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REPUBLIC OF SOUTH AFRICA

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Mr A W Harmse
South African Ntional Roads Agency Ltd
SANRAL
PO Box 415
PRETORIA
0001

Dear Mr Harmse

APPEAL DECISION: THE CONSTRUCTION OF THE PROPOSED N2 WILD COAST TOLL HIGHWAY BETWEEN EAST LONDON, EASTERN CAPE PROVINCE AND DURBAN, KWAZULU-NATAL PROVINCE

Mrs B E E Molewa, MP, Minister of Water and Environmental Affairs, has considered the appeals lodged against the decision by the Department of Environmental Affairs for the proposed N2 Wild Coast toll highway between the Gonubie interchange and the N2 Isipingo interchange in the Eastern Cape and KwaZulu-Natal Provinces respectively.

After evaluating the appeals and relevant information submitted to her, the Minister has reached a decision. A copy of her decision is attached hereto.

Yours sincerely

p.p.
MRS N MAPHOKGA-MORIPE
CHIEF OF STAFF: MINISTRY OF WATER AND ENVIRONMENTAL AFFAIRS
DATE: 26.07.2011

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Reference: 12/12//20/701

APPEAL DECISION

APPEAL AGAINST THE ENVIRONMENTAL AUTHORISATION FOR THE CONSTRUCTION OF THE PROPOSED N2 WILD COAST TOLL HIGHWAY BETWEEN THE GONUBIE INTERCHANGE (NEAR EAST LONDON, EASTERN CAPE PROVINCE) AND THE N2 ISIPINGO INTERCHANGE (SOUTH OF DURBAN, KWAZULU-NATAL PROVINCE)

1. INTRODUCTION

In terms of regulation 9(1)(a) of the Regulations, published in Government Notice No. 1183 of 5 September 1997, Regarding Activities Identified under Section 21(1) of the Environment Conservation Act, 1989 (Act No. 73 of 1989) (ECA), the Deputy Director-General: Environmental Quality and Protection (DDG: EQP) of the Department of Environmental Affairs (DEA) on 19 April 2010 authorised the South African National Road Agency Limited (SANRAL) to proceed with the construction of the above mentioned N2 Wild Coast Toll Highway.

2. BACKGROUND

2.1 According to SANRAL the proposed N2 Wild Coast Toll Highway will provide an improved and safer National Road link between East London and Durban which will be 75km shorter than the existing N2 route. It will also connect various economic centres between East

London and Durban, such as Butterworth, Mthatha, Lusikisiki, Port Edward and Port Shepstone. Thus, the proposed road will better serve the interests of business, development and society between these two centres than the existing roads. The improved access to be provided by the establishment of the road will contribute substantially to the upliftment of communities especially in the north-eastern portion of the Eastern Cape Province. In addition, the road in general will enhance access to markets which, in turn, will stimulate the economy of the area. The accessibility of educational, social and health services and tourist destinations and protected areas will be augmented as well.

2.2 Approximately 80% of the route of the proposed road (roughly 470km) will be along the route of the following existing roads and will involve the widening and upgrading thereof:

- The N2 between the Gonubie interchange and Mthatha;
- The R61 between Mthatha and Ndwalane;
- The R61 between the Ntafufu River and Lusikisiki; and
- The R61 and N2 between the Mthamvuna River and the Isipingo interchange.

2.3 It is proposed that a new road of approximately 90km be constructed between Ndwalane and Ntafufu and between Lusikisiki and the Mthamvuna River. These sections of new road will traverse the Pondoland Centre of Endemism (PCE) and will also necessitate the construction of high level bridges over nine river gorges.

2.4 Apart from the existing mainline toll plaza near Port Shepstone, six new mainline toll plazas (four in the Eastern Cape and two in KwaZulu-Natal) are proposed for erection along the proposed road. Eight new ramp toll plazas (one in the Eastern Cape and seven in KwaZulu-Natal) are also proposed in addition to the existing ramp toll plazas in KwaZulu-Natal at Shelly Beach, Marburg and Umtentweni.

2.5 A substantial number of jobs will be created by the construction and maintenance of the proposed road while the opening up of currently inaccessible areas in the Eastern Cape Province for tourism development will also generate some employment opportunities. In addition, it is estimated that through the value of time saved by the use of the road and due

to the traffic growth rate and through the increased income that would be enjoyed by agriculture, forestry, manufacturing, construction, trade and tourism once the road is in operation an additional annual income of R 2 612 million could be realised for KwaZulu-Natal and the Eastern Cape.

2.6 SANRAL appointed CCA Environmental (CCA), in association with NMA Effective Social Strategists (NMA), as environmental assessment practitioner (EAP) to conduct an environmental impact assessment (EIA) for the project. The public participation process (PPP), which was required in terms of the ECA Regulations, was conducted by NMA. After completion of an environmental impact assessment (EIA) and the submission of an environmental impact report (EIR), the DDG: EQP of the DEA, acting under delegation, in terms of section 22 (1) of ECA, read with the Environmental Impact Assessment Regulations published in Government Notice No. R. 1183 of 5 September 1997 (the ECA EIA Regulations) authorised SANRAL on 19 April 2010 to proceed with the construction of the proposed road.

3. THE APPEALS

In terms of section 35 (3) of ECA a total of 49 appeals were lodged against this authorisation. Twenty six of these appeals are based on pertinent legal and/or environmental grounds whilst the remaining 23 are only objections against the tolling of the road. As the latter appeals only pertain to the principle of tolling, I did not take them into account in my consideration of the appeals against the environmental authorisation of the proposed road. However, the appeals pertaining only to the principle of tolling will be submitted to the Minister of Transport for consideration in his decision on the desirability of the tolling of the road.

4. DECISION

4.1 In reaching my decision on the appeals against the authorisation of SANRAL to proceed with the construction of the proposed N2 Wild Coast Toll Highway, I have taken the following into consideration:

4.1.1 The information contained in the project file (ref. 12/12/20/701);

4.1.2 The grounds of appeal submitted by the appellants;

4.1.3 The response of SANRAL to the grounds of appeal;

4.1.4 The answering statements and supplementary answering statements submitted by some appellants;

4.1.5 The comments of various components of the DEA on the grounds of appeal, the responding statement of SANRAL and the answering and supplementary answering statements of some appellants;

4.1.6 The strategic importance of the proposed road and the economic and social benefits that will accrue for the Eastern Cape, KwaZulu-Natal and the country as a whole from the construction and operation of the road; and

4.1.6 A legal opinion by Senior Counsel on whether the consideration of the possible socio-economic impacts of the tolling of the proposed road is the responsibility of the DEA which should have incorporated such consideration in its decision to issue or refuse an environmental authorisation for the proposed road, or whether it is the responsibility of SANRAL which will have to integrate such consideration in the "intent to toll" process which is to be undertaken in terms of the South African National Roads Agency Limited and National Roads Act, 1998 (SANRAL Act).

4.2 Having considered the above information, I have concluded that the DDG: EQP of the DEA adequately considered the major anticipated environmental impacts of the proposed N2 Wild Coast Toll Highway and that the decision to authorise the development was correct. In addition, the implementation of the mitigation measures proposed in the EIR and compliance with the conditions contained in the environmental authorisation (EA) will ensure that the impact of the road is mitigated to acceptable levels. Therefore, in terms of section 35(4) of the ECA, I have decided to:

4.2.1 Dismiss the appeals against the EA granted by the DDG: EQP of the DEA for the construction of the proposed N2 Wild Coast Toll Highway between East London and Durban; and

4.2.2 Confirm the EA issued by the DDG: EQP of the DEA on 19 April 2010 for the construction of the proposed N2 Wild Coast Toll Highway.

4.3 The reasons for my decision, *inter alia*, are as follows:

4.3.1 The need for this development has been adequately demonstrated.

4.3.2 I am of the view that there is insufficient merit in the grounds of appeal to warrant the setting aside of the decision by the DDG: EQP of the DEA. In justification of my view I shall briefly discuss the major grounds of appeal below:

4.3.2.1 ***The DEA should have considered the social and economic impacts of tolling in its decision to issue or refuse an EA for the construction of the road. It is not the responsibility of SANRAL to consider those factors during the "intent to toll" process.***

Many appellants raised this ground of appeal. It is pointed out that, in terms of the EIA Regulations made under the ECA, the development of a road is an activity which requires an environmental authorisation. Furthermore, the definition of "road" in the ECA Regulations clearly includes a "toll road." Hence, the appellants maintain that the DEA is obliged, in terms of the ECA and its regulations and in terms of the environmental management principles contained in Chapter 2 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA) to take social and economic factors into account when considering an application for an environmental authorisation of a toll road. This evidently requires that the social and economic impacts of tolling must also be considered. The SANRAL Act, on the other hand, does not require such impacts to be considered during the "intent to toll" process. Consequently, the DEA abdicated the responsibility imposed on it in terms of the ECA and the NEMA to consider the social and economic impacts of tolling, to SANRAL. SANRAL has to do that in terms of the SANRAL Act which does not require a process nearly as comprehensive as is required in terms of the relevant environmental legislation.

Since the inception of the EIA Regulations, issued both in terms of the ECA and the NEMA, the view has been held within the DEA that, as the declaration of a road as a toll road and the determination of the amount of toll that may be levied for the use of such a road are the responsibilities of the Minister of Transport and SANRAL in terms of the SANRAL Act, it is also the responsibility of that Minister and SANRAL to consider the potential economic and social impacts of the tolling of the road whilst deciding on the declaration of the road and on the amount of toll to be levied. In the consideration of an application for an EA for a toll road, the responsibility of the relevant official of the DEA, who is acting under power delegated by me, is regarded as being limited only to the consideration of the potential environmental impacts of the tolling infrastructure. Hence, the DEA so far has refrained from considering the impacts of tolling. As far as can be ascertained, no formal legal opinion on this view has, as yet, been obtained. In view of the number of appellants who proffered this ground of appeal and in the light of the convincing legal argument tendered in support thereof, I have decided that a formal legal opinion by Senior Counsel be requested on this issue.

The findings of the Senior Counsel's opinion are summarised below:

- The SANRAL Act [section 27(1)(a)] authorises SANRAL, with the approval of the Minister of Transport, to declare a road as a toll road and [section 27(3)(a)] to determine the amount of toll that may be levied for the use of the road. Such approval by the Minister of Transport will only be given [section 27(4)(a)] after SANRAL has invited interested parties to comment on and make representations regarding such declaration and determination, has submitted a report [section 27(4)(c)] to the Minister of Transport indicating the extent to which the comments and representations have been accommodated in SANRAL's proposals and has considered the comments and representations [section 27(4)(d)].
- The above mentioned conditions of the SANRAL Act are considered wide enough to obligate SANRAL to consider the socio-economic impacts of its tolling proposals. Furthermore, it was confirmed in a court judgment (*Ladychin Investments (Pty) Limited v South African National Roads Agency Limited and Others* 2001 (3) SA 344 (N), at 361H-362C) that the proper consideration by SANRAL of comments and representations submitted by interested parties is a fundamental requirement for

SANRAL to comply with the SANRAL Act. Hence, the Minister of Transport is obliged to have regard to the socio-economic impact of a toll amount proposed by SANRAL before a decision on the determination of such an amount is taken.

- Neither the SANRAL Act nor the ECA or the NEMA empower the Minister of Water and Environmental Affairs to exercise powers similar to those given to the Minister of Transport in terms of section 27(3)(a) of the SANRAL Act, namely to determine the amount of toll that may be levied for the use of a toll road. Therefore, the Minister of Transport is to judge whether SANRAL, in its recommendation regarding the toll amount, has adequately accommodated the comments and representations of the interested parties and, hence, it follows that the same Minister is the appropriately empowered authority to consider the potential socio-economic impacts when deciding on the toll amount. The constitutional principle and requirement of cooperative government, enunciated in section 41 of the Constitution of the Republic of South Africa, 1996 (the Consitution), compels the Minister of Water and Environmental Affairs to respect and not to assume these functions of the Minister of Transport.
- Government Notice R.1182, published in Government Gazette No. 1826 of 5 September 1997, identify the construction or upgrading of a road as an activity which requires authorisation by the Minister of Water and Environmental Affairs in terms of section 22 of the ECA. However, the terms of that notice are not wide enough to cover the determination of the amount of toll by the Minister of Transport as an activity for which such authorisation in terms of section 22 of the ECA is necessary.
- To interpret section 35(3) of the ECA as providing the Minister of Water and Environmental Affairs with appellate power to consider the socio-economic impacts of a toll determined by the Minister of Transport is unpractical. Thus, the Minister of Water and Environmental Affairs would be considered entitled to reassess an issue which would already have been considered by the Minister of Transport and, in that process, would inevitably have to assume the powers vested in the Minister of Transport in terms of separate legislation. In addition, it would also allow the former Minister to consider the appropriateness of a decision made by the Minister of Transport. Such an approach is not conducive to fulfilment of executive powers by executive functionaries of equal status.

I concur with the view of the Senior Counsel. Therefore, I regard this ground of appeal as having no merit and it is consequently dismissed.

4.3.2.2 ***The public participation process (PPP) which was conducted as part of the EIA was inadequate and ineffective***

It is contended by various appellants that the extent of the project, the sensitivity of the environment involved, both from a physical and social point of view, and the consequent severity of the impacts of the project demand that the PPP needed to be executed much more thoroughly than is required in terms of current EIA Regulations. They are of the view that special care should have been taken to ensure that affected communities were informed in such a way that they fully understood what the proposed project entailed and how they would have been be affected by it. Special steps should also have been taken to enable such communities to effectively communicate their concerns to make it possible for them to influence decisions that would have a significant effect on their lives. According to some appellants this had not been done in the case of certain isolated communities in the Pondoland area.

I am aware that the EIA Regulations made under ECA do not stipulate any specific requirements for the PPP. I took note of the fact that, notwithstanding the absence of such requirements, SANRAL appointed NMA as a consultant specifically to conduct the PPP for this proposed development. Furthermore, the information at my disposal shows that NMA executed a comprehensive PPP. The availability for comment of the scoping report, the draft EIR and the final EIR was advertised in 22 national, regional and local newspapers and in radio announcements in three languages on seven local radio stations. The reports mentioned were also made available on the Internet. In addition, information on the project and on the findings contained in the EIR was set out in coloured leaflets, once again in three languages, of which 35 000 copies were distributed to libraries, public places and traditional leaders in the Eastern Cape Province and to libraries, traditional councils and election registration stations in KwaZulu-Natal Province. This information campaign was supplemented with a large number of information sharing meetings and open days along

the route of the proposed road. Where necessary, transport to such meetings was also provided to members of isolated communities.

Therefore, I am satisfied that the PPP conducted by NMA on behalf of SANRAL went beyond the requirements contained in the 2010 EIA Regulations which were made in terms of NEMA and which were used as a guideline by the DEA in view of the absence of specific PPP requirements in the ECA Regulations. Thus the PPP was not inadequate and ineffective. This was corroborated by the DEA in its comments on the appeals. In my view the consultation process which was conducted provided a reasonable opportunity for affected parties to be informed of the proposed project and to convey their concerns, through their participation in the assessment process, to the developer. Hence, I do not regard this ground of appeal as persuasive and it is dismissed.

However, I appreciate that there are some communities along the Wild Coast who may be significantly affected by the construction of the road and who still are of the opinion that their concerns have not yet received adequate attention. It is imperative that those communities be consulted, that their concerns be duly noted and that agreement be reached between them and SANRAL on the measures to be implemented to effectively address such concerns before construction of the road is commenced with.

4.3.2.3 ***The proposed road will be ecologically unsustainable and inconsistent with the National Protected Areas Expansion Strategy and the Wild Coast Strategic Environmental Assessment***

The appellants aver that the construction of the road through the PCE will lead to an irreversible loss of natural capital and, as such, is regarded as ecologically unsustainable. In addition, attention is drawn to the fact that the Pondoland area is identified in the National Protected Area Expansion Strategy (NPAES) for South Africa – a strategy which was jointly developed by the DEA and the South African National Biodiversity Institute (SANBI) – as an area with a high protection potential. In fact, it is stated in the Strategy that the creation of a protected area in Pondoland will be the last opportunity to establish a large coastal protected area in South Africa. The appellants also refer to the acknowledgment of Pondoland's protection potential in the Wild Coast Strategic

Environmental Assessment (SEA). The SEA is a guideline which indicates what development can sustainably be implemented in the Wild Coast environment.

The information at my disposal confirms the importance of the biological diversity of the PCE: the large numbers of species endemic to the area and the sensitive wetlands and forests it contains render the Pondoland coast a valuable and vulnerable natural asset which needs formal protection. I am aware that the proposed road, being a linear development, will fragment this delicate system. I am further aware that, in view of the fact that the area has already been impacted on by overutilisation for a considerable period, the need for its protection is steadily increasing. However, I have also been informed that the area earmarked, in terms of the NPEAS, for expansion of the Mkambati Nature Reserve lies to the east of the proposed road and will not be affected by it.

I also took note of the views held by biodiversity professionals within the DEA that the negative impacts of the road on this sensitive though no longer pristine environment are not anticipated to be of an extent that will threaten ecosystem function. Hence, the rigorous implementation of the wide-ranging mitigation measures recommended in the EIR and required in terms of the conditions imposed in the EA will, to a degree, counter those impacts. Where such impacts cannot be mitigated the effects thereof on the sensitive ecosystems could be compensated for by the applicant through the provision either of land of equal quality as a substitute for the affected land or through the provision of adequate funds to bolster conservation activities with a view towards balancing the anticipated loss of biotic attributes. I am aware of the condition in the EA which requires that SANRAL, the DEA and other parties co-operate in the development of such an offset agreement and I am also aware that exploratory discussions between representatives of SANRAL, the DEA, the former Department of Water Affairs and Forestry and other interested parties already took place during the EIA of this proposed project. As commencement of construction of the road in the greenfields sections is dependent on the conclusion of an offset agreement between the parties concerned I am confident that the agreement that will ultimately be arrived at will provide for adequate compensation of possible biodiversity loss.

I am cognisant of the view held within the DEA that the protection of areas with valuable biological diversity attributes could considerably be enhanced if associated communities are allowed to derive some benefit from such areas. Pondoland is a protection worthy area which currently has little or no development. In such situation, a balance should be sought between strict preservation on the one hand and the promotion of development, on the other. However, the development allowed must be compatible with the management of the area for protection. Only then will it be sustainable. Such developments will only be viable if the area is accessible. Thus, by making the area accessible, the construction of the road may contribute towards realising the area's potential. In my view and in the light of the predominance of poverty in this region, this approach is worthwhile pursuing.

Therefore, as the anticipated impacts of the road can be mitigated to a certain extent and as the loss of biological diversity caused by the construction of the road can be reasonably compensated for through the development and the implementation of a biodiversity offset agreement and in view of the possibility that construction of the road may create the opportunity for developments which have the potential to enhance the protection of the natural attributes of the area, I am not prepared to uphold this ground of appeal.

4.3.2.4 ***Alternatives, especially the upgrading of the existing road, have not been adequately considered***

The appellants maintain that the upgrading of an existing road is an obvious alternative to building a new road. By not considering the former option a proper comparison between an option that does not traverse the greenfields section and those that do, is not possible. It is further pointed out that no alternative routes, placing of toll plazas or the alternative of not tolling were considered in respect of the Mthamvuna to Isipingo section of the road.

I agree that the upgrading of an existing road will be the preferred option when the improvement of a road link between two locations is considered. According to the information at my disposal, exactly that was done in this case. During the planning phase preceding the EIA of this proposed road, the upgrading of sections of the existing N2 was intensively investigated. The outcome of the pre-EIA studies clearly indicated that the upgrade option would be unfeasible, for the following reasons:

- The sections of the existing road that will have to be upgraded are located farther inland in an area where the terrain is mainly rugged and broken. To function at least reasonably effective as a national highway, the upgrading of the relevant sections of the existing road will have to meet certain minimum design standards. Due to the nature of the terrain, reconstruction of the existing road to the minimum horizontal and vertical design standards will require ground works (cut and fill) of an unacceptable extent. The costs that will be involved with such extensive ground works will compare unfavourably with the construction costs of the road along the authorised route.
- The area traversed by the to-be-upgraded existing road is considerably more densely populated than the area to be traversed by the proposed road along the authorised route. Therefore, more communities will be disrupted by upgrading than by construction along the authorised route. Such an increase in "social costs" will be unacceptable.
- The environmental impacts of the upgrading of the existing road will be drastic. The extensive cut and fill operations will be undertaken in the headwaters of the multitude of rivers that rise in this part of the Eastern Cape. As it will be difficult to contain the hydrological effects of such construction activities to the construction sites, it is likely that the impacts thereof will be experienced over a wide area downstream of the upgraded road. On the other hand, the topography of the area along the authorised route is much flatter. River crossings in that area will be by means of single span high level bridges over deeply incised ravines. The main impact of such structures will be localised impacts caused only during the construction period, which will also be much easier to mitigate.

Pertaining to the Mthamvuna to Isipingo section of the road, some appellants allege that alternative locations of toll plazas or the option of non-tolling should have been considered. It is my view, as I have been advised by Senior Counsel, that the consideration of those issues is the sole responsibility of SANRAL and the Minister of Transport and that I have no legal authority in this regard. The DEA duly considered the potential environmental impacts of the toll plazas proposed by SANRAL along this section of the road and I am satisfied that it was adequately addressed. Regarding the issue of alternative routes I am

satisfied that, between Mthamvuna and Isipingo, the proposed construction of the road along the relevant sections of the R61 and the N2 is, from an environmental perspective, the most acceptable option.

In view of the above I am of the opinion that SANRAL adequately considered alternative options for the road. This ground of appeal is, therefore, not regarded as persuasive and is dismissed.

4.3.2.5 ***The independence of the EAP has been undermined***

It is averred by one appellant that the EIA process for the proposed road is fundamentally flawed because the independence of the EAP has been undermined by contractual requirements imposed by the applicant. The appellant asserts that SANRAL's terms of reference to the EAP compelled the EAP to provide strong motivation why the existing road should not be considered as an alternative option for the proposed road. Hence, the EAP was not allowed to consider all reasonable alternative options and, therefore, did not perform its task independently.

I am aware that a previous authorisation of this project was set aside on appeal by my predecessor and that the ground of appeal in that instance was that the independence of the EAP was compromised. I appreciate that the preservation of the independence of an EAP is extremely important and that any proven contamination thereof, due to whatever reason, may render an EIA fundamentally flawed. In this case it is alleged that "contractual requirements" imposed by the applicant impinged upon the EAP's independence. Hence, I requested that the agreement entered into between SANRAL and CCA be scrutinised.

It was reported to me that this ground of appeal is based on a requirement contained in a document entitled "*Terms of Reference for Environmental Consultant N2 Wild Coast Toll Road Project*" (TOR). Section 5 of this document is entitled "*List of issues for the environmental studies.*" The list includes, amongst others, the requirement that there must be: "*due consideration of alternative options and a strong motivation for excluding the R61 and current N2 as alternative options*". It was established that this TOR is a document which was made available by SANRAL to environmental assessment practitioners as an

invitation to any such firm which might have been interested to act as environmental consultant to SANRAL for the development of the proposed road, to submit proposals to this effect for SANRAL's consideration. As such, the document contains information on the aims and objectives of the project, the approach that needed to be followed, issues on which environmental studies needed to be undertaken and requirements regarding the environmental management plan (EMP) and public consultation for the project. This information would have put prospective EAPs in a position to draft project proposals which could be used by SANRAL in the selection of a suitable environmental consultant to be appointed for this project. On the basis of its project proposal, CCA was chosen and appointed by SANRAL for this task.

A perusal of the contract entered into between SANRAL and CCA in terms of which the latter was appointed as SANRAL's EAP for this project showed the following:

- The contract consists of two documents namely the *"Independent Consultant's Agreement"* (the Agreement) to which is attached CCA's *"Proposal to be Considered as Independent Environmental Consultant"* for the proposed Wild Coast Toll Road Project and which is referred to as "Annexure A". The Agreement has been signed by SANRAL and CCA representatives. In terms of clause 1.2.13 of the Agreement the Professional Services to be rendered by CCA are described in Annexure A. Every page of the Agreement as well as of Annexure A has been initialled by the SANRAL and CCA representatives.
- The Agreement contains several clauses in which the importance of the independence of the EAP is addressed and which, amongst others, require the EAP to:

  "4.1.5 act as an independent, objective, informed professional and not as a service provider acting in the interests of SANRAL;

  4.1.6 consider, on an objective basis, all issues which may arise during the course of the rendering of the Professional Services and thereby produce balanced and unbiased opinions, based on the relevant facts applicable to the Proposed Project, the Consultant's own knowledge, experience and ability;

  4.1.11 comply with the provisions of and the principles contained in NEMA, the ECA and the Regulations and any other applicable legislation; ...."

- The TOR referred to above was circulated by SANRAL to environmental consultants inviting them to present proposals motivating their appointment as EAP for the proposed development of the N2 Wild Coast Toll Road. The TOR is neither annexed to the Agreement nor is it referred to in the Agreement. Therefore, the TOR is not part of the contract between SANRAL and CCA. In paragraph 3 of Annexure A, CCA states that its interpretation of the work to be undertaken in terms of its contract with SANRAL is based on a number of communications and documents, of which the TOR is one. In my view such mere reference in Annexure A to the TOR does not oblige CCA in any way to give effect thereto. However, CCA is committed and obliged to render the Professional Services which are clearly enunciated in paragraphs 4 and onward of Annexure A and in which paragraphs no reference whatsoever is made to the consideration of alternatives.

Admittedly, the formulation of the requirement in the second bulleted point in section 5 of the TOR, namely that there must be *"...due consideration of alternative options and a strong motivation for excluding the R61 and current N2 as alternative options..."* is somewhat ambiguous and hence open to misinterpretation. However, the first section of the requirement *"...**due consideration of alternative options**..."* is clear. It does not preclude the consideration of any option. In fact, it demands that all alternatives be considered. In addition, when viewed against clauses 4.1.5, 4.1.6 and 4.1.11 of the Agreement, which are quoted above, it is reasonable to interpret the final section of the requirement that, in addition to the consideration of alternatives, any exclusion of the R61 and current N2 should be well motivated. Therefore, I do not agree with the interpretation of the appellant namely that the EAP is compelled to provide a strong motivation that the R61 and current N2 should not be considered as an option.

In view of the above I am not convinced that the independence of the EAP has in any way been undermined by contractual requirements imposed by SANRAL. Hence, this ground of appeal is dismissed.

4.3.2.6 ***Certain specialists involved in the EIA had an interest in a favourable outcome of SANRAL's application for authorisation to proceed with the construction of the proposed road***

One appellant raised specific concerns regarding the appointment of Tolplan to undertake the traffic study during the EIA. The appellant further drew attention to the very close working relationship between Tolplan and SANRAL and averred that Tolplan could be regarded as an extension of SANRAL. It was further pointed out that Tolplan had been involved in the pre-feasibility studies for the proposed N2 Highway and, in so doing, participated in the generation of the information on which the original bid for the road was based. Therefore, for Tolplan to have participated in the specialist studies required for the compilation of the EIR was inappropriate as it would have been inclined to support what it had motivated earlier.

The information at my disposal confirms the established relationship over a considerable period between SANRAL and Tolplan but it also substantiates that Tolplan is a privately owned enterprise in which SANRAL has no interest in or control of. It verifies, as well, that there are few institutions in the country that possess the expertise of Tolplan, which explains the frequent involvement of Tolplan in SANRAL's activities. I am aware that in June 2007 CCA declared to the Department of Environmental Affairs and Tourism (DEAT), as the DEA was known at that time, its intention to appoint Tolplan as a specialist consultant to undertake certain traffic studies as part of the EIA for the proposed road. The DEAT was informed of the close working relationship between SANRAL and Tolplan, of the limited number of traffic consultants capable of doing the work required for the EIA and of Tolplan's competency in this field and, hence, its suitability to be contracted for the work. As a consequence, the DEAT exempted Tolplan from the independence requirements in the ECA EIA Regulations, on condition that CCA accepts full responsibility for the validity and objectivity of Tolplan's report on the study it was to undertake. CCA expressed, in writing, its satisfaction with the way in which Tolplan concluded the study for which it was contracted and confirmed that the findings contained in Tolplan's report are objective and reasonable.

I have no reason to question CCA's statement and I am satisfied that Tolplan concluded its study without having been influenced by its close working relationship with SANRAL. Hence, I do not regard this ground of appeal as persuasive.

4.3.2.7 ***It is inappropriate that SANRAL, as the applicant, acted on behalf of the DEA to respond to the grounds of appeal***

One appellant argues that it would have been appropriate for the DEA, who took the decision to authorise SANRAL to proceed with the construction of the proposed road and who is, therefore, the only party with direct knowledge of the decision making process, to respond to the grounds of appeal submitted by the appellants. Yet, a third party, SANRAL, in whose favour that decision had been taken was responsible to justify the decision of the DEA. Because the DEA has failed to respond to the appeal, the appellant maintains that its view is confirmed that the DEA abdicated to SANRAL its duty to properly assess the application for the authorisation of the road.

I am aware that the ECA EIA Regulations do not provide clear directions on the administration of appeals against EAs. I have been informed that, in view of the absence of such directions, the appeals against SANRAL's authorisation to proceed with the construction of the N2 Toll Highway were dealt with in accordance with the directions contained in the EIA Regulations, 2006, which were made under the NEMA. In terms of the latter Regulations the applicant for an EA is required to respond to the grounds of appeal against such an authorisation, as was required with the appeals currently under consideration. This approach was also followed with the administration of other appeals which were lodged against authorisations issued in terms of ECA. I am satisfied that this is the proper way to process appeals and that it cannot be regarded, as is averred by the appellant, as an abdication by the DEA of its functions pertaining to the both the appeal and the EA to SANRAL. I also accept the confirmation given by the DEA that it made its decision on SANRAL's application in view of the information provided during the EIA process and in accordance with its legal mandate. In view of the above, I dismiss this ground of appeal.

4.3.2.8 ***The DEA failed to take changed circumstances into consideration***

One appellant avers that there is no indication in the EIR that economic factors which changed in the course of the EIA were taken into consideration.

I am aware that EIAs, especially in the case of complex linear developments, are often time consuming. However, I am satisfied with the assurance given by the DEA that relevant factors which might have changed in the course of this EIA were duly taken into consideration. Hence, I do not regard this appeal as persuasive.

4.3.2.9 ***Consideration of the application for the authorisation of the toll road should not have been separated from the consideration of other developments, and their associated impacts, that could be sparked by the development of the road***

Several appellants raised this ground of appeal. Specific reference was made of the fact that the improvement of access to the area may stimulate development, such as mining, which may impact negatively on, for instance, the tourism potential of the area.

I accept that an EIA is a project specific process and, hence, it cannot be expected of the DEA to base decisions on potential future developments on the information generated by the EIA for the proposed road. I am also satisfied that with the confirmation given by the DEA that the impact of the project on the tourism potential of the area has been adequately considered.

4.3.2.10 ***The project is not defined in sufficient detail to enable proper impact assessment***

One appellant alleges that, as the project is still in an early design phase, the applicant is attempting to obtain an authorisation which is based only on generalised knowledge.

The information at my disposal shows that, in the case of a complex linear development such as the proposed road, it is internationally accepted practice to acknowledge that certain site specific uncertainties will exist within the identified corridor at the authorisation stage. It will only be possible to do ground truthing of such uncertainties with the finalisation of the route delineation within the corridor. Hence, the EA issued provides that

the investigation of such uncertainties will be finalised and reported on to the DEA before commencement with construction. Therefore, I do not regard this ground of appeal as persuasive.

4.3.2.11 ***Regional and local needs were inadequately addressed in the development of the proposal for the development of the road***

It is alleged by some appellants that this project originated as an isolated and unsolicited bid by a consortium of private companies whose primary motivation was profit and not regional or local needs.

The Minister of Transport, with SANRAL as the Minister's executive arm, is legally mandated to improve the country's national road network within a set of priorities identified by them. The strategic importance of this project is emphasised and a high priority is assigned thereto by SANRAL. In view of the principle and requirement of cooperative government enunciated in section 41 of the Constitution it would be inappropriate for me, as Minister responsible for environmental affairs, to question its assessment of the importance of this proposed development. Therefore, this ground of appeal is dismissed.

4.3.2.12 ***Data generated through the EIA should have been interpreted through the implementation of systems dynamic analysis (SDA) and systems dynamic modelling (SDM)***

One appellant avers that the real effect of the road on the systems investigated cannot be determined through the type of cause and effect linear analysis of data generated during the EIA. Only by the application of SDA and SDM would the real consequences of the road be understood.

A decision on the authorisation of a proposed development has to be based on information which is to be generated through the execution of an EIA. The EIA is the tool currently provided for in environmental legislation which should be used to determine whether a proposed development is environmentally, socially and economically sustainable. As the DEA can only work within the framework of the enabling legislation in the decision-making processes it has to rely on the EIA. Hence, I cannot regard this ground of appeal as valid.

4.3.2.13 ***Specific environmental concerns***

Some appellants expressed concerns regarding specific anticipated environmental impacts such as noise and air pollution. However, I am satisfied that the identification and assessment of such impacts and the measures proposed to mitigate the impacts, as presented in the EIR, are adequate. I agree with the views held by the DEA, namely that there are no compelling reasons to dispute the findings of the EAP in this regard. Consequently, I do not regard these concerns as having sufficient weight to justify the setting aside of the EA by the DEA of this proposed project.

4.4 It must be noted that the reasons set out above are not exhaustive and should not be construed as such and that I reserve the right to provide comprehensive reasons for the decision should this become necessary.

MRS B E E MOLEWA, MP

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS

DATE: 25.07.2011