumption, improved energy efficiency and the move towards renewables, there is no need for additional coal-power generation developments such as this Project;[24]

56.2.3. The Appellant also disputes the submissions that not proceeding with the project would have negative impacts on socio-economic growth and refers, again, to the

[24] See the ERC and SDSN reports referred to above in paragraphs 51.2.5 to 51.2.11.

submissions in paragraphs 50.2 and 51.2, and their respective subparagraphs, in this regard. The Appellant also disputes the allegation that job opportunities would be lost. The socio-economic harm that would be caused by the Project would far outweigh any short-term employment that would result from it. If renewables were implemented as an alternative, this would give rise to far more extensive and sustainable job opportunities and skills transfer;[25] and

56.2.4. Regarding the submission that limitations on electricity supply may impact the environment in general due to use of low quality coal for domestic purposes and collection of wood from natural areas, the Appellant, once again submits that the impacts on the environment from the Project would significantly exceed any impacts that not implementing the Project would have on the environment. It is, furthermore, nonsensical to allege that the electricity supplied by this Project would play any role in preventing domestic coal burning or the use of wood, as it is submitted that the majority of people who use these sources do so not because electricity is not available, but because they cannot afford electricity.

57. With regard to the Appellant's submissions that, as part of the consideration of feasible alternatives the FEIR should have considered renewable energy alternatives to the project:

57.1. the Second Respondent submits that:

57.1.1. Ad paragraph 5.13.4.3: "*Renewable energy alternatives do not offer a baseload solution to South Africa's energy requirements*"; and

57.1.2. Ad paragraph 5.13.4.4: "*Engie has expertise in renewable energy sources but the adaptation of this Thabametsi*

[25] See SDSN Report P167 – 178. http://unsdsn.org/wp-content/uploads/2014/09/DDPP_Digit.pdf.

project was in response to base-load power for a coal-fired station in terms of the RfP produced by the DoE … coal-fired power stations such as Thabametsi still have a critical role to play in securing South Africa's medium term energy future."

57.2. In reply, the Appellant refers to paragraph 51.2, and its subparagraphs above, and submits further that:

57.2.1. There is no evidence to show that renewable alternatives do not offer a baseload alternative to South Africa's energy alternatives. On the contrary, there is substantial research and a plethora of growing technology to show that renewable energy and improved energy efficiency offer a solution to South Africa's baseload energy requirements.[26] Research conducted by a renewable-energy company, Mainstream Renewable Power[27] indicates that "*electricity generated from a combination of South African wind and solar resources closely follows the country's electricity demand profile and could make a baseload power contribution*";[28]

57.2.2. The SDSN 'Deep Decarbonisation Report', referred to above, not only acknowledges that a move away from coal-fired power generation in South Africa is crucial for socio-economic development in our carbon-constrained world, but also confirms that "*with South Africa's solar radiation resource, the extensive use of CSP [concentrated solar power] with storage and PV [photovoltaic solar power] across a wide geographic spread combined with some dispatchable generating*

[26] See http://theconversation.com/renewable-energy-can-provide-baseload-power-heres-how-2221 and http://www.iisd.org/publications/end-of-coal-ontario-coal-phase-out.
[27] http://mainstreamrp.com/
[28] http://www.engineeringnews.co.za/article/renewables-group-makes-case-for-combined-wind-solar-baseload-alternative-2015-07-06.

assets provides a system with satisfactory loss-of-load probability";[29]

57.2.3. The OECD Report – 'Aligning Policies for a Low Carbon Economy' - referred to above states that "*the lower demand for electricity combined with a rapidly growing share of renewables have made busload plants much less economical than anticipated*;"[30]

57.2.4. Not only should renewables be regarded as a feasible alternative, but it is submitted that, in line with the international movement towards fossil fuel divestment and a foreseeable future international obligation to curb GHG emissions, new coal-fired power should not form part of South Africa's future envisaged energy mix; and

57.2.5. The DoE's RfP is based on the IRP which, as submitted above in paragraph 51.2.4, is outdated and can no longer determine energy requirements.

58. With regard to the Appellant's submission that the First Respondent, in granting the Authorisation, failed to comply with section 24O(1)(b)(viii) of NEMA in failing to take into account the National Climate Change Response White Paper ("the White Paper"):

58.1. The Second Respondent submits that:

58.1.1. *"The white paper does not constitute binding legislation but is a guideline policy only… there are no legally binding obligations placed on South Africa to reduce greenhouse gas emissions. There are also no obligations in South African law to consider climate change issues in the EIA process. This notwithstanding, the issue of Climate Change was considered in the Air Quality Assessment and Risk Study*."

[29] P8, Deep Decarbonisation Report: South Africa 2014.

[30] P177 OECD Report, Aligning Policies for a Low Carbon Economy, http://www.keepeek.com/Digital-Asset-Management/oecd/environment/aligning-policies-for-a-low-carbon-economy_9789264233294-en#page178.

58.2. In reply, the Appellant submits that:

58.2.1. The obligation imposed on a decision maker by section 24O(1)(b(viii) NEMA is to consider "*any guidelines, departmental policies … and any other information in the possession of the competent authority that are relevant to the application*." Therefore the First Respondent was obliged to take the White Paper into account, irrespective of whether or not it is binding legislation; and

58.2.2. The Appellant refers to its submissions in paragraphs 54.2.2 and 54.2.3 and to paragraph 64.2, and its subparagraphs, below and points out that NEMA section 24(4)(a)(iv) and the EIA Regulations, 2010 require that the EIA process must ensure an investigation of the potential consequences for or impacts on the environment of the activity and an assessment of the significance of those potential consequences or impacts.[31] The FEIR must contain an assessment of each identified potentially significant impact.[32] As this Project, being a coal-fired power station, will no doubt through its operation, emit significant GHGs and further exploit an already scarce water resource, climate change is a potentially significant impact, which, in terms of NEMA, should have been comprehensively considered and assessed in the EIA process (including the FEIR);

58.2.3. A recent application by Transnet for an environmental authorisation to deepen and widen berths at its Durban container terminal was rejected by the DEA on grounds that the applicant failed to give adequate consideration to climate change;[33] and

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[31] Section 24(4)(a)(iv)
[32] Regulation 31(2)(l) NEMA EIA Regulations, 2010.
[33] http://www.bdlive.co.za/business/transport/2014/01/20/transnets-durban-port-plan-earns-climate-change-denialist-gibe

58.2.4. It therefore cannot be said that there are no legal obligations to consider climate change issues in the EIA process.

Appellant's Submissions on the Response to the Second Ground of Appeal - The Failure to Take into Account the Air Quality Impacts of the Project

59. With regard to the Appellant's submissions that the FEIR and the First Respondent's decision to grant the authorisation fail to consider the significant contribution that the project will make to the already poor air quality within the WBPA, the severely detrimental, and often fatal, health impacts of coal-fired power station emissions on people residing in close proximity to them and the objectives and provisions of South Africa's national air quality legislation:

59.1. the Second Respondent submits that:

59.1.1. Ad paragraph 5.14.3: "*A health impact assessment was undertaken for the Project and details the potential impacts associated with a project of this nature. The cumulative health impact is considered in the FEIR*";

59.1.2. Ad paragraph 5.14.5: "*The air quality assessment assesses the predicted levels of emissions in terms of the current and future national ambient standards*";

59.1.3. Ad paragraph 5.14.6: "*It was concluded that the human health risk for development of acute and chronic adverse effects from exposure to PM10 from the stack, stockpile and ash dump and SO2 and NO2 from the stacks is low at all three communities of concern (Lephalale, Onverwacht and Marapong) as well as at the other off-site sensitive receptor areas investigated*"; and

59.1.4. Ad paragraph 5.14.10: "*The air quality specialist study concluded that the potential impacts of the project would be low for all potential pollutants*."

59.2. In reply, the Appellant refers to its submissions in paragraphs 50.2, and 61.2, and their respective subparagraphs, and further submits that:

59.2.1. The Specialist Study states that "*the predicted ambient concentrations resulting from emissions from the Thabametsi power station comply with ambient air quality standards. The cumulative effect of these emissions with those from Eskom's Matimba Power Station and the new Madupi (sic) Power Station are likely to result in exceedances of the ambient standards. It is highly likely that the AQMP for the Waterberg-Bojanala Priority Area will include emission reduction requirements to address this situation*";[34]

59.2.2. The Specialist Study and FEIR therefore effectively acknowledge that air quality impacts of the Project will be problematic and will give rise to unlawful exceedances of ambient air quality standards, yet the FEIR nevertheless concludes that air quality impacts of the Project will be low and leaves the impacts to be dealt with at a later stage by an AQMP;

59.2.3. Allowing the air quality problems to be dealt with by a management plan, rather than at the outset and in the Authorisation itself, amounts to unlawfully deferring Constitutional and legislative duties;

59.2.4. The FEIR, as submitted, confirms under the 'Potential Cumulative Impacts on Air Quality and Human Health'[35] that "*the probability of direct cumulative impacts from dust, PM10, NO2 and SO2 emitted during normal operation of the power station, is considered to be high for all scenarios*" and the Specialist Study states that "*the predictive modelling provides 99th percentile ambient concentrations for each pollutant based on worst case meteorological scenario. These results show that predicted concentrations comply with the national ambient standard throughout the study domain. Despite this some*

[34] P62 Air Quality and Health Risk Specialist Study, Appendix E, FEIR.
[35] P192 FEIR.

risk to health remains and the probability of direct and cumulative air quality impacts during the operation of Thabametsi power station is considered to be high"[36];

59.2.5. The impacts of the Project cannot be viewed in isolation, and an adequate assessment of the cumulative impacts of the Project with other existing sources of emissions in the area is essential to assess the impacts that the Project will have on air quality and, crucially, on human health;

59.2.6. The cumulative impacts of the Project were not adequately assessed through dispersion modelling as they should have been. Modelling should have taken into account emissions from the existing Matimba power station, as well as the substantial emissions from Medupi power station - when it becomes fully operational (without flue gas desulphurisation mechanisms in place) - in addition to the predicted modelled emissions from the Project;

59.2.7. However, even such assessments as were conducted[37] revealed that exceedances of the ambient air quality standards were likely;

59.2.8. Modelling conducted on Eskom's behalf in its applications for postponement of compliance with minimum emission standards (by the same consultant who conducted the Specialist Study for the Project)[38] predicted that large areas would exceed both the hourly average and 24 hourly average;

59.2.9. The addition of emissions from the Project will clearly exacerbate this situation, and many or all of the

[36] P4 Air Quality and Health Risk Specialist Study.
[37] Appendix E to FEIR, Air Quality and Health Risk Specialist Study.
[38] Medupi Atmospheric Impact Report (AIR): http://www.iliso.com/emes1/Atmospheric%20Impact%20Reports_PDFs/Medupi_Final_AIR_2014%2002%2024.pdf;
Additional Information provided by Eskom: http://www.iliso.com/emes1/Annexure%20A_General%20Information/GI_Medupi_Final_2013%2012%2013.pdf

surrounding communities are likely to be exposed to air which is not compliant with the SO2 air quality standards, which are set to protect human health. The Appellant also points out that the World Health Organisation (WHO) 24 hour air quality SO2 guideline is 20ug/m3.[39] Ambient air in this entire area is already well above this value, even without Thabametsi power station, indicating that levels of air pollution harm human health;

59.2.10. As for particulate matter (PM), the Medupi atmospheric impact report (AIR) indicates that, at Marapong monitoring station (largely measuring mining emissions and those from Matimba), "*the daily limit of 75 µg/m3, effective from 2015 was exceeded on numerous occasions*" and "*the annual average concentrations all exceed the annual average NAAQS of 40 µg/m3 namely annual averages of 48,7 µg/m3 , 66,1 µg/m3 and 83,9 µg/m3 for 2010, 2011 and 2012 respectively*";[40]

59.2.11. It need not be said that both Medupi and Thabametsi would add to the SO_2 and PM emissions in the area, thereby contributing to and worsening the air quality with respect to PM;

59.2.12. The health risk assessment fails to quantitatively estimate the number of people exposed to each of the pollutants and the increased risk of illness and mortality due to exposure to the pollutants. The use of an undefined 'index value' is not a satisfactory substitute for a health risk assessment;

59.2.13. There are also a number of inconsistencies in the FEIR with regard to some of the mitigatory measures to address the emissions of the Project. Figures 3.1 and 3.4[41] provide for flue-gas treatment and circulating fluidised bed

[39] P18 WHO Report 2005, http://whqlibdoc.who.int/hq/2006/who_sde_phe_oeh_06.02_eng.pdf.
[40] P24 Medupi AIR.
[41] P20 and 27 of the FEIR.

measures, yet these are not mentioned in the air quality assessment of the FEIR or the Specialist Study. In short, final design options do not appear to have been selected. This complicates a comprehensive assessment of the air quality impacts of the Project;

59.2.14. For the reasons set out above, despite the Second Respondent's submissions, the Specialist Study (Appendix E to the FEIR) and air quality and health impact assessment in the FEIR do not adequately assess the air quality and health impacts of the Project; and

59.2.15. In light of the severity of the impacts that coal-fired power stations are known to cause for human health and the environment (as shown in the Appeal submissions), and the inevitable cumulative impacts that the Project would contribute to in a declared air pollution priority area, the DEA should have – in accordance with its obligations under AQA, NEMA and the Constitution[42] - conducted a more thorough and detailed investigation into the impacts of the Project on human health and required that additional health assessments - that took these factors into account - be conducted before deciding whether to grant the Authorisation.

The Appellant's Submissions on the Response to the Third Ground of Appeal - The Failure to Take into Account the Cumulative Impacts of the Project

60. With regard to the Appellant's submissions on the cumulative impacts that the Project is likely to have on various aspects of the environment and/or human health, as outlined in the FEIR, the Second Respondent simply refers to the FEIR without responding to the Appellant's concerns arising from what is in the FEIR. The Appellant's allegations are therefore not addressed and are reiterated.

[42] Section 24 of the Constitution of the Republic of South Africa 108 of 1996.

61. With specific regard to the Appellant's submissions concerning the cumulative impacts of the Project on groundwater and air quality:

61.1. The Second Respondent submits that:

61.1.1. Ad paragraph 5.15.4: with regard to cumulative impact of seepage in groundwater "*although the impact could not be quantified due to lack of information from other developments, the risk of cumulative impacts is indicated as being potentially significant*"; and

61.1.2. Ad paragraph 5.15.5: with regard to the cumulative impacts on air quality "*although the impact could not be quantified due to a lack of information from other developments, the risk of cumulative impacts is indicated as being potentially significant*".

61.2. In reply, the Appellant submits and emphasises that:

61.2.1. Although it is not known exactly which "other developments" the Second Respondent refers to, there is extensive information concerning the air quality impacts of Eskom's Matimba and Medupi power stations - which is easily accessible online[43] - and the FEIR assessments should have taken this information into account. In any event, the specialists who conducted the Specialist Study, also prepared the atmospheric impact reports for Eskom, and would have been aware of - and should have adequately addressed - the air quality impacts of Eskom's Medupi and Matimba power stations;

61.2.2. the lack of sufficient information on which to assess the cumulative impacts alone should be reason for further investigation before an environmental authorisation can

[43] http://www.iliso.com/emes1/Atmospheric%20Impact%20Reports_PDFs/Medupi_Final_AIR_2014%2002%2024.pdf for Medupi power station and http://www.iliso.com/emes1/Atmospheric%20Impact%20Reports_PDFs/Matimba_AIR_FINAL_2014%2002%2021.pdf for Matimba power station.

be properly evaluated, particularly where potential significant impacts are involved;

61.2.3. Both groundwater and air pollution are characterised by significant and long-term harmful impacts for human health and life, and for the environment. To grant an environmental authorisation without adequate consideration of these factors violates NEMA, PAJA and the Constitutional rights of South Africans; and

61.2.4. The Appellant refers further to paragraph 59.2 and its subparagraphs, above which fully address the FEIR's failure to adequately assess the cumulative impacts of the Project on air quality and human health.

62. With regard to the Appellant's submissions on the cumulative impacts of the Project on heritage sites:

62.1. the Second Respondent submits that :

62.1.1. Ad paragraph 5.15.6: "*The palaeontological study was not done as part of the EIA but from this study impacts are expected to be low*".

62.2. In reply, the Appellant refers to paragraphs 53.2 and 55.2 above and submits that the Second Respondent's submissions above are based on its own expectations/assessment of what the impacts might be. It is not permitted to draw its own conclusions from the palaeontological assessment and SAHRA Reports, as this is the function of the EAP and thereafter of the DEA, when it determines whether or not to grant an authorisation. Granting the Authorisation in the absence of an assessment of each identified potentially significant impact - which would include the palaeontological and other heritage impacts as dealt with in the SAHRA final report - as required by regulation 31(2)(l) of the EIA Regulations, 2010, and a failure to conduct a **full** investigation of the potential consequences for or impacts on the environment, contravenes section 24 of NEMA and the EIA Regulations, 2010. Therefore, as submitted, there has not been a proper assessment of the cumulative heritage impacts as alleged by the Second Respondent.

63. With regard to the Appellant's submissions that the FEIR completely disregards the cumulative socio-economic impacts from a health and well-being perspective:

63.1. the Second Respondent submits that:

63.1.1. Ad paragraph 5.15.8: "*cumulative health impacts are considered within the health impact assessment*".

63.2. In reply, the Appellant refers to its submissions in paragraphs 50.2 and 59.2, and their respective subparagraphs, above and points out that:

63.2.1. As submitted above, the cumulative impacts on health could not be properly assessed, thus the health impact assessment cannot provide an adequate reflection of the likely cumulative impacts of the Project on human health;

63.2.2. As the FEIR already acknowledges the existence of risk to human health – without accounting for the various shortcomings in the Specialist Study as highlighted in paragraph 59.2 – the First Respondent should have exercised the precautionary principle[44] and refused to grant the Authorisation on the basis of the information before it;

63.2.3. The health impact assessment considers only the health impacts from an air quality perspective, but fails to consider the health impacts likely to arise from the cumulative impacts of the project to groundwater and the impacts arising from climate change; and

63.2.4. Thus the FEIR does not meet the requirements of NEMA and the EIA Regulations, 2010 to assess each identified potentially significant impact, including cumulative impacts.[45]

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[44] "*Sustainable development requires the consideration of all relevant factors including the following that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions*" (s2(4)(a)(vii) of NEMA).

[45] Regulation 31(2)(l)(i) EIA Regulations, 2010.

The Appellant's Submissions on the Response to the Fourth Ground of Appeal - The Failure to Take into Account the International and National Obligations to Mitigate and Take Positive Steps against Climate Change

64. With regard to the Appellant's submissions made under this ground of appeal:

64.1. the Second Respondent submits that:

64.1.1. Ad paragraph 5.16.1: "*there are no legally binding obligations on South Africa to reduce GHG [greenhouse gas] emissions. This notwithstanding, the issue of climate change was considered in the Air Quality Assessment and Risk Study*"; and

64.1.2. Ad paragraph 5.16.2: "*In the absence of a requirement either from the DEA or from any of the I&APs, there is no legal obligation for this study to be undertaken*".

64.2. In reply, the Appellant refers to its submissions above in paragraphs 54.2 and 58.2, and their respective subparagraphs, and further submits that:

64.2.1. The alleged 'consideration' of climate change in the Air Quality Assessment of the FEIR simply consists of a statement that "*Further indirect effects are associated emissions of CO and CO2. CO2 is a GHG adding to the global concentrations. CO is not considered a GHG but is a strong precursor in the formation of ozone in the troposphere. The global warming potential of tropospheric ozone is equivalent to between 918-1022 tonnes of CO2*."[46] And the table titled 'Summary of Impacts on Air Quality and Human Health' goes on to conclude that indirect impacts associated with SO2 and NO2 emissions relate to acidification and those associated with CO and CO2 related to global warming are low (negative) and

[46] P136 FEIR.

acknowledges "*cumulative impacts on global warming with increased developments contributing to this effect*";[47]

64.2.2. Neither the FEIR nor the Specialist Study make any kind of modelled assessment into the anticipated CO_2 and other GHG emissions of the Project, nor do they make any suggestions for the mitigation of GHG emissions. It can hardly be said that the FEIR or the Study give any meaningful consideration to the impacts of the Project on climate change, other than acknowledging that there will be climate change impacts;

64.2.3. The proven risks connected with climate change, considered together with the section 24 environmental right - which includes the a right to have the environment protected for the benefit of present and future generations - and the requirements of NEMA that the EIA procedure must ensure an "*investigation into the potential consequences for or impacts on the environment on the environment of the activity and an assessment of the significance of those potential consequences*"[48] make clear that there is, in fact, a legal obligation to give adequate consideration to climate change considerations in an application for environmental authorisation;

64.2.4. The 2013 decision by the DEA to reject an environmental authorisation application based on, *inter alia*, the failure to properly consider climate change issues clearly supports this submission;[49] and

64.2.5. Furthermore, as already submitted in the Appeal submissions and above, in light of the growing international trend towards divestment from coal and other fossil fuels, proceeding with the Project would not give

[47] P140 – 141 FEIR.
[48] Section 24(4)(a)(iv) NEMA.
[49] http://www.bdlive.co.za/business/transport/2014/01/20/transnets-durban-port-plan-earns-climate-change-denialist-gibe

rise to the socio-economic benefits predicted in the FEIR. The Appellant refers to paragraph 51.2, and its subparagraphs, above.

The Appellant's Submissions on the Response to the Fifth Ground of Appeal - The Conditions of the Authorisation are Vague and Unenforceable

65. It is noted that the Second Respondent has only responded to three of the Appellant's submissions on the conditions of the authorisation.

66. With regard to the Appellant's submission that the condition pertaining to runoff water is incomplete:
    66.1. Ad paragraph 5.17.3: the Second Respondent submits that it "*believes that the condition is adequate but a more detailed response would have to be provided by the decision-making authority responsible for drafting the condition*".
    66.2. In reply the Appellant submits that, as it stands, the condition is open to various ambiguities and interpretations and must be clarified for the sake of certainty.

The Appellant's Submissions on the Response to the Sixth Ground of Appeal - The Granting of the Authorisation is in Contravention of the Promotion of Administrative Justice Act (PAJA)

67. The Appellant notes the Second Respondent's submission that these allegations are made directly to the DEA and it therefore has not commented on these issues.

68. With regard to the Appellant's submission that the FEIR fails to take into account health impacts, climate change and external costs that will be borne by the state as a result of the project:

68.1. Ad paragraph 5.18.2: the Second Respondent simply submits that: "*the EIA presents both the positive and negative impacts of the Thabametsi Project*".

68.2. In reply the Appellant refers to paragraphs 50.2, 51.2, 55.2, 59.2, 63.2 and 64.2, and their respective subparagraphs, above where this issue has been addressed and submits, again, that the FEIR fails to adequately assess the climate change and health impacts of the Project, and does not adequately reflect the full heritage impact assessments.

The Appellant's Submissions on the Second Respondent's Conclusion

69. In concluding its Responding Statement the Second Respondent submits, *inter alia*, that:

69.1. Ad paragraph 6.1.2: it has an integrated WML and EA for the project;

69.2. Ad paragraph 6.1.3: "*electricity is constrained and in the national interest new projects must be allowed to proceed if the demand for electricity is to be met, provided that the environmental impacts thereof can be sufficiently mitigated, thus projects such as Thabametsi Project must proceed to meet base-load electricity supply in the national interest*";

69.3. Ad paragraph 6.1.4: "[t]he *Thabametsi Project will not lead to unacceptable environmental impacts, the environmental impacts associated therewith can be mitigated to an acceptable level and in accordance with South Africa's relevant environmental legislation and this has been demonstrated during the EIA process*"; and

69.4. Ad paragraph 6.1.5: "*There are sufficient checks and balances throughout the environmental licensing process and through enforcement of legislation to ensure that the Thabametsi Project does not cause unacceptable environmental impacts*."

70. In reply, the Appellant submits that:

70.1. The Authorisation is suspended pending the outcome of the appeal, as required by section 43(7) of NEMA;

70.2. The environmental impacts have not been properly assessed – in various instances insufficient information was available to assess cumulative impacts, and the climate change impacts have not been adequately assessed, despite the obligation to do so;

70.3. The assessment of impacts on human health - not mentioned by the Second Respondent in its conclusion – was highly inadequate and fell short of the requirements of NEMA;

70.4. The heritage impacts were also not properly addressed – for the reasons set out above;

70.5. Accordingly, the Respondents cannot conclude that such impacts can and will be sufficiently mitigated; and

70.6. Irrespective of the Ministerial Determination in relation to coal baseload IPP projects, research demonstrates that electricity demands have been significantly overstated and that no new coal-fired power stations are required or should be built.

CONCLUSION

71. The Appellant wishes to emphasise and bring to the Appeal Authority's attention Engie's public announcement, referred to above and in annexure E, that it "*won't be involved in a new coal plant in South Africa*" - in light of the Second Respondent's submission that Engie holds 100% of the shares in the Second Respondent.

72. In the circumstances and in light of the many flaws in the Authorisation, the Appellant repeats its request that the Authorisation for the Project be set aside.

73. In the event that it is found that the Appellant's Appeal against the Authorisation was submitted out of time – which is disputed – the Appellant requests that condonation as requested in paragraph 25 above be granted.

DATED at **CAPE TOWN** on this the 13th day of **JULY 2015**

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