



REFERENCE: 14/3/1/D6/28/0474/20

Mr Deon van Zyl
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Dear Sir

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE ENVIRONMENTAL AUTHORISATION ISSUED FOR THE AFRO FISHING FISHMEAL AND OIL REDUCTION FACILITY ON QUAY 2 OF THE PORT OF MOSSEL BAY ON ERF 12459, MOSSEL BAY

1. The appeal lodged against the Environmental Authorisation ("EA") issued by the Department of Environmental Affairs and Development Planning on 27 July 2020, refers.
2. After considering all relevant facts and supportive documents I wish to advise that, in terms of section 43(6) of the *National Environmental Management Act, 1998 (Act No. 107 of 1998)* ("NEMA") I have decided to dismiss the appeal and confirm the abovementioned decision of the Delegated Officer.
3. **AMENDMENTS/EXCLUSIONS TO THE ENVIRONMENTAL AUTHORISATION:**
 - 3.1. Section G of the abovementioned EA is excluded from this authorisation.
 - 3.2. The following conditions of the EA are substituted and must be complied with:

Section E: Conditions of Authorisation
Scope and Validity Period of authorisation

Condition E1:

*"This authorisation is valid for a period of **five years** from the date of issue of this **appeal** decision. The holder must commence with the listed activities within the said period or this **appeal** authorisation lapses and a new application for authorisation must be submitted to the competent authority, unless the holder has lodged a valid application for the amendment of the validity period of this **appeal** authorisation (i.e. the application must be submitted to the Ministry of Local Government, Environmental Affairs and Development Planning ("Minister")), before the expiry of this authorisation."*

Condition E6:

"The holder of the Appeal Environmental Authorisation must in writing, within 14 (fourteen) days of the date of the appeal decision notify all registered interested and affected parties ("I&AP's")–

6.1 The outcome of the appeal;

6.2 The reasons for the appeal decision; and

6.3 The date of the decision."

4. REASONS FOR THE DECISION:

The reasons outlined in the original EA are applicable to this Appeal Decision. Below find further reasons for dismissing the Appeal and confirming the decision of the Delegated Officer:

4.1. IMPACT OF NOXIOUS INDUSTRY ON SENSE OF PLACE

An Air Quality Impact Assessment ("AQIA") was undertaken by Chris Albertyn of Lethabo Air Quality Specialists (Pty) Ltd who has more than 40 years' experience in the industry.

It has been found that the risk of malodours linked to fishmeal processing has been scientifically shown to be undetectable in the surrounding areas with the implementation of the Regenerative Thermal Oxidiser ("RTO") along with additional air scrubbers (chemical and seawater). These technologies have been included as conditions in both the Environmental Authorisation ("EA") and the Provisional Air Emissions License ("PAEL").

In addition to the implementation of the RTO and air scrubbers, the Afro Fishing fishmeal facility will only operate for an average of 80-120 days per year, which is dependent on quotas and how quickly it is caught, closure during the main holiday periods (traditionally the fishing season closes over Easter and between 15 December to 15 January) and weather patterns.

The Mossel Bay Municipality's definition of Industry explains that the zoning is associated with a factory but that it does not include a noxious trade or risk activity. The Air Quality Impact Assessment has determined that the proposed development will not be noxious, nor will it be a risk activity.

Even though Mossel Bay is a popular tourist destination, the Port of Mossel Bay is zoned as an area of industry and commercial activity, and PetroSA's tank farm is in the immediate vicinity of residential neighbourhoods and the Langeberg Mall.

It should be pointed out that although the harbour does have an aspect associated with tourism, the majority of the site is off limits to tourists as it is a working harbour. Transnet, as the mandated authority for the site has indicated that Quay 2 has been designated for fisheries industry activities in its long-term planning. Therefore, the current and future use will never be available for tourism activities. Thus, the existing Afro Fishing facility is in keeping with the primary use of Quay 2 and its "sense of place" as a working harbour.

The discussion of the 'Sense of Place', which included visual impact and small harbour character, in the Socio-Economic Impact Assessment stated that most of the infrastructure will be enclosed to retain the current 'look and feel' of the current Afro Fishing buildings, which is visually better than the current I&J buildings. The final plant would have a similar footprint as the current Afro Fishing and I&J buildings, but the different components will be integrated into larger units, i.e. storage facility, warehouse, refrigeration, etc. The additional components will include fish storage tanks. All the buildings will adhere to industrial zoning requirements and not exceed 12.5m in height. However, a few of the boiler stacks and the RTO stack (all at 28m), Low Sulphur Oil ("LSO") tanks (13m) and evaporation plant (13.5m)

that will stick out. In terms of visual impact, only the stacks will exceed the current highest point.

I conclude that the expansion of the existing Afro Fishing Facility to include the installation of a fish meal and oil reduction plant is in keeping with the primary use of the harbour and potential malodours will be mitigated through the installation of the RTO along with additional air scrubbers (chemical and seawater).

4.2. FACTUALLY INCORRECT BACKGROUND INFORMATION DOCUMENT TO NID / HERITAGE APPROVAL AND SIDE-LINING OF LOCAL HERITAGE BODY

The information presented to Heritage Western Cape ("HWC") stated that the development will not impact on any national estate referred to in Section 3(2) of the *National Heritage Resource Act (Act 25 of 1999)* ("NHRA"); no building or structure older than 60 years will be affected in any way; and the findings of the report indicates that no buildings / structures of cultural significance are present on the site. On 4 October 2019, HWC stated that they were satisfied that the requirements in terms of Section 38 of the NHRA had been addressed.

Subsequent to the appeal, the applicant appointed Aikman Associates to submit the application in terms of Section 34 of the NHRA. This application was lodged with HWC on 5 October 2020. It is noted that the appellant submitted the following comment during the public participation process for the application in terms of Section 34 of the NHRA:

"It is agreed that the properties on the site, some buildings of which are older than 60, in fact, c100 years, are not gradable or conservation worthy."

Thus, I conclude that, based on the findings of the application in terms of Section 34 of the NHRA and the appellants comment on the application, that the proposed expansion:

- will not impact on the National Estate or heritage resources; and
- will not result in the destruction or degradation of any conservation worthy buildings.

4.3. SIDE-LINING OF HERITAGE OF MOSSEL BAY

In terms of the NHRA there is no legal requirement for the heritage practitioner to consult directly with a local organisation, and in this case the Mossel Bay Heritage Society, to scrutinise a Background Information Document prior to its submission to the relevant Competent Authority.

I am satisfied that the Mossel Bay Heritage Society were afforded sufficient opportunities to participate and submit comment in the EIA process. It is on record that consultations with the Mossel Bay Heritage Society commenced in October 2018.

4.4. EMP NOT ADDRESSING MITIGATION MEASURES BEYOND CONSTRUCTION PHASE

The proposed expansion of the facility is subject to three authorisations from three different competent authorities, namely—

- 1) Environmental Authorisation ("EA") in terms of the Environmental Impact Assessment ("EIA") Regulations, 2014;
- 2) Air Emissions License ("AEL") in terms of the *National Environmental Management: Air Quality Act, Act No. 39 of 2004* ("NEM:AQA"), and
- 3) Coastal Waters Discharge Permit in terms of the *National Environmental Management: Integrated Coastal Management Act, Act No. 24 of 2008*.

As such, each competent authority has a specified mandate and may only issue a decision (i.e. impose a condition or restriction) in accordance with an empowering provision when exercising its assigned power in terms of the relevant legislation.

Listed Activity 34, of Listing Notice in GN No. R. 983 of 4 December 2014 of the EIA Regulations, 2014, was the only activity triggered that required authorisation. This listed activity relates to the need for a permit or licence or an amended permit or licence in terms of national or provincial legislation governing the release of emissions, effluent or pollution (i.e. air emissions and marine pollution).

As such, the EA focussed on the physical expansion of the facility, i.e. alteration and/or upgrading of buildings to increase capacity and footprint of the facility. The aspects regarding the air emissions and marine pollution are beyond the mandate of the Delegated Competent Authority and is being dealt with by the respective licensing / permitting authorities.

Both the EA in terms of the NEMA EIA Regulations, 2014 and the Air Emissions License ("AEL") in terms of the NEM:AQA required the potential impacts of the proposed development to be assessed in the form of a Basic Assessment Process. Thus, the Basic Assessment Process was conducted and assessed in terms of both the EIA Regulations, 2014 and NEM:AQA and considered the impacts of preconstruction, construction, operation and decommissioning of the proposed development. In terms of Heritage, the impacts on the sense of place was considered and it was confirmed that there were no tangible heritage assets of any value on site.

The mitigations were further carried through into the Environmental Management Programme ("EMPr") which has been included as a condition of the EA.

I am satisfied that the EA issued by the Delegated Competent Authority met the content requirements of an EA as per Regulation 26 of the EIA Regulations, 2014.

4.5. IMPARTIALITY OF FINAL BASIC ASSESSMENT REPORT

In terms of the NEMA and the Environmental Impact Assessment ("EIA") Regulations, 2014, an Environmental Assessment Practitioner ("EAP") is appointed by an applicant, at his cost, on behalf of the Delegated Competent Authority to undertake an EIA for proposed developments. Regulation 13 of the EIA Regulations, 2014 requires that EAPs to:

- "(a) be independent;*
- (b) have expertise in conducting environmental impact assessments or undertaking specialist work as required, including knowledge of the Act, these Regulations and any guidelines that have relevance to the proposed activity;*
- (c) ensure compliance with these Regulations;*
- (d) perform the work relating to the application in an objective manner, even if this results in views and findings that are not favourable to the application;*
- (e) take into account, to the extent possible, the matters referred to in regulation 18 when preparing the application and any report, plan or document relating to the application; and*
- (f) disclose to the proponent or applicant, registered interested and affected parties and the Delegated Competent Authority all material information in the possession of the EAP and, where applicable, the specialist, that reasonably has or may have the potential of influencing—*
 - (i) any decision to be taken with respect to the application by the Delegated Competent Authority in terms of these Regulations; or*
 - (ii) the objectivity of any report, plan or document to be prepared by the EAP or specialist, in terms of these Regulations for submission to the Delegated Competent Authority.*

unless access to that information is protected by law, in which case it must be indicated that such protected information exists and is only provided to the Delegated Competent Authority."

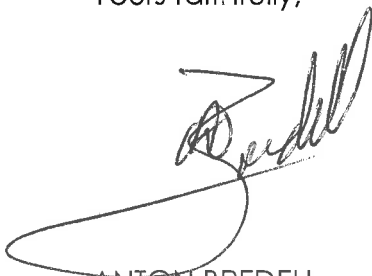
Thus, EAPs are required by law to act independently and impartially and submit a BAR that complies with the NEMA and Appendix 1 of the EIA Regulations, 2014.

I am satisfied that the EAP actions were independent and in accordance with the EIA Regulations, 2014.

5. The National Environmental Management Principles (set out in section 2 of the NEMA) which apply to the actions of all organs of state, serve as guidelines by reference to which any organ of state must exercise any function when taking any decision, and which must guide the interpretation, administration and implementation of any other law concerned with the protection or management of the environment. In terms of the NEMA Principles, the effects of decisions on all aspects of the environment are to be taken into account. \
6. As such, the consideration, assessment and evaluation of the social, economic and ecological impacts of activities (disadvantages and benefits) must be undertaken, and decisions are to be appropriate in the light of such consideration and assessment.
7. In view of the above, the NEMA principles, compliance with the conditions stipulated in the EA, and compliance with the conditions of the EMP, the proposed development will not conflict with the general objectives of integrated environmental management stipulated in Chapter 5 of the NEMA and any potentially detrimental environmental impacts resulting from the proposed development can be mitigated to acceptable levels.
8. I have discharged my decision-making powers when making this decision and I am thus functus officio in this regard. My decision is final and your only recourse, should you still be aggrieved by my decision, is to apply to the Western Cape High Court to review my decision.

Your interest in the future of our environment is greatly appreciated.

Yours faithfully,



ANTON BREDELL
WESTERN CAPE MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

DATE: 29/1/2021

Copied to:

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