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Comments regarding the Musina-Makhado Special Economic Zone Designated Site

Final Environmental Impact Assessment Report, September 2020

04 October 2021

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A) Introduction

1. The Centre for Applied Legal Studies ("CALS") welcomes the further opportunity provided to submit comments on the Musina-Makhado Special Economic Zone (MMSEZ) Environmental Impact Assessment Report (Final Report). It is, however, with regret that we note that our previous recommendations have not been meaningfully considered and have clearly not influenced the Final Report. It is further of concern and completely unacceptable that we were not sent the Final Report or given the opportunity to comment by EnviroXcellence, but rather had to be informed of the release of the Final Report by other organisations. We also note with extreme unease the reports of community members and interested parties being refused access to a landowner meeting by armed guards earlier this year. These reasons and issues set a dangerous precedent for the future of this project and we strongly suggest they are addressed in order to ensure a free, transparent and fair public participation process.

2. The purpose of these follow-up comments is to reiterate our previous submission made in October 2020 as part of the EIA process led by Delta Built Environment Consultants, and echo the objections already raised by stakeholders with regards to fatal flaws. These include, inter alia, the level of government at which this assessment was conducted, the choice of process (the failure to pursue a Strategic Impact Assessment (SEA) and the piece-meal approach to the EIA application) and deficiencies with regards to broad-based public participation.

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B) Competent Authority

3. A serious fatal process flaw concerns the incorrect competent authority that was identified to oversee the current EIA process. Importantly, since the process was initiated by a statutory body (Limpopo Economic Development Agency "LEDA") it falls within section 24 (2) (d) (iii) of NEMA which makes the Minister of Environment, Forestry and Fisheries rather than LEDET the competent authority. This alone is a fatal procedural flaw that should require the process to be restarted with the correct designated competent authority.

C) Regional Cumulative Impact

4. As has been raised on numerous occasions in response to previous developments (including the Coal of Africa, Vele Colliery dispute), it is premature and inappropriate to conduct an EIA with respect to a development and spatial plan with vast potential environmental, social, economic and human rights implications in the absence of a prior SEA as provided for in NEMA. An SEA is the appropriate tool for measuring the regional cumulative impacts of a proposed large scale development plan of a highly impactful nature. We therefore echo the civil society sector call for this process to be scrapped pending an SEA to be overseen by the Minister being the competent authority.

D) Notification and Participation

5. As mentioned above, we were not notified of the release of the Final Report, neither sent an invitation to comment, or even notified of the public participation meetings. This oversight is contrary to Regulation 43 of the EIA Regulations as all I&APs are entitled to comment on all reports or plans and Regulation 3(8) of the EIA regulations requires the commenting period to be at least 30 days. The Promotion of Administrative Justice Act (PAJA) also requires a reasonable and fair administrative process, requiring proper notification to the public and a commenting process. We have also become aware that we, as CALS, are not alone in being completely left out of this process managed by EnviroExellence. We are, therefore, of the strong opinion that since numerous I&APs have been excluded from the present EIA process and all relevant documents, including the EIA documents, have not been made available to the public, the current participatory process does not meet the NEMA and EIA regulation requirements, or reasonable administrative decision making process requirements in terms of PAJA.

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E) Lapsed Timeframe

6. We wish to draw your attention to the fact that given the scoping report was approved on 31 May 2019, the application is now out of time. Once the scoping report is approved, applicants have 106 days to submit the EIR and EMPr including a 30 day public participation process.[1] If during the course of the process 'significant changes have been made or significant new information has been added to the environmental impact report or EMPr, which changes or information was not contained in the reports consulted on during the initial public participation process' an additional 30 day public participation process is required and the amended deadline is 156 days following the competent authorities' acceptance of the scoping report.

7. 107 days following receipt of the EIR and EMPr the authority must elect to either grant environmental authorisation for all or part of the activity applied for or refuse authorisation.[2] Consequently the authorisation cannot occur later than 213 days of the acceptance of the scoping report (263 days if the additional 50 days for the EIR/EMPr are required) of the acceptance of the scoping report, a time period which has been exceeded in this case. For this reason, this EIA process is null and void. Should the applicant wish to still proceed with the project an entirely new application and EIA process would be required.

F) Unintegrated EIA Process

8. The unintegrated approach to the application process for environmental authorisation is one of the most pressing concerns related to this mega-project, and is in clear contradiction of principles of Integrated Environmental Management. The law clearly requires that the entirety of the project activities must be applied for in order for the competent authority to have a full understanding of the cumulative impact of all the listed activities. By separately applying for the land clearance for the purposes of fence construction, the applicant attempts to separate the myriad of activities that the project comprises of, ultimately making the complete understanding of the full impact impossible to comprehend. This approach is clearly unlawful and constitutes a fatal flaw.

[1] Regulation 23 (1) (a) of the NEMA EIA Regulations, 2014.
[2] Regulation 24 (1) of the NEMA EIA Regulations, 2014

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G) Development Uncertainty

9. Taking the above into consideration, it follows that due to the piece-meal approach taken by the applicant, it is impossible to have any type of certainty on what type of operations will be developed on the property. This developmental uncertainty is contrary to the fundamental NEMA s 2 principles and does not provide the necessary information for the competent authority to have a meaningful understanding of the cumulative impact of the entirety of the project. This approach also raises questions as to the plans to rehabilitate the cleared land identified in this application should the other future activities not be permitted. Assurances must be provided in this regard. This, again, shows the unlawful nature of the process and constitutes a fatal flaw.

H) Regional Impact

10. We take issue with how the SEZ will affect South Africa's neighbouring country of Zimbabwe. The Constitutional Court in the *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) states that:

> *"The correct approach to sound diplomatic relations and international cooperation here is, from a correct South African perspective, fundamentally about the protection and promotion of the essence of our Bill of Rights…. We ought to relate cordially with other nations and not to dictate to them. Similarly, we are never to feel obliged to relinquish our sovereignty and rightful place in the family of nations at the altar of diplomacy, comity and the need for consensus. We thus have to relate with other sister countries with an unshakeable purpose of contributing to the realisation of a more just, equal, peaceful, human rights-oriented, truly democratic order and shared prosperity. This is especially so in a region that has a long and painful history of struggling for the attainment of these good governance, economic development, growth and stability-enhancing goals of universal application".*[3]

[3] *Law Society of South Africa and Others v President of the Republic of South Africa and* Others 2019 (3) SA 30 (CC) at para 91.

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11. On socio-economic development and the environment; the Constitutional Court stated the following concerning development under the South African Constitution in the *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC), which concerned the interaction between social and economic development and the protection of the environment:

> *"The Constitution recognises the interrelationship between the environment and development; indeed, it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development". Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment."*[4]

I) Incompatibility with Spatial Plans

12. In echoing the submission of other organisations and concerned parties, we have noted with concern that the Bioregional Plans for all the district municipalities have been published. Please provide an explanation for this omission. According to law, these plans must be considered before developments of this magnitude are approved.

J) CONCLUSION

13. The Musina-Makhado EIA and the SEZ suffers from fundamental and fatal flaws at the levels of conception, procedure and is prima facie unlawful. Conceptually it commits the area to a high carbon growth path which runs counter to the need

[4] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) at para 45.

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to arrest the climate emergency while ensuring a just transition to an energy and economic development trajectory that places communities and workers at the centre of decision-making and benefits. Process wise it fails to use the tool of SEA, is unintegrated, uncertain and under the auspices of the incorrect government functionary.

14. Thank you for providing the opportunity to provide input. For queries and further information, please contact Dr. Louis Snyman (Senior Attorney, Head: Environmental Justice) at Louis.Snyman@wits.ac.za or 011 717 8629. CALS welcomes any opportunity for further engagement.