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

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Our ref: CER: RH/NL 34.18
3 April 2017

Dear Sirs

ENVIRONMENTAL AUTHORISATION ISSUED IN RESPECT OF THE PROPOSED CONSTRUCTION OF A 600MW COAL-FIRED INDEPENDENT POWER PLANT (IPP) AND ASSOCIATED INFRASTRUCTURE FOR KIPOWER (PTY) LIMITED SOUTH AFRICA NEAR DELMAS, IN MPUMALANGA

1. We act for groundWork[1] (gW), an interested and affected party (I&AP), in relation to the independent power producer (IPP) 600MW coal-fired power station proposed to be developed by Kuyasa Mining (Pty) Limited on behalf of KiPower (Pty) Ltd South Africa ("KiPower").

[1] A non-profit environmental justice service and developmental organisation aimed at improving the quality of life and vulnerable people in South Africa (and increasingly in Southern Africa), through assisting civil society to have a greater impact on environmental governance,

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2. We refer to the environmental authorisation issued to KiPower on 21 October 2015. Our client appealed this authorisation on 10 December 2015. One of the grounds of appeal was that the Department of Environmental Affairs (DEA) failed to apply the risk-averse and cautious approach necessitated in decision-making by the National Environmental Management Act, 1998 (NEMA), indicating that "*the Authorisation was granted without adequate information about the full implications of the Project for health and for its contribution to climate change and adaptation to a changed climate*".[2]

3. 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*,[3] 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 environmental authorisation ("the Thabametsi judgment").

4. We refer to the Minister's 8 November 2016 decision dismissing our client's appeal. In relation to the appeal ground pertaining to the need for a climate change impact assessment, the decision stated:

> "*It is common cause that coal-fired power generation is part of South Africa's energy mix as is evidenced in the country's [IRP] produced by the DOE … there is currently no legal basis to inform such [climate change impact] assessments within the EIA framework. Notwithstanding the above the applicant will be allocated a carbon budget as soon as it becomes operational …"* (own emphasis)

5. This decision clearly contradicts the Thabametsi judgment, 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"*[4] (own emphasis);
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> *"[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*"[5] (own emphasis); and
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> *"… 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*

groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices. See more information at: www.groundwork.co.za.

[2] Para 98, groundWork Appeal, 10 December 2016.

[3] Judgment of 8 March 2017, Murphy J, *Earthlife Africa Johannesburg v the Minister of Environmental Affairs and 4 others (NGHC),* case number: 65662/16.

[4] Ibid, Paragraph 88.

[5] Ibid, Paragraph 91.

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"[6] (own emphasis).

6. This judgment 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 environmental impact assessment (EIA);

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

   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. In light of the above, our instructions are to institute review proceedings to challenge the Minister's decision on the appeal, based on the findings in the Thabametsi judgment. The judgment confirms that KiPower 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 was a clear and material error of law.

8. Given the strong basis for the judicial review, and in the interests of saving unnecessary time and costs, we propose that the most suitable way forward is for the parties to agree to approach the High Court for an order in the following terms:

   8.1. The Minister's appeal decision on Ki Power's environmental authorisation is reviewed and set aside;

   8.2. KiPower is required to conduct a comprehensive climate change impact assessment in accordance with the procedures set out in the EIA Regulations, 2010; and

   8.3. the matter is remitted back to the Minister to reconsider the appeal, once KiPower has completed and submitted the required climate change impact assessment.

9. We record that KiPower did not bid to be considered a preferred bidder in the first window in the coal baseload IPP procurement programme (CBIPPPP). It is not yet clear whether, and if so, when, any further bid windows will be announced by the Department of Energy (DOE) and if such window is announced, whether KiPower would bid and be appointed a preferred bidder.

10. Irrespective of whether you agree to the proposal in paragraph 8 above, and in the interests of saving time and costs, we request further that you agree to extend the 180 day deadline for the filing of a review in terms of section 7(1) of the Promotion of Administrative Justice Act, 2000 (PAJA), so that the time period will commence running from the date that KiPower submits a bid under the second bid window of the CBIPPPP, or any other process in terms of which KiPower intends to commence with the authorised activities in its environmental authorisation.

[6] Ibid, Paragraph 119.

Given the uncertainty about the future of the CBIPPPP programme, this proposal would spare the parties the expense of a review application in circumstances where it is uncertain whether KiPower will proceed with its plans to construct a coal-fired power station.

11. If you are in agreement with this proposal, we will not launch a review application until such time as: KiPower bids in terms of any further bid window under the CBIPPPP or similar procedure, once our client is notified of the submission of the bid; and provided that KiPower provides an undertaking that it will not commence with the authorised activities unless appointed as a preferred bidder.

12. Kindly respond by no later than **13 April 2017**. Should we not hear from you by this date, our instructions are to proceed with the review application.

13. We look forward to receiving your response.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per:

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