



environmental affairs

Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA

Reference: LSA 167385

CONDONATION DECISION

REQUEST FOR CONDONATION FOR THE LATE FILING OF NOTICES OF INTENTION TO APPEAL AND REQUESTS FOR EXTENTION OF THE PRESCRIBED PERIODS IN RESPECT OF THE APPEALS AGAINST THE INTEGRATED ENVIRONMENTAL AUTHORISATION ISSUED FOR THE PROPOSED CONTSRUCTION OF A NUCLEAR POWER STATION AND ASSOCIATED INFRASTRUCTURE AT DUYNEFONTEIN, IN THE WESTERN CAPE PROVINCE

1. INTRODUCTION

In terms of the Environmental Impact Assessment Regulations, 2006, published by Government Notice (GN) No. R. 385, 386 and 387 of 21 April 2006 (2006 EIA Regulations), regarding activities identified under section 24 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA), the Chief Director: Integrated Environmental Authorisations of the Department of Environmental Affairs (the Department) authorised Eskom Holdings (SOC) Limited (the applicant), on 11 October 2017, to proceed with the construction of a Nuclear power station and associated infrastructure at Duynefontein, in the Western Cape Province.

2. BACKGROUND

- 2.1 The applicant lodged an application in May 2007 for the proposed construction of a Nuclear Power Station and associated infrastructure in the Western Cape or Eastern Cape Province.

- 2.2 The applicant thereafter commissioned an independent environmental consultancy to conduct an Environmental Impact Assessment (EIA) for the above mentioned application. Following the conclusion of a comprehensive and lengthy EIA process, the final Environmental Impact Report was acknowledged by the Department on 11 November 2016.
- 2.3 After receipt of all relevant information, the Department was satisfied that the applicant complied with the relevant provisions of the 2006 EIA Regulations and accordingly issued an EA to the applicant on 11 October 2017.
- 2.4 Following the issuance of the aforementioned EA, the Directorate: Appeals and Legal Review of the Department, on behalf of the Minister of Environmental Affairs, received 205 Notices of Intention to appeal from Interested and Affected Parties (I&APs) within the prescribed time period, which period lapsed on 31 October 2017.
- 2.5 On 1 November 2017, the Directorate: Appeals and Legal Review received a further notice of intention to appeal from the Western Cape Provincial Department of Environmental Affairs and Development Planning (DEADP), accompanied by a request for condonation for the late filling of the Notice of Intention to Appeal.
- 2.6 In addition to the above, the Directorate: Appeals and Legal Review received the following requests for extensions of timeframes within which to submit substantive grounds of appeal:
- 2.6.1 On 30 October 2017, Koeberg Alert Alliance requested an extension of 90 days from 31 October 2017, excluding the period from 15 December 2017 – 5 January 2018, to submit its grounds of appeal, which would accordingly be due on 23 February 2018;
- 2.6.2 On 28 October 2017, Mr Reyskens requested an extension of 90 days from excluding the period from 15 December 2017- 15 January 2018, to provide its grounds of appeal which would accordingly be due on 5 March 2018;

- 2.6.3 On 23 November 2017, Cliffe Dekker and Hofmeyr, on behalf of the applicant, requested an extension of an additional 60 days after receipt of all grounds of appeal to consolidate the appeals and to submit its responding statements thereto.

3 CONDONATION

- 3.1 In terms of section 47C of NEMA, read with Regulations 62(2) and 63(3) of the 2010 EIA Regulations, the Minister of Environmental Affairs has the legal authority to grant an extension or condonation for the late submission of an appeal or responding statement.

- 3.2 In terms of section 42 of NEMA, the exercise of the powers referred to in paragraph 3.1 above, have been delegated to the Director: Appeals and Legal Review of the Department.

- 3.3 Section 47C of NEMA provides as follows:

The Minister or an MEC may extend, or condone a failure by a person to comply with, a period in terms of this Act or a specific environmental management Act, except a period that binds the Minister or MEC.

- 3.4 Regulation 62(2) of the 2010 EIA Regulations provides as follows:

The Minister, MEC, Minister of Mineral Resources or designated organ of state, as the case may be, may, in writing, on good cause extend the period within which an appeal must be submitted.

- 3.5 Regulation 63(3) of the 2010 EIA Regulations further provides as follows:

The Minister, MEC, Minister of Mineral Resources or designated organ of state, as the case may be, may, in writing, on good cause extend the period within which responding statements in terms of subregulation (1) or an appellant's answering statement in terms of subregulation (2) (b) must be submitted.

- 3.6 In terms of Regulation 62(1) of the 2010 EIA Regulations, the notice of intention to appeal from DEADP, which was lodged on 1 November 2017, was consequently lodged one day outside of the prescribed timeframes. In motivating for the request to condone the late filing of its appeal, the DEADP submits that it only received the EA on 12 October 2017, and submits that its notice of intention to appeal was therefore submitted within 20 days from the date of receipt of the EA. The DEADP submits, furthermore, that the official responsible for delivering the notice of intention to appeal was out of the office on official duty and was experiencing a service disruption to email. In addition thereto, the DEADP submits that no prejudice will be suffered by the applicant or any other person should condonation be granted.
- 3.7 Koeberg Alliance submitted its notice of intention to appeal within the prescribed timeframes, but has requested an extension for the submission of its grounds of appeal. In motivating for its request for extension of the timeframe within which its grounds of appeal must be submitted, Koeberg Alliance submits that the ordinary period within which to prepare an appeal is inadequate when considering the extraordinary complexity and volume of information underlying this application. It submits, furthermore, that the EIR and EA is voluminous and may require inputs by relevant specialists. Koeberg Alliance submits, therefore, that for the appeal process to be fair, meaningful and legally defensible, the Department must provide the public with more time within which to prepare their appeals, and therefore requests a 90 day extension period from 31 October 2017, excluding the period from 15 December to 5 January 2018.
- 3.8 Mr Reyskens also submitted his notice of intention to appeal within the prescribed timeframes and has also requested an extension for the submission of his grounds of appeal. In motivating for his request for extension of the timeframe within which his grounds of appeal must be submitted, Mr Reyskens submits that due to the complexity of the appeal and the number of pages of documents that may need to be studied, he therefore requests a 90 day extension period from 31 October 2017, excluding the period from 15 December to 15 January 2018

- 3.9 On 23 November 2017, the applicant submitted a request for extension of the following prescribed timeframes:
- 3.9.1 A period of 30 days following submission of all appeals, including those appeals in which condonation was granted, for the Directorate: Appeals and Legal Review to consolidate all appeals and submit one bundle of appeals to the applicant;
- 3.9.2 A period of 30 days for the applicant to consider the evidence in the appeals and consolidate the arguments in the appeals submissions to allow for one consolidated response; and
- 3.9.3 A further 30 days to allow for 60 days from the date when the applicant has consolidated the evidence in the appeal submissions.
- 3.10 In motivating for its request for extension of the above mentioned timeframes, the applicant submits that good cause exists for the grant of an extension, particularly due to the extensive number of appeals submitted, the need for a fair administrative process, the national interest and technical nature of the information contained in the specialist reports, the length of the EIA and the need to streamline the appeal process. The applicant furthermore requests that all appeal submissions be handed simultaneously by the Directorate: Appeals and Legal Review to ensure that the process is not dealt with in a piecemeal manner and that all appeal submissions are collated and consolidated prior to its preparation of responding statements to the appeals.
- 3.11 The applicant has indicated, furthermore, that it does not intend to oppose the aforementioned condonation applications and requests for extension but submits that the extension period should be limited to granting an additional 60 days (i.e. 90 days in total), ending on 19 February 2018, for the submission of appeals. This, the applicant submits, is a reasonable period for purposes of perusing the EIA documents and obtaining specialist reports.

4. DECISION

4.1 In reaching my decision on the application for condonation for the late filing of the aforementioned notices of intention to appeal and the various requests for extension of the prescribed appeal timeframes, as per the 2010 EIA Regulations, I have taken the following into consideration:

- 4.1.1 Material information contained in the project file (12/12/20/944);
- 4.1.2 The request for condonation submitted by the DEADP on 1 November 2017;
- 4.1.3 The request for extension submitted by Koeberg Alliance on 30 October 2017;
- 4.1.4 The request for extension submitted by Mr D Reyskens on 28 October 2017;
- 4.1.5 The request for extension submitted by the applicant on 23 November 2017;
- 4.1.6 The response to the aforementioned requests for extension in terms of 4.1.3 and 4.1.4 above submitted by the applicant on 28 November 2017; and
- 4.1.7 Applicable case law, as well as the Appeals Guideline of the Department.

4.2 In arriving at my decision on the aforementioned requests for condonation and extension of time frames, it should be noted that I have not responded to each and every statement set out by the appellants and the applicant, and that where a particular statement is not directly addressed, the absence of any response should not be interpreted to mean that I agree with or abide by the statement made.

4.3 In evaluating the aforementioned requests for condonation and extension by the appellants and the applicant, and taking into consideration the aforementioned legal provisions, I have taken note of a long line of cases in respect of extensions of statutory time periods.

4.4 In particular, I have taken note of the fact that the courts have consistently held that in considering whether good cause is shown to extend a time period, a court may consider any relevant factor, including the degree of lateness, the explanation therefor, the prospects of success on the merits and the importance of the case. The courts have held further that although these factors are interrelated, they are not individually decisive and must thus be assessed together.

- 4.5 I am accordingly persuaded that the aforementioned requests for condonation and extension should be granted for the following reasons:
- 4.5.1 The degree of lateness of the DEADP appeal, which is a delay of one day, is very minor. The DEADP has furthermore furnished me with an eminently reasonable explanation for the delay and no prejudice will be suffered by the applicant or any other party as a result thereof.
- 4.5.2 With regard to the requests for extensions of the timeframes for the submission of appeals from Koeberg Alliance and Mr Reyskens, I am satisfied that the extra-ordinary nature of this appeal, the public interest in respect thereof and the voluminous nature of the specialist reports necessitate that the appeal period be extended beyond that provided for in the 2010 EIA Regulations.
- 4.5.3 The timeframe for the submission of grounds of appeals by Koeberg Alliance and Mr Reyskens is accordingly extended to 5 March 2018.
- 4.5.4 Furthermore, in the interests of a fair administrative process, all of the appellants are hereby afforded an extension of time within which to submit their grounds of appeal, which period will coincide with the extended period granted to Koeberg Alliance and Mr Reyskens and which period will therefore also be extended to 5 March 2018.
- 4.5.5 Appellants who have already submitted their appeals may elect to supplement those appeals and submit any supplementary appeals on or before 5 March 2018.
- 4.5.6 Similarly, I am persuaded that the interests of justice necessitate an extension of the timeframes for the consolidation of all appeals and for the submission of responding statements by the applicant, as detailed in paragraph 3.9 above.
- 4.6 The timeframes for the administration of the appeal process in respect of the aforementioned matter is therefore set out as follows:

PROCESS	DUE DATE
Final date for submission of grounds of appeal	5 March 2018
End of collation period	4 April 2018
Submission of Responding Statements	4 June 2018



ZIYAAD HASSAM

DIRECTOR: APPEALS AND LEGAL REVIEW

DATE: 1/12/2017