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Our Reference 19-0217

Your Reference DEA Ref No: 14/12/16/3/3/3/52/AM2 and NEAS Ref. No.: DEA/EIA/0001416/2012

30 March 2020

**Notification of DEA rejection of the Part 2 Amendment Application for Exemption extension in terms of National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA) for the continuous ashing at the Ash Disposal Facility, at Tutuka Power Station, Mpumalanga Province.**

Dear Interested and Affected Party (I&AP)

The Department of Environmental Affairs (DEA) has rejected amendment of the Exemption approval granted to Tutuka Ashing Facility, in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998), as amended.

**Background:**

The station applied for, and obtained, an Integrated Environmental Authorisation (IEA), 14/12/16/3/3/3/52 & DEA/EIA/0001416/2012, issued DEA on 19 October 2015. Subsequent to this authorisation, the station applied for a four-year Exemption from installing the required liner (a Class C liner), as a means to allow station ashing operations to continue while the required designs of the Class C liner were being developed, and to allow its installation.

To inform the Exemption application process, an equivalent footprint (area) for the four-year Exemption was estimated to be 54ha and was assessed and motivated by an independent Environmental Consultant and supporting Specialists. The DEA granted the four-year Exemption on 05 May 2016, and it had some conditions. The Exemption period lapses on 04 May 2020. Parallel to ashing on the area under the Exemption, developmental work was executed for the Class C liner for the Ash Disposal Facility.

In 2018, Tutuka realised that the 54 ha approved under the Exemption would not be fully utilised at the end of the four-year Exemption period, and a process to determine the most feasible option to manage this usage gap was undertaken, whereby a few alternative strategies were assessed. Through the assessment process a decision was made that the most feasible option was to apply for an extension of the Exemption period, without extending the area under the Exemption. To execute this strategy, Eskom undertook a Part 1 amendment process in November 2018, but the DEA rejected that application (dated 09 January 2019)

and required that a Part 2 amendment process be undertaken instead (which is the subject of this authorisation).

**Record of Decision:**

DEA has rejected the Part 2 amendment application dated September 2019 and received by the department on 14 October 2019. The motivation for the decision by DEA and key commenting authorities is provided in **Appendix 1**.

**Appeal:**

Your attention is drawn to the Appeal Regulations, 2014 (as amended), which prescribes the appeal procedures, which is provided in **Appendix 2**. Should you as an Interested and Affected Party (IAP) wish to appeal any aspect of the decision, you must formally lodge an appeal with the Director: Appeals and Legal Review of the DEA, within 20 days of the date of this notice, Wednesday 15 April 2020. To obtain the prescribed appeal form and/or guidance on the submission of appeals, visit the Departments website at:

[https://www.environment.gov.za/documents/forms#legal\\_authorisations](https://www.environment.gov.za/documents/forms#legal_authorisations) or request a copy of the form from [appeals@environmental.gov.za](mailto:appeals@environmental.gov.za).

All appeals are to be submitted by any of the means indicated below:

- i. Email - [appeals@environmental.gov.za](mailto:appeals@environmental.gov.za);
- ii. Hand - Environment House, 473 Steve Biko, Arcadia, Pretoria, 0083; or
- iii. Post - Private Bag X447, Pretoria, 0001

**Date of Authorisation**  
Tuesday, 24 March 2020

**Date of Notice**  
30 March 2020

**Appeals Deadline**  
15 April 2020



Lehlogonolo Mashego  
Tel: 011 803 5726, Fax: 011 803 5745,  
E-mail: [lehlo@gcs-sa.biz](mailto:lehlo@gcs-sa.biz)  
Mail: P O Box 2597, Rivonia, 2128

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Sharon Meyer'.

Sharon Meyer  
Environmental Consultant

A handwritten signature in black ink, appearing to read 'Mashego'.

Lehlogonolo Mashego (For/on behalf of GCS)  
Environmental Liaison Officer

## Appendix 1



## **environmental affairs**

Department:  
Environmental Affairs  
**REPUBLIC OF SOUTH AFRICA**

Private Bag X 447· PRETORIA · 0001· Environment House · 473 Steve Biko Road, Arcadia · PRETORIA

**DEA Reference:** 14/12/16/3/3/3/52/AM2

**Enquiries:** Ms Masina Litsoane

**Telephone:** (012) 399 9375 **E-mail:** [MLitsoane@environment.gov.za](mailto:MLitsoane@environment.gov.za)

Ms Deidre Herbst  
Eskom Holdings SOC Limited  
PO Box 1091  
**JOHANNESBURG**  
2000

**Tel:** 011 800 3501  
**Email:** [HerbstDL@eskom.co.za](mailto:HerbstDL@eskom.co.za)

### **PER FACSIMILE / MAIL / EMAIL**

Dear Ms Herbst

### **AMENDMENT OF THE EXEMPTION FROM LINING REQUIREMENTS ISSUED ON 19 OCTOBER 2015 FOR THE PROPOSED CONTINUOUS ASHING AT THE TUTUKA POWER STATION ASH DISPOSAL FACILITY, MPUMALANGA PROVINCE**

The Environmental Authorisation (EA) issued for the abovementioned application by this Department on 19 October 2015, Exemption from lining requirements issued on 05 May 2016, your application for amendment to the Exemption received on 29 November 2018, response letter issued to you dated 09 January 2019 and the final motivation report for amendment dated on September 2019 received by this Department on 14 October 2019 refer.

The applicant requires an amendment for extension of the validity period of the exemption from lining requirements issued on 05 May 2016.

This Department has consulted the Department of Water and Sanitation in order to obtain concurrence that is required in terms of Section 49(2) of the National Environmental Management: Waste Act, 2008 (Act No 59 of 2008) regarding the proposed development. Based on a review of the application for amendment as indicated above and the supporting documentation to amend the Exemption issued, this Department has decided **not to amend the exemption** dated 05 May 2016. The reasons for the decision are provided below:

- The cost of water lost in unlined facilities and consequential water treatment costs almost always exceed the barrier costs in coal ash and mine tailings facilities. The unjustified claim by Eskom on cost comparison ignores stability which requires drainage of the foundations.
- Leaving out a liner does not imply stable disposal-and this is known worldwide as seen by numerous hydraulic deposit failures around the world with consequential loss of life and pollution. The Eskom cost comparison excludes foundation drainage stability, as well as the socio-economic costs to the State and public for unlined facilities and resultant pollution remediation, including water treatment and dilution.
- The proposed amendment will result in disputes over precedence among other Type 3 waste producers of the mining and industrial sectors as the members of the mining sector have already raised allegations

of unfairness following the four (4) years dry ash exemption granted by DWS to Eskom for some Power Station some years ago.

- Non-compliance with legislation including the constitution of the Republic of South Africa, bill of human Rights, National Environmental Management Act principles of decision making by authorities, National Water Act sections on pollution control and factors to be considered for licensing and the Public Finance Management Act requirements of effective and efficient use of resources.

In terms of Regulation 4(2) of the Environmental Impact Assessment Regulations, 2014, as amended (the EIA Regulations), you are instructed to notify all registered interested and affected parties, in writing and within 14 (fourteen) days of the date of the EA, of the Department's as well as the provisions regarding the submission of appeals that are contained in the Regulations.

In terms of the Promotion of Administrative Justice Act, Act No. 3 of 2000, you are entitled to the right to fair, lawful and reasonable administrative action; and to written reasons for administrative action that affects you negatively. Further your attention is drawn to the provisions of the Protection of Personal Information Act, Act No. 4 of 2013 which stipulate that the Department should conduct itself in a responsible manner when collecting, processing, storing and sharing an individual or another entity's personal information by holding the Department accountable should the Department abuse or compromise your personal information in any way.

Your attention is drawn to Chapter 2 of National Environmental Management Act, Act No. 107 of 1998 National Appeal Regulations published under Government Notice R993 in Government Gazette No. 38303 dated 08 December 2014 (National Appeal Regulations, 2014), which prescribes the appeal procedure to be followed. Kindly include a copy of this document (National Appeal Regulations, 2014) with the letter of notification to interested and affected parties in this matter.

Should any person wish to lodge an appeal against this decision, he/she must submit the appeal to the appeal administrator, and a copy of the appeal to the applicant, any registered interested and affected party, and any organ of state with interest in the matter within 20 days from the date that the notification of the decision was sent to the registered interested and affected parties by the applicant; or the date that the notification of the decision was sent to the applicant by the Department, whichever is applicable.

**Appeals must be submitted in writing in the prescribed form to:**

The Director: Appeals and Legal Review of this Department at the below mentioned addresses.

By email: [appeals@environment.gov.za](mailto:appeals@environment.gov.za);

By hand: Environment House  
473 Steve Biko  
Arcadia  
Pretoria  
0083; or

By post: Private Bag X447  
Pretoria  
0001

Please note that in terms of Section 43(7) of the National Environmental Management Act, Act No. 107 of 1998, as amended, the lodging of an appeal will suspend the environmental authorisation or any provision or condition attached thereto. In the instance where an appeal is lodged, you may not commence with the activity until such time that the appeal is finalised.

DEA Reference: 14/12/16/3/3/52/AM2

Project Title: Exemption amendment for the continuous ashing at the Tutuka Power Station Ash Disposal Facility, Mpumalanga Province

To obtain the prescribed appeal form and for guidance on the submission of appeals, please visit the Department's website at [https://www.environment.gov.za/documents/forms#legal\\_authorisations](https://www.environment.gov.za/documents/forms#legal_authorisations) or request a copy of the documents at [appeals@environment.gov.za](mailto:appeals@environment.gov.za).

Yours faithfully



Mr Vusi Skosana

**Acting Chief Director: Integrated Environmental Authorisations  
Department of Environmental Affairs**

Date: 24/03/2020



## **environmental affairs**

**Department:  
Environmental Affairs  
REPUBLIC OF SOUTH AFRICA**

Private Bag X447 PRETORIA 0001 Environment House · 473 Steve Biko Road, Arcadia· PRETORIA  
Tel(+ 27 12 ) 399 9372

Enquiries: Mr Ishaam Abader Telephone: 012 399 9330 E-mail: [iabader@environment.gov.za](mailto:iabader@environment.gov.za)

**Mr. Vusi Skosana**  
Director: Strategic co-ordination planning and support

Dear Mr. V Skosana

**APPOINTMENT AS ACTING CHIEF DIRECTOR: INTEGRATED ENVIRONMENTAL AUTHORISATIONS FOR THE PERIOD 23<sup>rd</sup> MARCH 2020 UNTIL 27<sup>th</sup> MARCH 2020. WHILEST MR. SABELO MALAZA WILL BE ON ANNUAL LEAVE.**

I hereby inform you that I have decided to appoint you as the Acting Chief Director: Integrated Environmental Authorizations for the period 23<sup>rd</sup> March 2020 until 27<sup>th</sup> March 2020 whilst Mr. Sabelo Malaza will be on annual leave.

All the correspondence and other documents that are usually signed by the Chief Director: Integrated Environmental Authorizations must be signed under Acting Chief Director: Integrated Environmental Authorisations during the above-mentioned period.

Your appointment in the above acting position remains subject to the provisions of the Public Service Act, 1994 (Proclamation No. 103 of 1994), as amended, the Government Employees Pension Fund Act, 1996 (Proclamation No. 21 of 1996), the regulations promulgated under these Acts and relevant circulars.

In the execution of your duties and the exercising of the powers delegated to you, you will furthermore be subjected to the provisions of the Public Finance Management Act, compliance with the Promotion of Access to Information Act, Promotion of Administrative Justice Act, the Minimum Information Security Standard, Departmental Policies and other applicable legislations with the Republic of South Africa. You are therefore advised to make yourself familiar with the provisions of this legislations and policies and the amendments thereof. (Copies of Departmental policies can be obtained from the Human Resource Office).

Please accept my heartfelt gratitude for all your assistance on behalf of the department.

Yours sincerely,

  
**Mr Ishaam Abader**  
DDG: Regulatory Compliance & Sector Monitoring  
Date: 16/3/2020

### **ACKNOWLEDGEMENT**

I ACCEPT / ~~DO NOT ACCEPT~~ appointment as Acting Chief Director: integrated environmental authorisations

Signed: 

Date: 16/03/2020

**Appendix 2**



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## GOVERNMENT NOTICES

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### DEPARTMENT OF ENVIRONMENTAL AFFAIRS

No. R. 993

8 December 2014

NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998  
(ACT NO. 107 OF 1998)

#### NATIONAL APPEAL REGULATIONS

I, Bomo Edith Edna Molewa, Minister of Environmental Affairs, hereby make the regulations pertaining to the processing, consideration of, and decision on appeals, under section 44(1)(a) read with section 43(4) of the National Environmental Management Act, 1998 (Act No. 107 of 1998), as set out in the Schedule hereto.



**BOMO EDITH EDNA MOLEWA**  
**MINISTER OF ENVIRONMENTAL AFFAIRS**

**SCHEDULE**

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## CHAPTER 1

## INTERPRETATION AND PURPOSE OF REGULATIONS

## Interpretation

1. (1) In these Regulations any word or expression to which a meaning has been assigned in the Act, and unless the context requires otherwise—

**“appeal administrator”** means a holder of an office in the Department or Provincial Department responsible for environmental affairs who administers the appeal on behalf of the appeal authority;

**“appeal authority”** is the Minister, the MEC or a person delegated the power to decide on appeals by the Minister or MEC, as the case may be;

**“appellant”** means any person who is entitled to submit an appeal in terms of the legislation referred to in regulation 3(1) of these Regulations;

**“decision-maker”** means an official who has been delegated the authority to make a decision in terms of the laws referred to in regulation 3(1) of these Regulations;

**“applicant”** means a person to whom a decision has been issued in terms of the Act or specific environmental management Act;

**“independent”**, in relation to a person appointed as a member of an appeal panel or a person providing an appeal authority with expert advice as contemplated in regulation 6 of these Regulations, means—

- (a) that such a person has no business, financial, personal or other interest in the appeal in respect of which that person is appointed in terms of these Regulations other than fair remuneration for work performed in connection with that appeal; and
- (b) that there are no circumstances that may compromise the objectivity of that person in performing such work;

**“the Act”** means the National Environmental Management Act, 1998 (Act No. 107 of 1998).

- (2) When a period of days must be reckoned in terms of these Regulations, the period must be reckoned as from the start of the day following that particular day to the end of the last day of the period, but if the last day of the period falls on a Saturday, Sunday or public holiday, that period must be extended to the end of the next day which is not a Saturday, Sunday or public holiday, and the period of 15 December to 5 January must be excluded from the reckoning of days.
- (3) Where a prescribed timeframe is affected by one or more public holidays, the timeframe must be extended by the number of public holiday days falling within that timeframe.

### **Purpose of Regulations**

2. The purpose of these Regulations is to regulate the procedure contemplated in section 43(4) of the Act relating to the submission, processing and consideration of, a decision on an appeal.

### **Application of Regulations**

3. (1) These Regulations are applicable to an appeal in terms of section 43 of the Act to the Minister or MEC against a decision taken in terms of the:

- (a) Environment Conservation Act, 1989 (Act No. 73 of 1989);
- (b) National Environmental Management Act, 1998 (Act No. 107 of 1998);
- (c) National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004);
- (d) National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004); or
- (e) National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008);

and subordinate legislation made in terms of any of these Acts.

- (2) No appeal is available if the Minister or MEC took the decision himself or herself in his or her capacity as the competent authority, issuing authority or licensing authority.
- (3) An appeal against a decision by an official or municipal manager acting under delegated authority from a metropolitan, district or local municipality must be submitted, processed and considered in terms of section 62 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000).

## **CHAPTER 2**

### **ADMINISTRATION AND PROCESSING OF APPEALS**

#### **Appeal submission**

4. (1) An appellant must submit the appeal to the appeal administrator, and a copy of the appeal to the applicant, any registered interested and affected party and any organ of state with interest in the matter within 20 days from:

- (a) the date that the notification of the decision for an application for an environmental authorisation or a waste management licence was sent to the registered interested and affected parties by the applicant; or
  - (b) the date that the notification of the decision was sent to the applicant by the competent authority, issuing authority or licensing authority, in the case of decisions other than those referred to in paragraph (a).
- (2) An appeal submission must be—
- (a) submitted in writing in the form obtainable from the appeal administrator; and
  - (b) accompanied by—
    - (i) a statement setting out the grounds of appeal;
    - (ii) supporting documentation which is referred to in the appeal submission; and
    - (iii) a statement, including supporting documentation, by the appellant to confirm compliance with regulation 4(1) of these Regulations.

### **Responding statement**

5. The applicant, the decision-maker, interested and affected parties and organ of state must submit their responding statement, if any, to the appeal authority and the appellant within 20 days from the date of receipt of the appeal submission.

### **Appeal panel**

6. (1) If the appeal authority reasonably believes that expert advice must be sought or that an appeal panel must be appointed, the appeal administrator must source an independent expert or constitute an independent appeal panel, or both, within 10 days from the date of receipt of an instruction from the appeal authority.
- (2) The appeal panel contemplated in subregulation (1) may consist of such number of independent experts and with such expertise as the Appeal Authority may deem necessary under the circumstances;
- (3) The expert or appeal panel must provide advice to the appeal administrator within 10 days from the receipt of an instruction from the appeal administrator.

### **Recommendations and decisions on appeals**

7. (1) The appeal administrator must make a recommendation on the appeal to the appeal authority within 30 days of receipt of the responding statement referred to in regulation 5 of these Regulations, in the event that an independent expert has not been sourced or an independent appeal panel has not been constituted.
- (2) The appeal administrator must make a recommendation on the appeal to the appeal authority within 10 days of receipt of the advice referred to in regulation 6(2) of these Regulations, in the event that an independent expert has been sourced or an independent appeal panel has been constituted.
- (3) The appeal authority must reach a decision on an appeal, and notify the appellant, applicant, and any registered interested and affected party, within 20 days of the recommendation on the appeal by the appeal administrator.
- (4) The decision contemplated in subregulation (3) must contain written reasons for the decision.

### **Communication**

8. (1) A person may deliver documents in terms of these regulations by using one of the delivery methods referred to in section 47D of the Act.
- (2) In order to meet the time periods determined in these regulations, the person referred to in subregulation (1), must also email, fax or hand deliver the document to the recipient, if the document is delivered by ordinary mail or registered mail.

## **CHAPTER 3**

### **GENERAL MATTERS**

#### **Repeal of regulations**

9. The regulations mentioned in the Table in Annexure 1 to these Regulations are hereby repealed or amended to the extent set out in the third column of the Table.

**Transitional arrangements**

10. (1) An appeal lodged prior to the commencement of these Regulations, and which is still pending when these Regulations takes effect, must be finalised in terms of the legislation that applied at the time when the appeal was lodged.
- (2) An appeal lodged after the commencement of the Environmental Impact Assessment Regulations, 2014 must be submitted, processed and considered in terms of these Regulations.

**Short title and commencement**

11. These Regulations are called the National Appeal Regulations, 2014, and take effect on the date of publication in the *Gazette*.

## ANNEXURE 1

REGULATIONS REPEALED		
Date and year of publication	Short title	Extent of repeal
Government Notice No. R.543, <i>Gazette No. 33306</i> of 18 June 2010.	Environmental Impact Assessment Regulations, 2010.	Chapter 7.