



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

Ms Karen Breytenbach
Head of IPP Office
Department of Energy: IPP Projects
By email: Karen.breytenbach@ipp.projects.co.za

Copies to:

The Honourable Minister Ms Mmamolo Kubayi
Minister of Energy
Department of Energy
By email: kate.dire@energy.gov.za
By email: thabo.mothibi@energy.gov.za
By email: bianca.selao@energy.gov.za

Our ref: NL/IPP
6 April 2017

Dear Ms Breytenbach

UPDATE ON THE THABAMETSI POWER COMPANY (PTY) LIMITED AND ACWA POWER KHANYISA THERMAL POWER STATION (RF) (PTY) LIMITED INDEPENDENT POWER PRODUCER PROJECTS

1. We address you on behalf of Earthlife Africa Johannesburg¹ (ELA) and groundWork (gW)² (“our clients”).
2. Our clients were registered interested and affected parties (I&APs), in relation to the authorisation processes for the proposed Thabametsi and Khanyisa coal-fired power stations, respectively.
3. The authorisation for the proposed 1200 MW Thabametsi power station (“Thabametsi”) is held by Thabametsi Power Company (Pty) Limited and the authorisation for the proposed 600 MW Khanyisa power station (“Khanisa”) is held by ACWA Power Khanyisa Thermal Power Station (RF) (Pty) Limited South Africa (“ACWA”).

¹ Earthlife Africa Johannesburg is a non-profit organisation that seeks to encourage and support individuals, businesses and industries to reduce pollution, minimise waste and protect natural resources. Its largest campaign is the Sustainable Energy and Climate Change Project (SECCP), which seeks a just transition to renewable energy and a low-carbon economy. The SECCP works to promote local and global environmental and social justice on sustainable energy and climate change issues, by changing policies and behaviour through building the awareness and capacity of civil society and government, to achieve an equitable future with respect for all. See more information at: www.earthlife.org.za

² groundWork is a non-profit environmental justice campaigning organisation working primarily in South Africa, in the areas of Climate & Energy Justice, Coal, Environmental Health, Global Green and Healthy Hospitals, and Waste See more information at: www.groundwork.org.za

2nd 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, www.cer.org.za

Both projects were appointed in October 2016 as preferred bidders under the Coal Baseload Independent Power Producer Procurement Programme (CBIPPPP).

4. We refer to our letter to your office of 18 October 2016, wherein we brought to your attention relevant information concerning the Thabametsi project. We have not yet received a response to this letter, despite your advice on 27 October 2016 that the Department of Energy (“the Department”) was considering its position, and a subsequent assurance in an email of 18 November 2016 that a response would be forthcoming soon. A copy of this correspondence is again attached, marked **1** for your ease of reference. In the 18 October 2016 letter, we alerted you to:
 - 4.1. our client, ELA’s review application, launched in the North Gauteng High Court in August 2016 (under case no 65662/16), to set aside the environmental authorisation (EA) for Thabametsi, based on Thabametsi’s failure to conduct a climate change impact assessment, and the Department and Minister of Environmental Affairs’ failure to consider the climate change impacts of the proposed coal-fired power station as a relevant factor in deciding whether to authorise the power station; and
 - 4.2. Thabametsi’s duty to inform the Department of the pending litigation against them pursuant to the criteria set out in Clause 4.1.3 of the Legal Qualification Criteria, Volume 2 of the Request for Proposals (RFP) for the CBIPPPP.
5. We now write to you with reference to both Thabametsi and Khanyisa – to ensure that relevant information pertaining to these preferred bidders is brought to your attention and also to inform you of the recent decision of the North Gauteng High Court (pertaining to Thabametsi) which is relevant to all coal baseload IPPs under the CBIPPPP (both for the current two preferred bidders and for all the other proposed coal baseload IPPs, of which there are many).
6. We note, in terms of Legal Qualification Criteria, Volume 2 of the RFP for the CBIPPPP,³ that, in order for a preferred bidder to reach financial and commercial close, such bidder must, at least one month before the scheduled commercial close, provide the Department with the following, *inter alia*:⁴
 - 6.1. the approval of all outstanding Environmental Consents integral to the Project, including, but not limited to the following:⁵
 - 6.1.1. an EA;
 - 6.1.2. a water use licence (WUL);
 - 6.1.3. any provisional atmospheric emission licence (AEL), required in terms of the National Environmental Management: Air Quality Act, 2004 (AQA); and
 - 6.1.4. any heritage approvals in terms of the National Heritage Resources Act, 1999, other applicable provincial laws, and, if applicable, Phase II mitigation permits;
 - 6.2. a generation licence from the National Energy Regulator of South Africa (NERSA);⁶ and
 - 6.3. proof of the resolution or settlement of any appeals and or reviews which may have been lodged or instituted against a decision to grant any environmental consent for the project.⁷

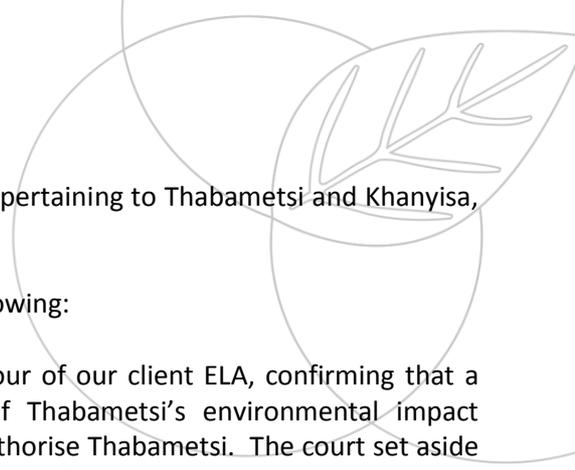
³ Coal RFP “Request for Qualification and Proposals for New Generation Capacity under the Coal Baseload IPP Procurement Programme” Volume 2, Part 3 ‘Legal Agreements’, December 2014. See Pages 14 - 17.

⁴ Ibid. Volume 2, Part 5 ‘Preferred Bidder Documents’. See Section 5.5.

⁵ Ibid. Volume 2, Part 5 ‘Preferred Bidder Documents’. See Section 5.2.2

⁶ Ibid. Volume 2, Part 5 ‘Preferred Bidder Documents’. See Section 5.5.8

⁷ Ibid. Volume 2, Part 5 ‘Preferred Bidder Documents’. See Section 5.2.3

- 
7. In relation to the above RFP requirements, the following information, pertaining to Thabametsi and Khanyisa, is relevant.
 8. With regard to the proposed **Thabametsi** project we point out the following:
 - 8.1. On 8 March 2017, the North Gauteng High Court ruled in favour of our client ELA, confirming that a climate change impact assessment was required as part of Thabametsi's environmental impact assessment (EIA) before a decision could have been made to authorise Thabametsi. The court set aside the Minister's decision remitting the appeal of the EA to the Minister for reconsideration.
 - 8.2. The High Court has ordered the Minister to consider Thabametsi's final climate change impact assessment report (and public comment thereon) and to make a fresh decision on the appeal. A copy of the judgment ("the Thabametsi judgment") is attached marked **2**. Until such time as the Minister's decision is made, Thabametsi's EA is suspended.
 - 8.3. The Thabametsi judgment further confirmed that:
 - 8.3.1. coal-fired power stations significantly contribute to climate change,⁸ which in turn, poses a substantial risk to sustainable development in South Africa;⁹
 - 8.3.2. coal-fired power stations not only contribute to climate change, but are also at risk from the consequences of climate change. As water scarcity increases due to climate change, this will place electricity generation at risk, as it is a highly water-intensive industry; and
 - 8.3.3. all proposed new coal plants must fully assess climate change impacts within an EIA, before a decision can be made to authorise (or refuse authorisation for) such plants.
 - 8.4. Thabametsi has conducted and published a draft climate change impact assessment report.¹⁰ The draft report points out significant climate change impacts, as well as numerous risks for the power station resulting from climate change, it states, *inter alia*, that:
 - 8.4.1. the power station will emit 8.2 million tons of CO2 equivalent per year, which is considered "very large" in terms of greenhouse gas (GHG) emissions, when compared with international standards;¹¹
 - 8.4.2. the plant does not represent an improvement on the emissions intensity of South Africa's grid, but only represents an improvement (from a GHG-emissions perspective) on South Africa's three oldest coal-fired power plants – Eskom's Camden, Hendrina and Arnot stations– all of which are well over 40 years old¹² - and which have all sought to postpone compliance with South Africa's weak minimum emission standards;
 - 8.4.3. the impacts of climate change – particularly on water availability, water quality and temperature increases – are likely to pose a high risk to the power station in the short to long - term future;¹³ and
 - 8.4.4. drought conditions have historically negatively impacted local communities, including farmers and other rural residents directly dependent on water supplies for cattle farming and other

⁸ Ibid, Paragraph 25.

⁹ Judgement of 8 March 2017, Murphy J, *Earthlife Africa v the Minister of Environmental Affairs and 4 others (NGHC)*, case number: 65662/16, Paragraph 119.

¹⁰ Available at <http://www.savannahsa.com/projects/>.

¹¹ Thabametsi Draft Climate Change Impact Report "Greenhouse Gas Assessment for the 1200NW Thabametsi Coal-Fired Power Station in Lephalale, Limpopo Province South Africa: Final report" Savannah Environmental (Pty) Ltd, January 2017. Page 45 Available at: <http://www.savannahsa.com/projects/project.php?project=438>

¹² Ibid, Page 59.

¹³ Thabametsi Climate Resilience Report, at page XI, available at <http://www.savannahsa.com/projects/project.php?project=438>.

agriculture in the Lephalale region. Additional water stress brings about increased community concerns and tension, and the increased dry spells/drought events will affect communities and may threaten “Thabametsi’s social licence to operate”.¹⁴

- 8.5. Thabametsi is yet to be issued with any of the following: an integrated WUL (IWUL), an AEL, or a licence to generate electricity from NERSA – these are consents vital to key activities required by the CBIPPPP, and are required in order for Thabametsi to reach commercial and financial close.¹⁵
 - 8.6. We, on behalf of ELA, have submitted objections to Thabametsi’s IWULA and NERSA licence applications, which objections are attached hereto as annexures **3** and **4** respectively. We were recently advised by NERSA that the public hearing for Thabametsi’s NERSA licence application has been placed on hold in light of the Thabametsi judgment, and until “the issue of the [EA] is sorted out”.
9. With regard to **Khanyisa**, we record and point out the following:
- 9.1. ACWA obtained an EA for the project in 2013. This EA has subsequently been amended numerous times. One of these amendments, in 2015, included an amendment to increase the plant capacity from 450MW to 600MW.
 - 9.2. Khanyisa’s EIA is legally unsound, in that it failed to adequately consider the climate change impacts of the proposed power station. In accordance with the ruling handed down in the Thabametsi judgment – this is a fatal flaw, and in light of this, our client gW has instructed us to obtain leave from the Minister of Environmental Affairs to appeal the EA. We are in the process of drafting submissions to show good cause for the late filing of the notice of intention to appeal on 18 April 2017, as required by regulation 60(4) of the EIA Regulations, 2010. In the event that the Minister refuses to allow the appeal to proceed, we are instructed to follow appropriate legal remedies to challenge this decision.
 - 9.3. Khanyisa does not yet have an IWUL or licence from NERSA. Objections have been submitted by gW against Khanyisa’s IWUL application and its NERSA electricity generation licence application – see attached, annexures **5** and **6**.
 - 9.4. Khanyisa obtained a provisional AEL (PAEL) in 2013. However, our client has numerous objections to and concerns around the validity of the PAEL, in that, *inter alia*, it was issued for a 450 MW plant and not a 600 MW plant and has not been varied to provide for the increased plant capacity. We wrote to the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs (MDARDLEA) to object to ACWA’s reliance on a dated and inaccurate AEL, on 1 December 2016. On 20 February 2017, the environmental assessment practitioner (EAP) advised I&APs that ACWA intended to apply to transfer the AEL from Anglo Operations (Pty) Ltd (“Anglo”), the original applicant and holder of the PAEL, to ACWA. gW has objected to the proposed transfer and to the continued reliance on the PAEL by ACWA, based on the fact that it would be wholly inadequate and unlawful to rely on an inaccurate, outdated and procedurally-flawed PAEL: we have submitted that a fresh AEL application is required. The relevant correspondence is attached marked **7**.
10. The RFP provides that financial and commercial close must be reached within 6 months from the date of announcement of the preferred bidders¹⁶ – this being April 2017. In accordance with section 5.5 of the RFP, both Thabametsi and ACWA should already be providing the Department with proof of the above consents,

¹⁴ Ibid, at page XII.

¹⁵ Coal RFP “Request for Qualification and Proposals for New Generation Capacity under the Coal Baseload IPP Procurement Programme” Volume 2, Part 5 ‘Preferred Bidder Documents’, December 2014. See Section 5.2.

¹⁶ Coal RFP “Request for Qualification and Proposals for New Generation Capacity under the Coal Baseload IPP Procurement Programme” Part A: General Requirements Rules, P 97. See Section 12.

with it now being less than one month from the commercial and financial close deadline. Yet neither of the projects have their IWUL or NERSA licences and their EAs and AELs are either suspended and/or contested.

11. On the face of it, and based on the requirements of the RFP, it appears that neither Khanyisa nor Thabametsi is able to meet the threshold legal qualification criteria for commercial and financial close. Kindly advise whether extended deadlines for commercial and financial close have been granted to either Thabametsi and/or ACWA, and if not, what steps will be taken in relation to this likely non-compliance.
12. Kindly also respond to our letter of October 2016 by providing the requested clarity on the following:
 - 12.1. whether Thabametsi informed the Department of ELA's application to review and set aside Thabametsi's EA;
 - 12.2. whether Thabametsi made submissions to the Department as to why its bid should be accepted, despite the then pending appeal and subsequent review application (if so kindly provide us with a copy of these submissions); and
 - 12.3. what the Department's reasons for appointing Thabametsi as a preferred bidder were, in the face of ELA's pending review application.
13. We also wish to emphasise the importance of the Thabametsi judgment, and the court's confirmation that the climate change impacts of all proposed coal baseload IPPs must now be comprehensively assessed and considered by government in considering the EIAs of these projects. We are instructed to require that this is done for all such projects, including those that will bid in terms of any future CBIPPPP bidding round.
14. We look forward to your response.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

Robyn Hugo
Attorney and Programme Head: Pollution & Climate Change
Direct email: rhugo@cer.org.za