

APPEAL SUBMISSION



**APPEAL SUBMISSION
TO
THE KWAZULU-NATAL MEC FOR ECONOMIC DEVELOPMENT,
TOURISM & ENVIRONMENTAL AFFAIRS**

Appeal submission in terms of section 43 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) and the National Appeal Regulations, 2014

This notice may be posted, faxed, e-mailed or hand delivered to:

**THE APPEAL ADMINISTRATOR,
OFFICE OF THE KWAZULU-NATAL MEC FOR ECONOMIC DEVELOPMENT, TOURISM &
ENVIRONMENTAL AFFAIRS**

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EIA or Waste Management
Licence Provincial Reference
Number¹
Date Received:

KZN/EIA/0001494/2021

13th Sept 2021

¹ Please provide the relevant application reference number)

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DETAILS OF PROJECT

EIA Reference or Waste Management Licence Provincial Reference No:
Project description:

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| KZN/EIA/0001494/2021 |
| Proposed Establishment of a Fuel Filling Station on Erf 3148, Howick, Umngeni Municipality, KwaZulu-Natal |
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1. Locus Standi and Confirmation of Compliance with Regulation 4(1) of the 2014 EIA Regulations

1.1 This appeal is submitted on behalf of the Federation for Sustainable Environment (FSE). The FSE is a federation of community based civil society organisations committed to the realisation of the constitutional right to an environment that is not harmful to health or well-being, and to having the environment sustainably managed and protected for future generations. Their mission is specifically focussed on addressing the adverse impacts of mining and industrial activities on the lives and livelihoods of vulnerable and disadvantaged communities who live and work near South Africa's mines and industries.

1.2 In terms of section 43(2) of the National Environmental Management Act, 107 of 1998 (NEMA), "*any person may appeal to an MEC against a decision taken by any person acting under a power delegated by that MEC under this Act or a specific environmental management Act*".

GROUNDS FOR THE APPEAL

2. Piecemeal Approach

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- 2.1 According to the Final Basic Assessment Report (BAR), “*The filling station will require a Special Consent application in terms of the uMngeni Spatial Planning and Land Use Management By-Laws*”² read with the uMngeni Urban Planning Scheme. It is uncertain whether a Special Consent Application was submitted. It is certain, however, that a Special Consent was not granted in terms of uMngeni Spatial Planning and Land Use Management By-Laws.
- 2.2 In addition, the proposed development is likely to trigger regulated activities in terms of section 21 (a) taking water from a watercourse, (c) impeding or diverting the flow of water in a watercourse, (f) discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit, (g) disposing of waste in a manner that may detrimentally impact on a water resource and (i) altering bed, banks, course or characteristics of a watercourse, of National Water Act (NWA), 36 of 1998.
- 2.3 According to the Final BAR a considerable portion of the site is furthermore occupied by a wetland buffer, (page 13 of the Final BAR).
- 2.4 At the time of the granting of the EA, a Water Use License (WUL) was applied for but not granted. In terms of the One Environmental System a piecemeal approach cannot be permitted.
3. Gaps
- 3.1 In terms of Chapter 2 of the National Environmental Management Act, 107 of 1998, section 4, subsection (vii) “*a risk-averse and cautious approach*” must be applied.

² Page 3 of the Final BAR.

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3.2 Biodiversity

3.2.1 The Midmar Nature Reserve is less than 500 m to the south of the site. Nature Reserves are important for conserving biodiversity, for supporting or buffering other biodiversity priority areas, for maintaining important ecosystem services for particular communities or the country as a whole.

3.2.2 The BAR refers to an assessment of biodiversity on only the project area. The BAR ought to have included an assessment of the proposed Project on the biodiversity of the Midmar Nature Reserve in order to determine the significance of the impact on biodiversity.

3.3 Air quality

3.3.1 The Final BAR refers to Section 5.6 for information on the air quality and light pollution. However, Section 5.6 of the Final BAR addresses the traffic impacts and not impacts on air quality. The only reference to air quality in the Final BAR is the following: *“During operation the development is unlikely to impact on air quality, provided the facility complies with SANS. Air quality complaints are not currently received for the two existing filling stations at Tweedie / Lions River / Howick, and these are located closer to residential areas compared to the proposed filling station.”*

3.3.2 The cumulative impacts of the existing filling stations together with the proposed Project on the air quality and human health have not been assessed. Diesel and other motor fuels contain aromatic hydrocarbons including benzene. These substances are dangerous to human health. Vapour releases occur during tanker offloading. Fuel vapour does not disperse easily and may also travel long distances. It tends to sink to the lowest possible level and may collect in tanks, cavities, drains, pits, or

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other enclosed areas, where there is little air movement.

3.4 Fire and explosion risks

3.4.1 Furthermore, fire and explosion risks have not been adequately assessed.

3.5 Impacts on the Wetlands

3.5.1 The Wetland Delineation and Assessment Study:

- *“...identified two freshwater ecosystems within 500m radius of the proposed upgrade (sic) activities”.*
 - *“The first wetland is a hill slope seep wetland.*
 - *“The second Hydrogeomorphic Unit (HGM) identified within the study site is an un-channelled valley-bottom wetland.*
 - *“Although modified, this wetland does provide ecosystem services within the landscape, contributing to the overall functional integrity of the greater uMngeni River catchment, as a high priority and protected water resource.”*
- 3.5.2 Furthermore, according to the Final BAR a considerable portion of the site is furthermore occupied by a wetland buffer.
- 3.5.3 In terms of the Department of Water and Sanitation’s National Water and Sanitation Master Plan, South Africa has lost over 50% of its wetlands, of the remaining 3.2 million hectares, that is, one third are already in a poor condition.
- 3.5.4 A suite of wetland policy imperatives relating to wetland management and protection are embedded in existing policies and international commitments, which have relevance to the proposed Project. These are:

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3.5.4.1 The DWS Wetlands Policy of 2018 (Draft), which recognizes the need for the protection of pristine wetland ecosystems as a basis for addressing water scarcity and water risks as well as addressing several key challenges related to food and climate. There are also several regulating authorities with a mandate for wetland management in South Africa. These mandates are entrenched in legislation, e.g. the NWA, NEMA, NFA, NEM: PAA, NEM:BA, NEM:ICMA, CARA, ECA, SPLUMA, MSA, DMA, NVFFA.

3.5.4.2 Sustainable Development Goals in particular Goal 6.6 namely: *“By 2020, protect and restore water related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes.”*

3.5.4.3 Convention on Biodiversity. Given that wetlands are considered an ecosystem type rich in biodiversity the imperatives of the convention can only be realised through measures aimed at the conservation and effective management of wetlands.

3.5.4.4 The United Nations Framework Convention on Climate Change. The objective of this Convention is to stabilize greenhouse gas concentrations “at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system.” The Convention further stipulates that “such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner.”

3.5.4.5 The United Nations Convention to Combat Desertification. As with the convention on climate change effective wetland management can combat desertification as in their pristine state some wetlands are capable of providing food, fibre, fodder and water for domestic or agricultural purposes during the dry season when alternative sources of water have long since be exhausted.

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3.5.4.6 Ramsar Convention on wetlands. The convention on Wetlands is an intergovernmental treaty with the following vision statement: “Wetlands are conserved, wisely used, restore and their benefits are recognized and valued by all”. Their mission is “the conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world.”

3.5.5 In the light of the abovementioned national and international obligations to protect wetlands and in the light of the ecological importance and sensitivity of the wetlands the Wetland Assessment is too basic.

3.5.6 As a result of these gaps in information, mitigation and management measures are inadequate to either remove these risks or, where this is not possible, to control them.

4. Cumulative Impact of the proliferation of filling stations and of the proposed filling station on existing ones and the environment

4.1 Seven (7) petrol stations, inter alia the Zenex Tweedie, Thokans filling station, Engen Howick and BP Howick Falls filling stations already exist in close proximity to the proposed Project, with one filling station less than a kilometre from the proposed site.

4.2 In terms of section 24 of the Constitution of the Republic of South Africa, 108 of 1996, the environment must be protected through reasonable legislative and other measures that “*secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*” It is our considered opinion that the proposed filling station is not economically justifiable and ecologically sustainable in the light of the already existing power stations

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within the area and the sensitivity of the area.

- 4.3 The judgement handed down by the Constitutional Court in the Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others on the 7th of June 2007 has relevance. The judge held that the Constitution recognizes the interrelationship between the protection of the environment and socio-economic development. It contemplates the integration of environmental protection and socio-economic development.
- 4.4 Ngcobo J held that the obligation of the environmental authorities to consider socio-economic factors includes the **obligation to consider the impact of the proliferation of filling stations and of the proposed filling station on existing ones. This obligation is wider than the requirement to assess the need and desirability. It also comprehends the obligation to assess the cumulative impact on the environment of the proposed development.**
- 4.5 The proliferation of filling stations poses a potential threat to the environment, which arises from the limited end-use of filling stations upon their closure. The filling station infrastructure that lies in the ground may have an adverse impact on the environment.
- 4.6 Grounded upon the abovementioned judgment, the FSE submits that the cumulative impacts on the environment of the existing filling stations and the proposed filling station, with its proposed 21 (twenty-one) x 23 000 litre fuel tanks, with storage capacity of 493 000 liters of fuel, were not adequately considered in the Final BAR and the EA.
- 4.7 Although it is alleged that the proposed Project will contribute towards poverty

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alleviation, infrastructure, job creation and skills development, it must be noted that a healthy environment (biophysical) is the primary and essential foundation for socio-economic activity and development. The economy is entirely dependent on the environment. There can be no sustainable socio-economic development on a deteriorating environmental base.

5. Best Practicable Environmental Option (BPEO)

5.1 The BPEO was not adequately evaluated.

5.2 Although it is argued by the Environmental Assessment Practitioner (EAP) that *“the establishment of the filling station will contribute towards local job creation, poverty alleviation and skills development”*, the balancing of the negative environmental impacts versus the short term social benefits and the economic advantages can only be assessed if the loss to the environment is evaluated and the potential impacts on the existing filling stations within the area.

5.3 The BAR has not adequately taken into account the environmental sensitivity of the area (the Midmar Dam the uMngeni River and the Midmar Nature Reserve), the overall environmental and socio-economic costs and benefits.

5.4 This ought to have included an assessment of the opportunity costs, e.g.:

- Understanding the value of the foregone opportunity/opportunities;
- The achievement of the desired aim/goal for the specific area;
- Optimising of positive impacts;
- Minimising of negative impacts;
- Equitable distribution of impacts; and

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- The maintenance of ecological integrity and environmental quality.

5.5 Applying the “opportunity cost” principle would change the question being asked, namely, by placing a positive duty upon the decision maker to consider if the proposed development will constitute the best use of the resources (i.e. the best practicable environmental option).

SUBMITTED BY:



Mariette Liefferink.

CEO: FEDERATION FOR A SUSTAINABLE ENVIRONMENT

13 September 2021

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1. DOCUMENTS THAT MUST ACCOMPANY THIS APPEAL SUBMISSION

This appeal submission must be accompanied by an Appendix that includes the following documents (refer to regulation 2(b) of the National Appeal Regulations, 2014):

- i. A statement setting out the grounds of appeal;
- ii. Supporting documentation which is referred in the grounds of appeal; and
- iii. A statement, including supporting documentation, by the appellant to confirm compliance with regulation 4(1) of the National Appeal Regulations, 2014.

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2. DETAILS OF APPELLANT

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| Is the appellant the applicant for this project? | YES | NO X |
|--|-----|------|

Full names of Appellant

Mariette Liefferink.

CEO: FEDERATION FOR A SUSTAINABLE ENVIRONMENT

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Date

13 September 2021

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