



# Centre for Environmental Rights

## Advancing Environmental Rights in South Africa

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Our ref: CER 54.1 RH/MK (Khanyisa)

9 December 2019

**URGENT**

Dear Adv Coetzee

### UPDATE ON THE PREFERRED BIDDERS UNDER THE FIRST BID WINDOW OF THE COAL BASELOAD IPP PROCUREMENT PROGRAMME (THE PROPOSED THABAMETSI & KHANYISA COAL-FIRED POWER STATION) & STATUS OF ANY FUTURE BID WINDOWS

1. We refer to our correspondence dated 12 November 2019 as well as our telephone discussion with your office on 26 November and your further response thereto on 29 November 2019. We write to provide you with a further update.
2. In our previous correspondence, we advised that it was confirmed by the Department of Environment, Forestry and Fisheries (DEFF) on 20 September 2019 that, absent ACWA's confirmation that it had fulfilled the relevant conditions in the environmental authorisation (EA) ("the requisite proof"), the **EA for the proposed Khanyisa independent power plant (IPP) coal-fired power station expired on 31 October 2018**. We attached DEFF's correspondence in support thereof. The 20 September letter (attached again for your ease of reference) stated that:
  - 2.1. ACWA's purported commencement with some of the listed activities in the EA was unlawful in that ACWA had not fulfilled peremptory conditions of the EA prior to commencement of the activity;
  - 2.2. due to the suspensive nature of the conditions in the EA, unlawful commencement with any of the listed activities cannot operate to interrupt the lapsing of the EA; and

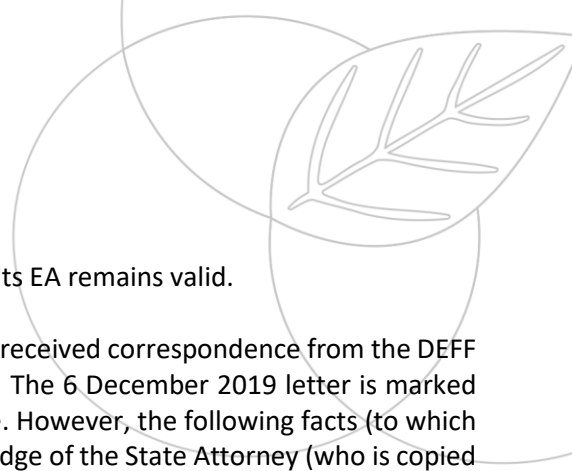
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2.3. the EA had lapsed on 31 October 2018.

3. As you are no doubt aware, despite the above, ACWA is of the view that its EA remains valid.
4. Further to this correspondence, we advise that, on 6 December 2019, we received correspondence from the DEFF confirming its 20 September 2019 position that ACWA's EA had expired. The 6 December 2019 letter is marked "without prejudice" and its full contents cannot be disclosed at this stage. However, the following facts (to which no privilege applies) are relevant and are being disclosed with the knowledge of the State Attorney (who is copied on this letter):
  - 4.1. despite a further meeting with ACWA and a request by the DEFF, ACWA did not provide the necessary proof that the requisite conditions of the EA had been fulfilled at the time of commencement of listed activities;
  - 4.2. officials from the Department have conducted their own independent verification which concluded that certain conditions in the EA had not been fulfilled;
  - 4.3. ACWA did not timeously apply for the extension of the validity of the EA; and
  - 4.4. DEFF's position in relation to the EA expiry ad paragraph 2.1-2.3 above is confirmed.
5. The confirmation by DEFF that ACWA's EA in respect of the Khanyisa project lapsed on 31 October 2018 by operation of law, has far-reaching implications for the future of the proposed Khanyisa IPP power station; including for its continued participation in the coal baseload IPP programme, administered by the Department of Mineral Resources and Energy (DMRE).
6. Whilst the 20 September letter is attached, should the IPP office require additional confirmation in relation to the 6 December 2019 letter, we request that the IPP office contact the State Attorney herein to confirm the contents of 6 December 2019 letter. Alternatively, we propose that the State Attorney share the letter with the IPP office. In the further alternative, we request that the IPP office contact the State Attorney to share the salient facts, which are crucial for their deliberations and discussions.
7. In light of the above, as well as the updates we provided in our 12 November correspondence, we look forward to receiving the IPP office's response as to the status of the Khanyisa project; including whether the IPP office intends granting any further postponements to the commercial and financial office deadline, given the EA expiry – which impacts on various other authorisations.
8. Further, we await your **confirmation on the commercial and financial deadline** for both Khanyisa and Thabametsi projects as soon as possible (including the implications of their continued failures to reach close), and we continue to await your advice on **whether; and if so, when, you anticipate a second coal IPPs' bidding round will be announced.**
9. Given the relevance of this information for a number of other legal processes, we request your urgent response, **by no later than 13 December 2019.**
10. Please let us know, should you have any queries.

Yours faithfully

**CENTRE FOR ENVIRONMENTAL RIGHTS**

per:

**Michelle Koyama**  
**Attorney**

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