



ENVIRONMENTAL ALERT

IN THIS ISSUE

DEVELOPERS REQUIRED TO CONSIDER CLIMATE CHANGE IMPACT WHEN APPLYING FOR ENVIRONMENTAL AUTHORISATION

Climate change considerations have recently entered the realm of decision making on two completely separate and distinct occasions.

GREATER SCRUTINY BY ENVIRONMENTAL NON-PROFIT ORGANISATIONS ANTICIPATED

The Department of Environmental Affairs (DEA) has made environmental licences available to the public automatically, without requiring the submission of a request under the Promotion of Access to Information Act (PAIA). The permits listed in the DEA's new notice published under s15 of PAIA include environmental authorisations, waste management licences, atmospheric emission licences, and biodiversity permits.

DEVELOPERS REQUIRED TO CONSIDER CLIMATE CHANGE IMPACT WHEN APPLYING FOR ENVIRONMENTAL AUTHORISATION

Though climate change is not a novel phenomenon, it is the first time that its risks and impact have played a deciding role in the decision-making process.

In light of these decisions, developers applying for an EA would be well-advised to, where applicable, show that the risks and impact of climate change have been properly studied and/or considered.



Climate change considerations have recently entered the realm of decision making on two completely separate and distinct occasions.

- The Minister of Environmental Affairs made the environmental authorisation (EA) for the Thabametsi Power Project (Pty) Ltd coal-fired power station subject to the condition that a full climate change impact assessment first be conducted.
- The Limpopo Department of Economic Development and Tourism refused to grant Aquila Steel SA (Pty) Ltd an EA for its iron ore mine in light of the detrimental effects the mine would have on the climate change resilience of the proposed development site.

Though climate change is not a novel phenomenon, it is the first time that its risks and impact have played a deciding role in the EA decision-making process.

EAs are regulated under the National Environmental Management Act, No 107 of 1998 (NEMA) and the Environmental Impact Assessment (EIA) Regulations promulgated under the auspices of NEMA. These instruments do not explicitly or directly regulate climate change adaptation and mitigation. NEMA does, however, set out a number of principles that must be considered by a decision-maker before granting or refusing an EA. The White Paper on the National Climate Change Response (White Paper) identifies the following as some of the principles fundamental to the achievement of South Africa's climate change response objective:

- intra- and inter-generational sustainability;
- the precautionary principle;

- the polluter pays principle; and
- sustainable development.

Sections 24O of NEMA and 18 of the EIA Regulations furthermore prescribe criteria to be taken into account by competent authorities when considering EA applications, which include:

- any environmental impacts or degradation likely to be caused if the EA is approved or refused; and
- any guidelines, departmental policies and management instruments adopted by the Minister or MEC (this would include the White Paper).

This framework serves as the basis upon which climate change considerations may be incorporated into the EA process. The decisions made in respect of the Thabametsi Power Project and the Aquila Steel iron-ore mine are therefore not due to any changes in law or regulation. Rather, they reflect how the decision-makers are starting to exercise their discretion in a manner that affords climate change more weight when considering whether to approve an EA.

In light of these decisions, developers applying for an EA would be well-advised to, where applicable, show that the risks and impact of climate change have been properly studied and/or considered.

Alecia Pienaar and Sandra Gore

GREATER SCRUTINY BY ENVIRONMENTAL NON-PROFIT ORGANISATIONS ANTICIPATED

The Department of Environmental Affairs (DEA) has made environmental licences available to the public automatically, without requiring the submission of a request under the Promotion of Access to Information Act (PAIA).

With licenses now being made available automatically, NPOs are far better placed to monitor and encourage enforcement proceedings against environmental law transgressors.

The Department of Environmental Affairs (DEA) has made environmental licences available to the public automatically, without requiring the submission of a request under the Promotion of Access to Information Act (PAIA). The permits listed in the DEA's new notice published under s15 of PAIA include environmental authorisations, waste management licences, atmospheric emission licences, and biodiversity permits.

Environmental enforcement in South Africa has to a large extent been led by environmental non-profit organisations (NPOs). Previously, obtaining licenses from the DEA was a lengthy process, with the DEA not adhering to the time frames for providing documents. With licenses

now being made available automatically, NPOs are far better placed to monitor and encourage enforcement proceedings against environmental law transgressors.

Sandra Gore



TOP RANKED
GLOBAL
CHAMBERS
AND PARTNERS
2016

Cliffe Dekker Hofmeyr

BAND 1
Environment

2015 RANKED #1 BY DEALMAKERS FOR M&A DEAL FLOW 7 YEARS IN A ROW
1st by General Corporate Finance Deal Flow

2014 1st by M&A Deal Flow
1st by M&A Deal Value
1st by General Corporate Finance Deal Flow

2013 1st by M&A Deal Flow
1st by M&A Deal Value
1st by Unlisted Deals - Deal Flow

2012 1st by M&A Deal Flow
1st by General Corporate Finance Deal Flow
1st by General Corporate Finance Deal Value
1st by Unlisted Deals - Deal Flow

DealMakers

2015
1ST
South African law firm and 12th internationally for Africa & Middle East by deal value

2ND
South African law firm and 2nd internationally for Africa & Middle East by deal count

1ST
South African law firm and 15th internationally for Europe buyouts by deal value

FINANCIAL AND CORPORATE
RECOMMENDED FIRM

2016

NO.1
6
YEARS IN A ROW
for client service excellence
#6YearsInARow

OUR TEAM

For more information about our Environmental practice and services, please contact:



Terry Winstanley
National Practice Head
Director
T +27 (0)21 481 6332
E terry.winstanley@cdhlegal.com



Sandra Gore
Director
T +27 (0)11 562 1433
E sandra.gore@cdhlegal.com



Tracy-Lee Erasmus
Senior Associate
T +27 (0)11 562 1590
E tracy-lee.erasmus@cdhlegal.com



Helen Dagut
Executive Consultant
T +27 (0)21 481 6334
E helen.dagut@cdhlegal.com



Valencia Govender
Associate
T +27 (0)21 481 6419
E valencia.govender@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2016 1077/MAY