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The Honourable Minister of Environmental Affairs

c/o The Director: Appeals and Legal Review
Department of Environmental Affairs

By email: appealsdirectorate@environment.gov.za

Dear Madam

**Appeal against the Refusal to Amend Environmental Authorisation issued on 20 March 2013, as amended, for the Establishment of the 100MW Concentrating Solar Power (CSP) Facility on Site 4, Farm Portion 2 of Matjiesrivier 41, as part of the larger Karoshoek Solar Valley Development, within the Dawid Kruiper Local Municipality (formerly Khara-Hais Local Municipality), Northern Cape Province**
**DEA Reference: 14/12/16/3/3/2/296/AM3**

1. Introduction

1.1. We act for FG Emvelo (Pty) Ltd (the **Holder**), the holder of the Environmental Authorisation (**Site 4 EA**) issued on 20 March 2013, as amended, for the construction of the 100MW Concentrating Solar Power (CSP) Facility on Site 4, Farm Portion 2 of Matjiesrivier 41 under DEA References 14/12/16/3/3/2/296/AM3 (**Proposed Facility**). The Site 4 EA is substantively identical to an environmental authorisation issued separately to the Holder for a 100MW Concentrating Solar Power (CSP) Facility on Site 5, Farm Portion 2 of Matjiesrivier 41, in respect of which a separate appeal will simultaneously be lodged.

1.2. The Holder submitted an application for amendment of the Site 4 EA (**Amendment Application**) to the Department of Environmental Affairs (**DEA**/the **Competent Authority**) on 30 January 2020, under Regulations 29 and 30 (**Part 1**) of the Environmental Impact Assessment Regulations, 2014 (**EIA Regulations, 2014**) published under the National Environmental Management Act, 1998 (**NEMA**).

1.3. This document contains the appeal of the Holder (the **Appeal**) against the refusal of the Competent Authority to grant amendment to the Site 4 EA, dated 2 March 2020 (**Refusal to Amend the Site 4 EA**). The Refusal to Amend the Site 4 EA is attached to this document as Annexure '**A**'.

1.4. The Appeal is submitted in compliance with the National Appeal Regulations, 2014 published under NEMA, as amended, including within 20 days of the date on which the Refusal to Amend the Site 4 EA were issued, in compliance with Regulation 4.

1.5. A copy of the Appeal will be submitted to all registered interested and affected parties and organs of state with an interest in the matter on the same day that it is submitted to the Honourable Minister and the Director: Appeals and Legal Review.

2. Grounds of Appeal

2.1. The Amendment Application was lodged with the purpose of the Holder being authorised to increase the authorised turbine capacity for the Proposed Facility from 100MW to 350MW under the Site 4 EA. As indicated in the Amendment Application, the turbine capacity is proposed to be increased as a result of improved technology not previously available for the Proposed Facility and the need for emergency power solutions capable of producing baseload power, intermediate power and peaking power as per the Request for Information (**RFI**) issued by the Department of Mineral Resources and Energy (**DMRE**) on 13 December 2019. As the Honourable Minister will be aware, the DMRE is seeking to find short-term measures to fill an energy gap of 3000 MW, to give Eskom breathing room to undertake maintenance on its ageing and increasingly unreliable fleet of power stations.

2.2. Crucially, the footprint, layout and associated infrastructure of the Proposed Facility would remain entirely identical to what has already been assessed and authorised under the Site 4 EA. No additional negative environmental impacts are associated with the proposed amendments.

2.3. The Refusal to Amend the Site 4 EA provide one primary reason for the Competent Authority's decision, namely that the proposed amendments "[constitute] a listed or specified activity" with the effect that the Amendment Application was excluded from 'Part 2' of the EIA Regulations, 2014 (the **Exclusion**).[1] The Listed Activity alleged by DEA to be applicable is "The development of facilities or infrastructure for the generation of electricity from a renewable resource where the electricity output in 20 megawatts or more, excluding where such development…is for photovoltaic installations and occurs within an urban area…".[2]

2.4. For the reasons provided below, in issuing the Refusal to Amend the Site 4 EA, the Competent Authority made errors of law. The Competent Authority also appears to have taken into account irrelevant considerations, as well as disregarding relevant considerations. Further, the Refusal to Amend the Site 4 EA is not rationally connected to the information that was before the Competent Authority.

2.5. As the Honourable Minister will be aware, all of these constitute grounds for judicial review of administrative action under the Promotion of Administrative Justice Act, 2000 (**PAJA**) and require the Refusal to Amend the Site 4 EA to be set aside on appeal.

[1] Regulation 31 of the EIA Regulations, 2014.

[2] Listed Activity 1 in G NR 984 of the EIA Regulations, 2014.

2.6. **The Competent Authority made Errors of Law**

2.6.1. In relying on the Exclusion contained in Part 2, of changes which, on their own "constitute a listed or specified activity" to issue the Refusal to Amend the Site 4 EA, the Competent Authority made errors of law arising from a misinterpretation of the applicable Regulations.

2.6.2. As is apparent from the Site 4 EA, the development of infrastructure for the generation of electricity with an output of over 20 megawatts has already been approved to be undertaken by the Holder for the Proposed Facility. That approval remains valid until 20 March 2023 under the Site 4 EA.

2.6.3. What is being applied for in the Amendment Application is <u>not</u> the development of infrastructure to enable the generation of electricity, nor the generation of electricity of more than 20 megawatts, as that authorisation is already held under the Site 4 EA and remains valid. The specified Listed Activity is therefore not applicable. Rather, what is being applied for is an increase in the already-authorised generation capacity of the Proposed Facility, without a change in environmental impacts. Such an increase in capacity (output) amounts to a change in scope of an already-authorised Listed Activity and not a new one. The Amendment Application therefore falls squarely within Part 1 of the EIA Regulations, 2014.

2.6.4. The proposed change in scope described in the Amendment Application is also not an expansion of facilities or infrastructure as contemplated in the EIA Regulations, 2014, both because infrastructure size and footprint are not to increase and because the proposed infrastructure has not yet been built and therefore cannot be expanded.

2.6.5. As such, the Amendment Application cannot be said to trigger Listed Activity 1 in G NR 984 of the EIA Regulations, 2014 nor any other Listed Activity. In concluding that a Listed Activity was triggered by the Amendment Application and applying the Exclusion under Part 2,[3] the Competent Authority erred in its interpretation of the applicable law. It both misinterpreted the nature of the Exclusion and wrongly applied Part 2 to the Amendment Application.

2.6.6. The fact that the Competent Authority had previously expressed this incorrect interpretation of the Regulations to the Holder in pre-application meetings in July 2019 neither makes the view correct nor binds the Holder to the incorrect view.

2.6.7. Being based on errors of law, the Refusal to Amend the Site 4 EA is fatally flawed and should be set aside on appeal, failing which it is vulnerable to judicial review under PAJA.

2.7. **The Competent Authority took into Account Irrelevant Considerations and Failed to Take into Account Relevant Considerations in Refusing the Amendment Application**

2.7.1. As is apparent from what is stated in 2.6 above, the Competent Authority misconstrued the applicability of a Listed Activity and therefore of the Exclusion. It accordingly incorrectly applied Part 2 to the Amendment Application. In doing so, it presumably failed to take into account several key factors, including that the Holder has already been approved in the Site 4 EA to

[3] Refer to footnote 1 above.

undertake the development of infrastructure to enable the generation of electricity of over 20 megawatts, which approval remains valid until March 2023.

2.7.2. The Competent Authority appears also to have failed to take into account that the authorisation of the development of infrastructure for the generation of electricity over 20 megawatts remains applicable to the Proposed Facility even with the use of the improved technology described in the Amendment Application. The proposed amendments do not change the nature of the Proposed Facility as authorised in the Site 4 EA from the development of infrastructure for the generation of over 20 megawatts of electricity to anything else.

2.7.3. It is also apparent that the proposed increase in output capacity is related to advancement in technology and not to any increase in development footprint, layout or infrastructure. The Competent Authority appears not to have taken this relevant information into account in finding, erroneously, that a Listed Activity was triggered and therefore that the Exclusion applied to the Amendment Application.

2.7.4. The Competent Authority is likely also not to have considered or appreciated, as specified in the Amendment Application, that if the amendments were not granted, there would be lost opportunity for socio-economic development in the Northern Cape Province and for an increase in the generation of renewable energy, which is a highly-desirable alternative to non-renewable energy sources. If the Amendment Application was not granted, there would also be lost potential for emergency power solutions capable of producing baseload power, intermediate power and peaking power as mandated in the RFI of December 2019.[4]

2.7.5. If the Amendment Application is not granted, the output capacity of the Proposed Facility would be below optimal, with the effect that the potential full benefit of renewable energy production from the Proposed Facility would be lost. The Competent Authority appears to have failed to take into account that the increased capacity would be beneficial because it would result in more electricity from the same footprint, reducing the need for additional facilities and thereby reducing the overall impact on the environment.

2.7.6. In applying the Exclusion, the Competent Authority also, it appears, failed properly to consider the scheme of the EIA Regulations and particularly the manner in which Chapter 5 which deals with amendments to environmental authorisations, is to be applied by competent authorities.

2.7.7. It is apparent that in issuing the Refusal to Amend the Site 4 EA, the Competent Authority failed to take into account a range of highly relevant information and considered irrelevant factors and it ought therefore to be set aside on appeal.

2.8. **Refusal to Amend the Site 4 EA is not Rationally Connected to the Information before the Competent Authority**

2.8.1. As described in 2.6 and 2.7 above, the Refusal to Amend the Site 4 EA is based upon the Competent Authority's incorrect interpretation of the Exclusion and of the scheme of the EIA Regulations, 2014, which is a fundamental error of law. It also arises from the Competent

[4] As described in paragraph 2.1 above.

Authority's presumed failure to take into account and correctly construe the rationale for the proposed amendments and that the proposed increase in generation capacity will not result in any change in the significance of identified impacts, nor in any additional negative impacts of the Proposed Facility.

2.8.2. The Refusal to Amend the Site 4 EA, which has the effect of sterilising the Holder's ability to proceed with utilising advanced technology without negatively affecting the environment, cannot be said to be rationally connected to the information before the Competent Authority, namely an increase in generation capacity arising from improved technology, which would meet the need for emergency power generation, with no change in environmental impact.

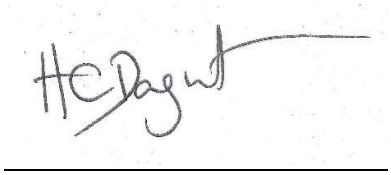
2.8.3. The lack of rational connection between the information before the Competent Authority and the Refusal to Amend the Site 4 EA renders the decision open to judicial review. It should therefore be set aside on appeal.

3. Conclusion

3.1. For the reasons provided in this Appeal, the Refusal to Amend the Site 4 EA is fatally flawed. This is primarily because of the fundamental error of law made by the Competent Authority in misconstruing the EIA Regulations and erroneously applying Part 2, including the Exclusion, where it is not applicable. The fact that the Competent Authority had previously expressed this incorrect interpretation of the Regulations to the Holder neither makes the view correct nor binds the Holder to the incorrect view. On this ground alone, the Refusal to Amend the Site 4 EA must be set aside on appeal by the Honourable Minister.

3.2. The Refusal to Amend the Site 4 EA is further flawed and highly vulnerable to judicial review under PAJA because of the failure of the Competent Authority to consider and apply relevant information and the taking into account of irrelevant information. Related to this, the Refusal to Amend the Site 4 EA is also not rationally connected to the information that was before the Competent Authority in considering the Amendment Application.

3.3. The Appeal accordingly should be upheld and the Refusal to Amend the Site 4 EA overturned.



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