MINISTER
FORESTRY, FISHERIES AND THE ENVIRONMENT
REPUBLIC OF SOUTH AFRICA

Reference: LSA 194963 / LSA 195638

APPEAL DECISION

APPEALS AGAINST THE DECISION TO REFUSE THE APPROVAL OF THE AMENDMENT APPLICATIONS IN RESPECT OF AN EXEMPTION FROM LINING REQUIREMENTS ISSUED ON 5 MAY 2016 FOR THE PROPOSED CONTINUOUS ASHING AT THE TUTUKA AND KENDAL POWER STATIONS ASH DISPOSAL FACILITIES, IN MPUMALANGA PROVINCE

Eskom Holdings SOC Ltd	Appellant
Department of Environment, Forestry and Fisheries	Issuing Authority

Appeals: These appeals were lodged by Eskom Holdings SOC Ltd (the appellant) on 29 April 2020 and 10 July 2020, respectively, against the decision of the Acting Chief Director: Integrated Environmental Authorisations within the Department of Environment, Forestry and Fisheries (the Department) to refuse the approval of the amendment applications of the Exemption from lining requirements issued for Tutuka and Kendal Power Stations Ash Disposal Facilities, in the Mpumalanga Province. The decisions to refuse the amendment applications in respect of these Exemptions for both facilities were made on 24 March 2020 and 19 June 2020, respectively. For purposes of this decision, I shall refer to the above facilities as "Tutuka PS" and "Kendal PS", respectively.

1. BACKGROUND AND APPEAL

1.1 The appellant is a holder of an Integrated Environmental Authorisation (IEA) for continuous Ash Disposal Facility (ADF) at Tutuka PS dated 19 October 2015.

1.2 Subsequent to this authorisation, the appellant applied for a 4-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 for its installation. As part of the Exemption application process, the equivalent footprint (area) for the 4-year Exemption was estimated to be 54ha and was assessed and motivated by an independent Environmental Consultant.

1.3 The Department granted the 4-year Exemption on 5 May 2016. The exemption period was due to lapse on 4 May 2020, however taking into account the provisions of the Directions published on 5 June 2020, the due date for the lapsing of the exemption period is 4 September 2020.

1.4 In 2018, the appellant realised that the 54ha approved under the Exemption would not be fully utilised at the end of the 4-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.

1.5 The appellant undertook a Part 1 amendment process in November 2018, but the Department rejected the application on 09 January 2019 and required that a Part 2 amendment process be undertaken.

1.6 The appellant appointed GCS Water and Environment (Pty) Ltd (GCS), as an independent environmental consultant, to undertake the Part 2 amendment application process to the Exemption. This amendment application sought to extend the validity period of the Exemption from lining requirements issued on 05 May 2016.

1.7 Upon evaluation of the amendment application and the information submitted in support thereof, the Department refused an amendment to the said Exemption on 24 March 2020. In their decision to refuse amendment to Exemption, the Department advanced the following reasons:

- The cost of water loss in unlined facilities and consequential water treatment costs almost always exceeds 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 social-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 type3 waste producers of 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 Department of Water and Sanitation (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 Rights, principles of National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA) for decision making by authorities, National Water Act, 1998 (Act No. 36 of 1998) section on pollution control and factors considered for licensing and the Public Finance Management Act, 1999 (Act No. 1 of 1999) requirements of effective and efficient use of resources.

1.8 On 29 April 2020, the Directorate: Appeals and Legal Review (Appeals Directorate) within the Department received the appeal from the appellant against the Department's decision to refuse the amendment to the Exemption.

1.9 A copy of the appeal was provided to the Department, which submitted a responding statement thereto on 27 July 2020.

1.10 The appellant is also the holder of an IEA dated 28 July 2015, for continuous disposal of ash at the existing ash disposal facility at Kendal PS in Mpumalanga Province. One of the conditions of the IEA was that the new Ash Disposal Facility (ADF) should be lined with Class C lining. The appellant applied for a transition period exemption to dispose on a portion of the approved area without lining, while the construction of the lined ADF is underway. This would allow the appellant to continue with its current ashing operation manual processes, thus allowing the station to continue generating electricity, while in parallel continuing with the processes for installing the Class C performance liner. The exemption application was approved by the Department on 05 May 2016, granting the appellant permission to dispose without lining until 5 May 2020.

1.11 The area under Exemption to ash without liner is 83ha and the Exemption authorisation has a time constraint up to 5 May 2020. Due to lower generation load factor (GLF) which was experienced on the system, Kendal PS produces less ash than had been predicted, and therefore the ADF has been filling up at a lower rate than it was initially anticipated. It was extrapolated that by 05 May 2020, there will still be 35ha of land remaining unutilised, out of the 83ha of area.

1.12 The appellant therefore applied to the Department to extend the validity of the Exemption period by continuing to ash on the existing exempted footprint until the exemption footprint reaches its full capacity. The appellant indicated that the proposed changes to the Exemption Authorisation may not result in significant impacts to the environment, and was therefore of the opinion that a Part 1 amendment process was applicable for the proposed changes in terms of the Environmental Impact Assessment Regulations, 2014, as amended (2014 EIA Regulations). However, the Department indicated that a Part 2 amendment process must be followed.

1.13 The appellant appointed Green Gold Group (Pty) Ltd (Green Gold) to undertake the required amendment application process in terms of NEMA and the 2014 EIA Regulations.

1.14 Upon evaluation of the said application and the information submitted in support thereof, the Department refused the amendment to the said Exemption on 19 June 2020.

1.15 On 10 July 2020, the Appeals Directorate received an appeal from the appellant against the Department's decision to refuse an amendment to the Exemption issued on 05 May 2016. In their decision to refuse the amendment to the Exemption, the Department advanced the following reasons:

- The reason provided in the initial exemption application was that the installation of the Class C liner will take approximately 4 years post-acquisition of the EA. The exemption was therefore issued solely based on the time requirement to install the liner and not on footprint requirements, as stated in your motivations for requesting the amendments to the exemption timeframes.
- The proposed amendment will result in disputes over precedence among other type 3 waste producers of 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 section on pollution control and factors considered for licensing and the Public Finance Management Act requirements of effective and efficient use of resources.

1.16 A copy of the appeal was provided to the Department, which submitted a responding statement thereto on 3 August 2020.

1.17 Both appeals are broadly premised on the following grounds:

1.17.1 Failure to consider the principles of NEMA;

1.17.2 Failure to consider specialists reports submitted with Exemption amendment applications; and

1.17.3 Failure to consider that time is aligned to footprint for ashing.

Failure to consider the principles of NEMA

1.18 The appellant states that the Department cited the following as a reason for refusal for both the Tutuka and Kendal facility: "*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 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 2015*".

TUTUKA PS

1.19 The appellant submits that they applied for an EA for the extension of the ADF at Tutuka PS and an IEA was granted on 19 October 2015 (DEA Ref: 14/12/16/3/3/3/52). The appellant submits that this application was in line with the requirements of NEMWA Waste Classification Management Systems (WCMS) classified ash as a Type 3 waste and recommended a Class C barrier system. The appellant contends that the environmental impact assessment (EIA) process was supported by specialist studies focusing on groundwater and surface water of the receiving environment.

1.20 To install the required barrier system for the ADF extension, the appellant required the time provision, which would allow all necessary developmental processes to be undertaken. The appellant submits that it was anticipated that the planning and developmental processes, which would also ensure good quality project implementation, for installing the Class C liner, would take a period of approximately four (4) years, post-acquisition of the IEA. The appellant submits that the duration required to get the lined surface ready for ashing would have resulted in challenges with achieving immediate compliance with respect to the lining, from acquisition of the IEA. The appellant therefore applied for an exemption for the said duration (up to 4 years) from the required Class C liner. The estimated footprint required for the 4-year exemption period was 54ha, and the identified area was assessed in the Exemption application process.

1.21 The appellant submits that the Exemption Amendment Motivation Report clearly provides that the developmental processes for the Class C liner outside the 54ha area under the Exemption approval continued in parallel with the use of, and beyond the borders of, the area under exemption. At the time of applying for an amendment of the Exemption, these Class C developmental processes have progressed.

1.22 The appellant avers that since the time of application for extending the validity of the Exemption approval, the station's GLF has reduced to approximately 54%, and this has resulted in less ash being produced. With this lower ash production, and if the current GLF maintains, the appellant determined prior to the amendment process that it would take longer than 4 years to use the area under the Exemption. It is estimated that a footprint of 11ha is the area that will not have been used by the end of the 4 years, and would create a gap if not used. Due to such a gap, the ADF body would have a gap between the used area under Exemption and the new lined footprint. As mentioned in the alternatives investigated to manage this gap, a gap in the ADF body, would have dire impacts, hence it was not regarded as a feasible alternative to be pursued.

1.23 The appellant submits that it must be noted that all principles of the NEMA have been considered. These principles were contemplated during the Integrated EIA process completed in 2015 when the authorisation was granted by the Department in October 2015. Furthermore, it is the appellant's submission that the exemption application process considered and addressed all NEMA principles when the authorisation was granted by the Department in May 2016.

1.24 The appellant submits that if the principles had not been considered, then it is expected that authorisations would not have been granted. The Exemption amendment application was assessed by specialists. The appellant contends that it was found that the additional 11ha of deposition on unlined surface would not to change the significance of the potential impacts from the Exemption application. Therefore the environmental and social interests of the receiving environment are not at additional risk than predicted in the Exemption application. The appellant fully outlines the principles of NEMA considered during the exemption process, which application was subsequently approved by the Department.

1.25 The appellant submits that the exemption application process carried out in 2016, undertook a robust public participation process (PPP) as per Chapter 6 of 2014 EIA Regulations.

1.26 In conclusion of an appeal in respect of Tutuka facility, the appellant submits that there is no merit to the rejection, as the basis of rejection is not supported by the specialist studies undertaken to investigate the application at hand, which have concluded that the application will not cause additional significant impacts to those already identified in 2014.

KENDAL PS

1.27 With regard to the Kendal facility, the appellant submits that they applied for IEA for the extension of the Ash Disposal Facility (ADF) at Kendal PS, and this authorisation was granted by the Department on 28 July 2015 (DEA Ref: 14/12/16/3/3/3/63). This authorisation process, according to the appellant, was also in line with the requirements of the NEMWA Waste Classification Management Systems (WCMS) classified ash as a Type 3 waste and recommended a Class C barrier system.

1.28 The appellant advance the same argument as under Tutuka PS, save to add that, as mentioned in the alternatives investigated to manage this gap, a gap in the ADF body would have dire impacts such as reducing available ashing capacity and resulting in operational challenges in the immediate future, a future need for an additional ashing footprint outside the current available land, as well as associated increase in Kendal's environmental footprint.

1.29 The appellant submits that in the area surrounding Kendal, finding such additional land would be impossible, as the greater area is mostly used for mining and agricultural purposes. Therefore leaving the gap area was not regarded as a feasible alternative to be pursued, as it would require compensation in the future.

1.30 The appellant submits that the exemption Final Amendment Motivation Report clearly provides that the developmental processes for the Class C liner, outside the 63ha area under the Exemption approval, continued in parallel with use of and beyond the borders of,

the area under exemption. The appellant submits that to date, the Contractor for construction of the Class C liner has been appointed and is on site, an Environmental Control Officer has been employed as well.

1.31 The appellant further contends that all principles of the NEMA have been considered. The appellant submits that these principles were contemplated during the Integrated Environmental Impact Assessment process completed in 2015 when the authorisation was granted by the Department in July 2015. Furthermore, it is argued that the exemption application process considered and addressed all NEMA principles when the exemption was authorisation granted by the Department in May 2016. The appellant repeats the same argument that if the principles had not been considered, then it is expected that these authorisations would not have been granted. Furthermore, the exemption extension application process was supported by specialists, whose assessment provided that the additional 35ha of deposition on unlined surface would not change the significance of the potential impacts identified from the exemption application. Therefore according to the appellant, the environmental and social interests of the receiving environment are not at any further additional risk than predicted in the exemption application. As is the case with Tutuka appeal, the appellant fully outlines the principles of NEMA considered during the exemption process, which application was subsequently approved by the Department.

1.32 The appellant submits that the specialist studies carried out for the Exemption amendment application indicate that the continued ashing on the remaining 35ha would not have additional impacts on the social or biophysical environment. The appellant further submits that the rejection by the Department does not take cognisance of the loss of production from Kendal PS and the impact this would have on the supply of electricity in South Africa. The appellant submits that the rejection results in Kendal PS no longer being authorised to continue ashing and therefore creates a risk of Kendal not being able to lawfully continue with the generation of electricity.

1.33 In conclusion, the appellant submits that there is no merit to the rejection, as the basis of rejection is not supported by the specialist studies undertaken to investigate the application

at hand, which have concluded that the application will not cause additional significant impacts to those already identified in the Exemption application of 2015.

1.34 In response to this ground of appeal, the Department submits that it must be noted that there is no provision under NEMA and the 2014 EIA Regulations for an amendment of an Exemption. The Department submits that they should have refused the initial amendment applications. The Department submits that the motivation given for the Exemption request was the time needed to install a liner, not a footprint. According to the Department, Exemption was therefore issued sorely on time needed to install a liner which was indicated to be 4 years.

1.35 In evaluating the submissions by the appellant in respect of both Tutuka and Kendal facilities, as well as responses thereto by the Department, I have noted that a full public participation was undertaken for the Exemption amendment application process of both facilities, as set out in section 8 of the Motivation Report. In my view, this encouraged the membership of potentially interested and affected parties to participate in these applications. In this regard, the information before me indicates that no responses or objections were received against these amendment applications.

1.36 I also had sight of the groundwater impact report for Tutuka Facility, which indicate that "*an extension in the duration of ashing within the residual exemption period to cover the residual area of 11ha will not change the groundwater impacts determined by SLR (2014)*". With regard to the Specialist on Wetland Impact Assessment Review, I note that the study concludes that "*An extension of the duration of Exemption period to cover the residual area of 11ha does not influence the residual significance of any of the anticipated impacts identified during the 2014 assessment*". I also had sight of the groundwater report, surface water report and soils report of the Kendal Facility confirming low impacts to the receiving environment.

1.37 I have also considered extensive submissions made by the appellant regarding compliance with NEMA principles, and I am accordingly satisfied that the appellant did consider the NEMA principles in both Tutuka and Kendal amendment applications and also complied with Part 2 amendment requirements as required by the Department.

1.38 I am aware of section 24M of NEMA which stipulates as follows: "*The Minister or MEC, as the case may be, may grant an exemption from any provision of this Act, except from the provision of section 24(4)(a) or the requirement to obtain an environmental authorisation contemplated in section 24(2)(a) or (b)*". In this regard, I noted the submission by the appellant that they already started with the Detail Design for construction and lining work for the footprint as well as appointed an Environmental Control Officer.

1.39 I have taken note of the submission by the Department that there is no provision under NEMA and the 2014 EIA Regulations for an amendment of an Exemption. In this regard, there is a merit in this submission since neither NEMA nor 2014 EIA Regulations make specific provision for amendment of an Exemption.

1.40 However, in terms of section 43(6) of NEMA, I have the authority, after considering the appeal, to confirm, set aside or vary the decision, provision, condition or directive or to make any other appropriate decision. In my view, this provision empowers me to make a decision I deem appropriate in the circumstance. Having duly considered the reasons advanced by the Appellant for extension of the Exemption period, and taking into account the national importance of Tutuka and Kendal facilities, as well as the impact on the electricity grid stability in case these facilities are shut down, I am inclined to uphold the appeals.

1.41 Having ruled in favour of the above appeals, I find it appropriate to extend the validity period of Exemptions in respect of Tutuka and Kendal facilities with additional twelve (12) months from the date of signature hereof. Accordingly, the Department is directed to amend the Exemption approvals in respect of the above facilities to reflect an extension of 12 months, containing the same conditions of the original Exemptions.

1.42 In light of the above conclusion, I find it unnecessary to deal with the grounds of appeals mentioned in paragraphs 1.17.2 and .1.17.3 separately, as I have already addressed them above.

2. DECISION

2.1. In reaching my decision on the above appeals against the decision of the Department to refuse the approval of the amendment applications of the exemption from lining requirements, I have taken the following information into consideration:

2.1.1. IEA issued by the Department for Tutuka Facility dated 19 October 2015;
2.1.2. IEA issued by the Department for Kendal Facility dated 28 July 2015;
2.1.3. Exemption letter issued by the Department for Tutuka Facility dated 5 May 2016;
2.1.4. Exemption letter issued by the Department for Kendal Facility dated 5 May 2016;
2.1.5. Decision on amendment application in respect of Tutuka Facility dated 24 March 2020;
2.1.6. Decision on amendment application in respect of Kendal Facility dated 19 June 2020;
2.1.7. Appeal submitted by the appellant for Tutuka Facility on 29 April 2020;
2.1.8. Appeal submitted by the appellant for Kendal Facility on 10 July 2020;
2.1.9. Responding statements submitted by the Department in respect of both appeals on 27 July 2020 and 3 August 2020 respectively;
2.1.10. The Application for the Exemption Amendment Report, Ground Water Report and Wetland Specialist Report for Tutuka Facility; and
2.1.11. The Application for the Exemption Amendment Report, Ground Water Report, Surface Water Report and Soils Report for Kendal Facility.

2.2. In terms of section 43(6) of NEMA, I have the authority, after considering the appeal, to confirm, set aside or vary the decision, provision, condition or directive or to make any other appropriate decision.

2.3. Having carefully considered the abovementioned information and in terms of section 43(6) of NEMA, I have decided to uphold the appeals and set aside the decisions of the Department to refuse the amendment to the abovementioned Exemption approvals as set out in paragraph 1.39 above.

APPEALS AGAINST THE DECISION TO REFUSE THE APPROVAL OF THE AMENDMENT APPLICATIONS IN RESPECT OF AN EXEMPTION FROM LINING REQUIREMENTS ISSUED ON 5 MAY 2016 FOR THE PROPOSED CONTINUOUS ASHING AT THE TUTUKA AND KENDAL POWER STATIONS ASH DISPOSAL FACILITIES, IN MPUMALANGA PROVINCE

2.4. In arriving at my decision on the appeal, it should be noted that I have not responded to each and every statement set out in the appeals and/or responses thereto, and where a particular statement is not directly addressed, the absence of any response thereof should not be interpreted to mean that I agree with or abide by the statement made.

2.5. Should any party be dissatisfied with any aspect of my decision, it may apply to a competent court to have this decision judicially reviewed. Judicial review proceedings must be instituted within 180 days of notification hereof, in accordance with the provisions of section 7 of the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000).

MS B D CREECY, MP

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 4/9/2020