



# Centre for Environmental Rights

Advancing Environmental Rights in South Africa

**Department of Environmental Affairs**  
**Sabelo Malaza**

Chief Director: Integrated Environmental Authorisations  
Department of Environmental Affairs  
By email: [smalaza@environment.gov.za](mailto:smalaza@environment.gov.za)  
[sdlamini@environment.gov.za](mailto:sdlamini@environment.gov.za)

**The Honourable Ms Edna Molewa**  
**The Minister of Environmental Affairs**  
Attn: **Ziyaad Hassam** and **Heloise van Schalkwyk**  
Director: Appeals and Legal Review  
Department of Environmental Affairs  
By email: [appealsdirector@environment.gov.za](mailto:appealsdirector@environment.gov.za)  
[hvanschalkwyk@environment.gov.za](mailto:hvanschalkwyk@environment.gov.za)

**Debra and John James**  
**Colenso Power (Pty) Ltd**

Directors  
By email: [debbiej@inala-energy.com](mailto:debbiej@inala-energy.com)  
[johnj@inala-energy.com](mailto:johnj@inala-energy.com)

**Nondumiso Gwala**  
**EcoPartners**  
By email: [ndumi@ecopartners.co.za](mailto:ndumi@ecopartners.co.za)

**Adam Gunn**  
**Gunn Attorneys**

By email: [adam@gunnattorneys.co.za](mailto:adam@gunnattorneys.co.za)

Your ref: LSA 151941  
Our ref: 34.23/RH  
3 April 2017

**URGENT**

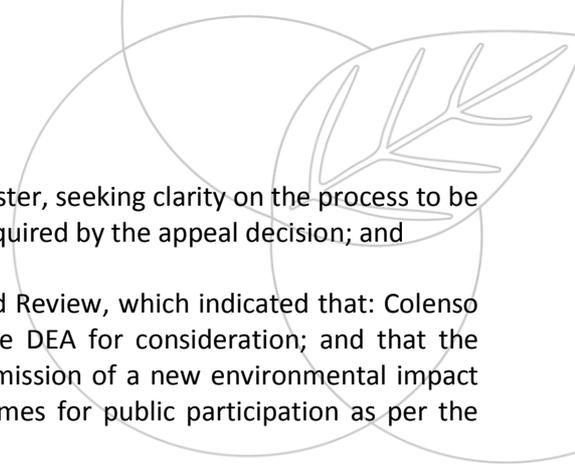
Dear Sirs

**REQUEST FOR CONFIRMATION REGARDING CLIMATE CHANGE IMPACT ASSESSMENT FOR COLENZO IPP POWER STATION APPEAL DECISION REF: LSA 151941**

1. We refer to the following:

- 1.1 the appeal decisions of 8 November 2016 issued to our clients, groundwork and the South Durban Community Environmental Alliance (SDCEA), in relation to our clients' appeal against the environmental authorisation (EA) for the proposed independent power producer (IPP) Colenso coal-fired power station ("Colenso"). The appeal decisions set aside the EA and referred the matter back to the Department of Environmental Affairs (DEA), based on "deficiencies and inaccuracies" in the EA;

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

- 
- 1.2 our 15 November 2016 correspondence to the DEA and the Minister, seeking clarity on the process to be followed in relation to the layout map and geophysical survey required by the appeal decision; and
  - 1.3 the 18 November 2016 response from the Director: Appeals and Review, which indicated that: Colenso was required to submit the site layout map and survey to the DEA for consideration; and that the submission of these documents would not necessitate the submission of a new environmental impact report, but would be subject to the requirements and timeframes for public participation as per the Environmental Impact Assessment (EIA) Regulations, 2014.
2. As you may be aware, the Gauteng Provincial Division has recently handed down judgment in the case of *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others*,<sup>1</sup> which confirmed that the climate change impacts of a proposed coal-fired power station need to be assessed and comprehensively considered before a decision can be made on whether to issue an EA (“the Thabametsi judgement”).
  3. There was a wholly-inadequate consideration of climate change impacts in the EIA process for the Colenso power station. Several of these deficiencies were addressed in our clients’ appeal.
  4. Nevertheless, the Minister’s 8 November 2016 decision rejected our clients’ appeal ground pertaining to the need for a climate change impact assessment, stating the following:

Whilst the appellants’ contentions in respect of the necessity to undertake a climate change impact assessment for the proposed project are noted, it must be emphasised that although South Africa has confirmed its nationally determined contribution at an international level, through its adoption of the Paris Agreement on Climate Change in December 2015, there is currently no legal basis to inform such assessments within the EIA framework.

Notwithstanding the above, the applicant will be allocated a carbon budget as soon as it becomes operational, should it obtain the requisite authorisations and be awarded preferred bidder status by the Department of Energy. This measure is one of the measures designed to reduce the country’s greenhouse gas (GHG) emissions and to keep South Africa’s emissions within its NDC.

Furthermore, once pollution prevention plan regulations are promulgated and GHGs are declared as priority pollutants, the applicant will be required to outline how it plans to reduce GHGs as well as to submit its annual progress reports in respect thereof, which will be evaluated by the Department on an annual basis to ensure that the country remains within its nationally determined contribution.

---

<sup>1</sup> [2017] JOL 37526 (GP)

It is also evident from the submissions by the appellant that it is in opposition to all coal-fired power stations and intimates that all such projects should be refused on the grounds that it contributes to CO<sub>2</sub> emissions globally. This view is untenable and the appellant is reminded that in order for the country to meet its long term electricity demand, a mix of power generation technologies must be pursued, which includes coal-fired power stations. I must stress, however, the Department's commitment to identifying and implementing cleaner power generation technologies in the country's energy mix.

As a result of the foregoing, this ground of appeal is dismissed.

5. This decision clearly contradicts the Thabametsi judgement, in which the court has confirmed that:

*"... (a) plain reading of Section 24O (1) of NEMA confirms that climate change impacts are indeed relevant factors that must be considered. The injunction to consider any pollution, environmental impacts or environmental degradation logically expects consideration of climate change. All the parties accepted in argument that the emission of GHG's from a coal-fired power station is pollution that brings about a change in the environment with adverse effects and will have such an effect in the future" and that "[t]he absence of express provision in the statute requiring a climate change impact assessment does not entail that there is no legal duty to consider climate change as a relevant consideration...The respondents' complaint that without explicit guidance in the law on climate change impact assessments. Thabametsi could not be required to conduct a climate change impact assessment, as there is no clarity on what is required, is unconvincing"<sup>2</sup> (own emphasis);*

*"[T]he legislative and policy scheme and framework overwhelming support the conclusion that an assessment of climate change impacts and mitigating measures will be relevant factors in the environmental authorisation process, and that consideration of such will best be accomplished by means of a professionally researched climate change impact report. For all these reasons, I find that the text, purpose, ethos and intra- and extra-statutory context of section 24O(1) of NEMA support the conclusion that climate change impacts of coal-fired power stations are relevant factors that must be considered before granting environmental authorisation"<sup>3</sup> (own emphasis); and*

*"... the decision to grant the authorisation without proper prior consideration of the climate change impacts is prejudicial in that the permission has been granted to build a coal-fired power station which will emit substantial GHG's in an ecologically vulnerable area for 40 years without properly researching the climate change impacts for the area and the country as a whole before granting authorisation"<sup>4</sup> (own emphasis).*

6. This judgement makes clear that:

6.1 there is a legal duty under the South African environmental law regime, to comprehensively consider climate change impacts of proposed projects that would have significant climate change impacts, as part of an EIA;

6.2 government and industry are obliged to fully assess the climate change impacts of a proposed coal-fired power station before any EA can be issued;

---

<sup>2</sup> Ibid, Paragraph 88.

<sup>3</sup> Ibid, Paragraph 91.

<sup>4</sup> Ibid, Paragraph 119.

6.3 a climate change impact assessment extends beyond merely considering the potential greenhouse gas (GHG) emissions of the project, and requires analysis of the broader impacts of: climate change (such as water scarcity); the social and environmental cost of those impacts; how climate change will impact on the feasibility of the project; how the proposed project would exacerbate the impacts of climate change for the people of South Africa by increasing the vulnerability of communities and the environment to climate change by utilising and polluting the limited water available; and of any possible mitigation measures; and

6.4 these climate change impacts are best assessed by means of a “a professionally researched climate change impact report”.

7. The Thabametsi judgement confirms that Colenso was under an obligation to fully assess the project’s climate change impacts as part of the EIA, and before a decision could have been made to authorise the power station. The Minister’s finding to the contrary, in respect of our clients’ appeal, was a clear and material error of law.
8. In light of the above, our instructions are to require urgent confirmation that:
  - 8.1 Colenso will comprehensively consider and assess the climate change impacts of the proposed Colenso power station (as set out above);
  - 8.2 such assessment will at least follow the requirements and timeframes for public participation as per the EIA Regulations, 2014; and
  - 8.3 the DEA will consider the Colenso report on climate change impacts when reconsidering the EA in terms of the Minister’s appeal decision.
9. Our clients’ rights are reserved, including the right to challenge an EA granted to Colenso which fails to assess climate change impacts in the manner set out in paragraph 8 above.
10. Kindly respond by **13 April 2017**.

Yours faithfully

**CENTRE FOR ENVIRONMENTAL RIGHTS**

per: 

**Nicole Loser**  
**Attorney**

Direct email: [nloser@cer.org.za](mailto:nloser@cer.org.za)

