APPEAL DECISION

Reference: 12/12/20/997

APPEAL AGAINST THE ENVIRONMENTAL AUTHORISATION FOR THE CONSTRUCTION OF THE PROPOSED ADMINISTRATIVE COMPLEX AND TRAINING CENTRE CAMPUS AT THE KOEBERG POWER STATION, WESTERN CAPE PROVINCE

1. INTRODUCTION

1.1 In terms of regulation 37 of the Environmental Impact Assessment Regulations, 2006 (the Regulations) made under the National Environmental Management Act, 1998 (Act No. 107 of 1998 [NEMA]), the erstwhile Department of Environmental Affairs and Tourism (the Department) issued to Eskom Holdings Limited (the applicant) on 20 February 2009 an environmental authorisation (EA) for the construction of the proposed Administrative Complex and Training Campus at the Koeberg Nuclear Power Station.

1.2 The Koeberg Nuclear Power Station is situated on Cape Farm No 34, Duynefontein, near Cape Town in the Western Cape Province.

1.3 Three appellants subsequently appealed in terms of section 43 of NEMA against the decision, namely CapeNature, the Wildlife and Environment Society of South Africa (WESSA) and the City of Cape Town.
2. BACKGROUND

2.1 The applicant proposes the construction of the facilities mentioned in paragraph 1.1 above. It has been indicated that the current administrative offices are unsuitable as they are inconveniently located within the secure areas of the power station and lack the capacity to accommodate the existing operational and administrative staff. The power station also has an urgent need for new, upgraded training facilities for its existing staff and the new operating staff, which are employed on a regular basis, as the current facilities are insufficient for existing and future needs. At present the training is being done in inadequate temporary buildings. It is intended to install two large training simulators in the new training centre.

2.2 On 27 October 2009 my predecessor requested the applicant to commission a more detailed botanical study as she was concerned about the high sensitivity in terms of biodiversity at the development area. The botanical study had to assess all alternative locations. Furthermore, the study had to describe the vegetation type per location, indicate the level of sensitivity and rarity of species at each location, provide a comparison of locations in terms of sensitivity (advantages and disadvantages, including cumulative impacts) and a professional opinion as to which location is the most suitable, together with a recommendation as to the mitigation measures applicable. Subsequently the applicant submitted a report by Dr C Boucher. I shall return to this study in paragraph 4.4 below.

3. THE APPEALS

3.1 The grounds of appeal can be summarized as follows:

3.1.1 FIRST GROUND: Location alternatives

(a) The environmental impact assessment (EIA) process was flawed due to
limited consideration of alternatives, especially location alternatives. The EIA process should have more thoroughly considered alternatives.

(b) Insufficient consideration was given to the impacts on biodiversity.

(c) The site is located on a sensitive and unique transitional vegetation type.

3.1.2 SECOND GROUND: Layout alternatives

(a) A more detailed EIA for the best practical environmental solution should have been done.

(b) An alternative with a much smaller footprint should have been considered, for example, multi-storey buildings and underground parking.

(c) Further consideration should have been given to a layout with the least impacts on biodiversity. The footprint should be limited to those areas already disturbed or be placed in a more suitable location.

(d) Applicant has not illustrated the relationship between the number of administrative and training personnel directly related to the generation of nuclear energy versus general “non-nuclear” related administrative and training personnel. This would have helped qualify the reason for the extension of the development and proposed location. The footprint could be further reduced by accommodating the non-nuclear generation related administrative and training personnel off-site at a location of less botanical significance.

(e) If (d) is not practical, the on-site relocation to an area where transitional vegetation does not occur should be considered.

3.1.3 THIRD GROUND: Biodiversity offsets

(a) If the decision to approve the EA is upheld, the impacts should be reduced
as far as possible through off-site biodiversity (especially botanical) offsets.

(b) The impacts could also be mitigated through no-go areas during construction, by conducting a search and rescue operation to save rare and endangered species or by securing the remainder of the area for conservation.

(c) Consideration should be given to declaring the existing private nature reserve as a conservation area in terms of the National Environmental Management: Protected Areas Act, 2003 (Act No 57 of 2003 [NEMPA]).

3.1.4 FOURTH GROUND: EA

(a) Future activities planned for the Koeberg site will impact on a much larger area than is currently applied for. This EA is one of a number of similar Eskom projects, with similar detrimental botanical impacts, which the Department approved recently. The cumulative impact of the loss of irreplaceable vegetation caused by the same applicant has clearly not been considered by the Department.

(b) The Department makes no mention of the high negative impacts on biodiversity in the EA. Appellant disputes the claim that the impacts of the activity will "not severely or significantly impact negatively on the environment" whereas the proposed buildings and parking footprint will still occupy an area of approximately 16 ha located on vegetation of extreme rarity and ecological sensitivity.

(c) No mitigation measures to reduce the impact on biodiversity were included in the EA.

(d) Many of the conditions included in the EA are vague and meaningless. For example:

(i) NEMBA, sections 56(d) and 57(1) must be complied with (i.e. no person should carry out a restricted activity involving a listed species.) This offers no protection to the species of concern here.
(ii) Existing spatial biodiversity plans pertaining to the site must be taken into consideration. The City of Cape Town Biodiversity Network has this area demarcated as a protected area. It is unclear how taking this into account would offer any legal protection to the biodiversity on site.

(e) The EA does not adequately reflect the findings of the Botanical Impact Assessment of January 2008 nor concerns raised by interested and affected parties (I&APs) by not requiring the applicant to implement the recommended biodiversity offset.

(f) The EA fails to indicate how the activity will be managed (Construction Environmental Management Plan [EMP]).

(g) The applicant’s argument that the active management of the Koeberg Private Nature Reserve adequately compensates for the development does not justify the loss of biodiversity and does not negate the need for an offset.

4. DECISION

4.1 In terms of section 43(6) of NEMA, I have the authority, after considering appeals, to confirm, set aside or vary the decision of, in this case, the Director-General, or to make any other appropriate decision.

4.2 In the event, and after having considered all the information available to me, I have decided not to set aside the Department’s decision. However, I have decided to amend the EA by inserting additional conditions as will appear in paragraph 5 below.

4.3 In reaching my decision, I have considered the information contained in the following documents:

4.3.1 The project file, reference 12/12/20/997;
4.3.2 The EA issued by the Department dated 20 February 2009;
4.3.3 The appeal;
4.3.4 The applicant’s comments;
4.3.5 The more detailed botanical study dated 30 January 2010 prepared by Dr C Boucher, as referred to in paragraph 2.2 above;

4.3.6 The appellants’ comments on the study mentioned in paragraph 4.3.5;

4.3.7 The applicant’s response to the comments of the appellants; and

4.3.8 The Composite Site Development Plan mentioned in paragraph 4.4.1 below.

4.4 I deal with the reasons for my decision, *inter alia*, as follows:

4.4.1 **FIRST GROUND: Location alternatives (paragraph 3.1.1 above)**

The issues raised in paragraphs (a), (b) and (c) are interlinked and are therefore dealt with collectively.

For the reasons that I will mention shortly, my predecessor was not satisfied that all the alternatives, especially the preferred alternative, were sufficiently examined.

The Department, in fact, had conceded that the area is of high sensitivity in terms of biodiversity and that it should have requested a more detailed Botanical study that compares the five alternative sites identified in the scoping report. The existing study only assessed the site that Eskom wants to develop (refer to recommendation no.1 on page 52 of the botanical study in the EIR).

It was clear that the location assessed by the botanical study, which is regarded as sensitive and a no-go area by the appellants and the biodiversity section of this Department, is preferred by the EAP mainly in terms of Eskom’s needs, i.e. proximity of the proposed development to the existing structures.

My predecessor therefore decided to direct the applicant to submit the detailed botanical study mentioned in paragraph 2.2 above. Subsequently the applicant, through its environmental consultants, MLH Architects and Planners, submitted a report dated 30 January 2010, prepared by a respected botanist, Dr C Boucher of Stellenbosch. In his report Dr Boucher evaluated all the alternative sites. As a result,
MLH designed a revised site development plan (SDP) which was intended to avoid the sensitive vegetation types B and E identified by Dr Boucher on the preferred site. The revised SDP was submitted to Dr Boucher, who replied that he found it acceptable subject to certain conditions. The Boucher report, the revised SDP and Dr Boucher’s response to the revised SDP were circulated to the appellants for their comments, and in turn MLH was given the opportunity to respond to the appellants’ comments.

All the appellants replied that they found the revised SDP acceptable subject to the conditions recommended in the Boucher study, although CapeNature and the City of Cape Town expressed some reservations.

However, the Chief Directorate: Biodiversity Management of the Department was strongly opposed to development on the land in question. That component remarked, \textit{inter alia}, as follows:

"It needs to be emphasized that this is not about a few plant domains on a micro-scale, but about the conservation status of a transition zone of which almost nothing is left, and which makes it critical as a climate change corridor in the planning domain".

The Chief Directorate: Biodiversity Management of the Department recommended that, amongst others, the impact of the total footprint of all planned developments by the applicant on this parcel of land and the off-sets that would be required, be investigated. The same applied to the impact that the development would have on the nature reserve status of the land in question. The said component was strongly in favour that off-sets be provided elsewhere to compensate for the impact on the vegetation on the preferred site.

A site visit was conducted on 28 July 2010 and it was suggested that Eskom should, in cooperation with CapeNature, produce a plan showing a comprehensive SDP for the Eskom Koeberg land holdings on Cape Farm No 34, indicating what has been developed, what is in the planning for the current project and future developments. Eskom expressed its full support for the suggestion.
On 9 September 2010 MLH Architects and Planners, on behalf of the applicant, submitted a Composite SDP supported by further information on the current and future projects on Eskom’s land as mentioned above. After considering MLH Architects and Planners’s submission, I am of the opinion that the project could go ahead, subject to conditions being inserted in the EA to the effect that Eskom’s management plan for its private nature reserve be approved by CapeNature, that Eskom enters into a stewardship agreement with CapeNature and that all the proposed developments on the site appealed against should be finalized before any further development, as proposed in the Composite SDP, is submitted for environmental authorization.

I am of the opinion that the conditions mentioned in the previous paragraph will address the remaining reservations of CapeNature and the City of Cape Town.

4.4.2 SECOND GROUND: Layout alternatives (par 3.1.2 above)

Ad paragraphs (a) (b) and (c); These issues have substantially been subsumed in the discussion of the First Ground above and need not be addressed separately, except to make the following remarks regarding paragraph (b):

Eskom argued that it is not feasible for the training centre to comprise a multi-storey building as suggested in paragraph 3.1.2(b), as the very large training simulators require a warehouse type structure.

Ad paragraph (d); All the administration and training personnel to be accommodated within the proposed precinct are directly related to nuclear power generation and there will be a continuous interface between this precinct and the power station. This is critical to the operation and management of the power station.

Ad paragraph (e); This issue has since been overtaken by the Boucher report and the revision of the SDP that was made as a result thereof. The adjusted SDP will greatly
minimise impacts on sensitive vegetation. As already mentioned, Dr Boucher and the appellants accepted the revised SDP.

I am of the opinion that this ground of appeal, insofar as it is not covered in the discussion of the First Ground, lacks merit and should be dismissed.

4.4.3 **THIRD GROUND: Biodiversity offsets (par 3.1.3 above)**

*Ad paragraph (a):* The applicant has stated that it is reluctant to consider biodiversity offsets on an ad hoc basis. Eskom is of the opinion that any policy with regard to the use of offsets should be agreed upon at a higher, intergovernmental level, taking various such projects over South Africa into account. I am in agreement with this view.

*Ad paragraph (b):* Eskom has undertaken to apply mitigation measures including, but not limited to, a search and rescue operation to remove as many rare and endangered species as possible and to relocate them in suitable areas within the Koeberg Private Nature Reserve. In this action, Eskom will be assisted by a specialist botanist.

*Ad paragraph (c):* The applicant argues that the Koeberg Private Nature Reserve proclaimed in 1991 and comprising 2 900ha of the 3 029ha property (96.9% of the total Koeberg landholdings), is actively managed as a conservation area and will remain so in future. Further to this, Eskom states that it also manages two other nuclear sites, namely Bantamsklop, a 1 709 ha portion of land in the Southern Cape and Thyspunt, measuring 2 429 ha, in the Eastern Cape.

These sites are managed by the Environmental and Land Manager, in accordance with an existing Environmental Management Plan, updated annually by an Environmental Management Action Plan. Eskom employs 7 full-time, and
approximately 20 contractual staff members, to undertake the general conservation work and to clear alien vegetation on all three sites on a regular basis. The average budget per annum for the Environmental and Conservation work done on Eskom property is roughly R6 million and therefore confirms Eskom commitment to the responsible management of its land.

In connection with this paragraph, I refer to the amendment of the EA to be made by the insertion of a new condition 1.46 through paragraph 5.3 below, which I believe will largely allay the concerns of the appellants.

For the above reasons, this ground of appeal is dismissed.

4.4.4 FOURTH GROUND: EA (par 3.1.4 above)

Ad paragraph (a): Although the applicant has various other projects planned for the greater Koeberg site, for which EIAs are currently underway, it has taken cognisance of the overall impact of these developments on the environment and their locations have been specifically planned so as to minimise the potential impact thereof. This ground of appeal is also addressed by the Composite SDP referred to in paragraph 4.4.1.

Ad paragraph (b): The EIA does not necessarily have to repeat the contents of the reports that form part of it, but needs to provide conditions on how environmental impacts should be managed. One of the conditions stipulates that an EMP must be compiled and submitted to the Department for approval. I am satisfied that if the impacts are properly managed as required by the EMP, the environment will not be severely impacted on or suffer a significantly negative impact. In any case, the revised
SDP will substantially reduce the impact of the development footprint on rare and sensitive biodiversity.

**Ad paragraph (c):** Mitigation measures to minimise the impact of the project on the surrounding biodiversity during construction will be included in the EMP as required by the EA. These include no-go areas through sensitivity mapping, a search and rescue operation etc. In addition, an environmental control officer will be appointed to ensure that the necessary environmental requirements are adhered to during the construction phase.

**Ad paragraph (d):** The EA did not address with sufficient specificity the biodiversity mitigation. However, this shortcoming has been cured by the Boucher report and the revised SDP resulting from this report.

**Ad paragraphs (e):** Although it is correct that the EA does not make specific reference to the findings of the Botanical Impact Assessment, this ground of appeal has also been overtaken by the Boucher study. The question of biodiversity off-sets has been discussed under paragraph 4.4.3.

**Ad paragraph (f):** The activity will be managed in accordance with the EMP as part of the construction and operation management plans.

**Ad paragraph (g):** The applicant’s initial argument was that the active management of the Koeberg Private Nature Reserve (as well as of their many other sites), which is definitely resulting in the conservation of biodiversity, should contribute to making the unavoidable loss of biodiversity, as a result of the proposed development, more acceptable. However, this issue has also been overtaken by the revised SDP made in
accordance with the Boucher study, which will greatly minimise the impacts on biodiversity.

On the strength of the above, this ground of appeal in my opinion is not persuasive.

4.5 The reasons set out above are not exhaustive and should not be construed as such and I reserve the right to provide comprehensive reasons for my decision, should this become necessary.

5. **AMENDMENTS OF THE EA PURSUANT TO MY DECISION**

Pursuant to my decision, I direct that the EA dated 20 February 2009 be amended as follows:

5.1 By the substitution of the first sentence in paragraph 1.5 with the following sentence:

"This activity must commence within a period of four (4) years from the date of the decision taken by the Minister of Water and Environmental Affairs on the appeals against this environmental authorisation submitted by WESSA, CapeNature and the City of Cape Town."

5.2 By the substitution of paragraph 1.18 with the following paragraph:

"1.18 The proposed administrative centre and training campus must be relocated in accordance with Figure 2 attached to the letter dated 8 February 2010 addressed by MLH Architects and Planners to Dr C Boucher."

5.3 By the addition of the following paragraphs after paragraph 1.39:

"1.40 The vegetated dune on the western edge of the proposed training centre and canteen must be left undisturbed. A buffer of at least 10m between the foot of the dune and the development must be set aside within the development footprint."
1.41 Plant Community E as identified in the botanical study by Dr C Boucher, dated 30 January 2010, must be excluded from the development areas allocated to the proposed training centre and canteen.

1.42 The wetland in the south-east corner of the mown area indicated in Figure 7 in the botanical study by Dr Boucher, dated 30 January 2010, must be excluded from development.

1.43 The quarry indicated in Figure 7 as mentioned in paragraph 1.42 must be rehabilitated by removing the discarded building materials, by shaping the sides where necessary (see Dr Boucher’s letter dated 9 February 2010 addressed to MLH Architects and Planners) and by rehabilitating the sides with indigenous vegetation sourced as far as possible from areas to be disturbed through development.

1.44 The proposed administrative centre and training campus, as relocated in terms of paragraph 1.18, must include a fire protection perimeter which does not further disturb the natural rural area.

1.45 The construction of the proposed administrative centre and training campus must be finalised before any further development on Cape Farm 34 is submitted for environmental authorisation.

1.46 Further, before any further development on Cape Farm 34 is submitted for environmental authorisation, the applicant must submit its management plan for its private nature reserve to CapeNature for approval and must enter into a stewardship agreement with CapeNature.”

MRS B E E MOLEWA, MP
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS
DATE: 23/11/2010