



Western Cape
Government

Environmental Affairs and
Development Planning

MINISTRY OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND
DEVELOPMENT PLANNING

14/3/6/A1/2/0278/17

Mr Dave Lewis
PC Revalidation cc
122 Peter van Eck Street
ATLANTIS INDUSTRIAL
7352

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Dear Mr Lewis

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE ADMINISTRATIVE FINE DECISION ISSUED FOR THE UNLAWFUL ZINC SPRAY OPERATION OF PORTABLE LIQUID PETROLEUM GAS CYLINDERS WHICH REQUIRES A PERMIT OR LICENSE IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT, 2004 (ACT NO. 39 OF 2004) ON PORTION 4 OF FARM NO. 122, ATLANTIS

Your appeal lodged against the Administrative fine decision issued by the Department of Environmental Affairs and Development Planning on 7 July 2017, refers.

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)* (as amended) ("NEMA"), I have decided to partially uphold your appeal and vary the abovementioned decision of the delegated officer.

In terms of section 24G(4) of the NEMA you are hereby informed that in order for the competent authority to process your application further, an administrative fine of **R 50 000-00** (Fifty thousand Rand) must be paid.

1. Payment may be made by cash, cheque or electronic transfer as follows:

Cash Payment:

The amount may be paid at the cashier's office of the Department of Environmental Affairs and Development Planning, 1st floor Utilitas Building, 1 Dorp Street, Cape Town from Mondays to Fridays

809 Utilitas Building, Cape Town, 8001 Private Bag X9186, Cape Town, 8000
tel: +27 21 483 3721 fax: +27 21 483 4174 www.westerncape.gov.za/eadp

between 8h00 and 12h30. The following allocations must be given to the cashier when making the payment:

Reference No: S24G00192

Item: section 24G Administrative fine

Company/ Individual Name:

ID No:

Cheque Payment:

The cheque must be crossed and made payable to the Department and may either be deposited at the aforementioned cash office under the allocations mentioned above or deposited directly in the bank account. (See bank details below)

Electronic Transfer

An electronic transfer may be made to the following account:

Name of Bank:	NEDBANK
Name of Account:	Provincial Government of the Western Cape Department of Environmental Affairs and Development Planning
Account Type:	Current Account
Account Number	1452 045 003
Branch Name:	NEDBANK CORPORATE
Branch Code:	145 209
Reference No.:	S24G00192

You are hereby requested to forward a copy of the proof of payment (e.g. receipt, deposit slip, electronic transfer confirmation) to the Sub-directorate: Rectification for the attention of Ms Moe'mina Hoosain (Tel: (021) 483 2755 and Email: Moe'mina.Hoosain@westerncape.gov.za) and quote the abovementioned reference number to ensure that the case officer can acknowledge the payment of the administrative fine.

The administrative fine must be paid within **60 days** from the date of this letter. However, the payment of the administrative fine in instalments may be arranged with the competent authority. If no payment of the administrative fine is received and/or no arrangement of the fine payment is made with the competent authority within the abovementioned timeframe, the competent authority will proceed with the appropriate law enforcement action.

Please take note that the administrative fine is not an authorisation of the unlawful commencement of the listed activities according to the NEMA. Consideration of your application will only commence upon the payment of the administrative fine.

REASONS FOR THE DECISION:

In addition to the reasons contained in the abovementioned Administrative Fine decision, the following are reasons to uphold your appeal and vary the original administrative fine issued by the delegated authority:

Financial Position

- 1.1 The NEMA principles that apply to the actions of all organs of state that may significantly affect the environment specifically require *inter alia* that:
 - i. Environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural and social interests equitably;
 - ii. Development must be socially, environmentally and economically sustainable;
 - iii. That the disturbance of ecosystems and loss of biological diversity are avoided, or where they cannot be altogether avoided, are minimised and remedied;
 - iv. That a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
 - v. The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.
 - 1.2 The trigger of the listed activity is based on the following history of the matter:
 - 1.2.1 Pre – 1998: The site was a hat manufacturing company.
 - 1.2.2 At the beginning of 1998: Pressure Concepts, the previous owner of the facility (also a cylinder re-certification and testing station) had their facility on the site from 1998 - 2006. Pressure Concepts installed a cylinder re-certification facility (including the installation of the combustion installation and zinc spray operation).
 - 1.2.3 At the beginning of 2006 Pressure Concepts liquidated.
 - 1.2.4 In November 2006, PC Revalidation (the applicant) registered their new company and re-commenced the Liquid Petroleum Gas ("LPG") gas bottle refurbishment facility. The facility and equipment in the facility was purchased from the liquidator – PC Revalidation then recommenced with the cylinder re-certification and testing station.
 - 1.2.5 In 2006 – 2013, minor upgrades were effected by PC Revalidation to the building infrastructure which included installing additional roof structures, construction of a chemical liquid store (which was later relocated), relocation of windows and doors, and the construction of a second paint spraying booth area (within the same warehouse).
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- 1.2.6 In November 2013, the facility was upgraded from a 6000m² facility to a 10000m² facility to include 4000m² of additional storage space (to store empty gas bottles). The upgrade basically involved placing gravel aggregate on the surface. Empty cylinders are stored in this area.
- 1.2.7 In July 2014, an external flammable liquids / chemical storage area was constructed with an impervious concrete floor and a canopy.
- 1.2.8 In July 2014, new shot blasting equipment was installed.
- 1.2.9 In August 2015, the zinc spray operation was decommissioned.
- 1.2.10 In September 2015, the area outside directly surrounding the previous vent where zinc particles were deposited to the ground and emitted to the atmosphere was remediated in September 2015. An area of approximately 18m x 25m wide and 300mm deep was dug up and the "dirty" soil (contained steel and zinc particles) was stockpiled on site (still observed on site on 2 November 2015).
- 1.2.11 In November 2015, PC Revalidation installed the new equipment which was bolted to the wall and bolted together, etc. for the new zinc spraying operation. A new reverse pulse bag extraction system was installed but was not operational. No zinc spraying activities are taking place at the facility.
- 1.2.12 In 2016, PC Revalidation proposed to re-start their zinc spraying operation if the Department allow them to do so. It was also proposed to construct a dedicated hazardous waste storage area (<10m²) and to install an "afterburner" at the oven stack.
- 1.3 An application form which complied with section 24G of the NEMA was submitted by the applicant to obtain a retrospective EA for the listed activities which were commenced with in relation to the abovementioned development.
- 1.4 The competent authority was correct in imposing an administrative fine as section 24G(4) of the NEMA requires an applicant that has commenced with an activity without an authorisation to, in the rectification process of the unlawful activity, pay an administrative fine which may not exceed R 5 million rand. Section 24G(4) of the NEMA does not make provision for exemption from the payment of the administrative fine.
- 1.5 On 20 June 2014, the National Department of Environmental Affairs developed the Section 24G Standard Operating Procedure (which was made available for the applicant's consideration) for the determination of section 24G(4) Administrative fines. This section 24G Standard Operating Procedure included a calculator for the determination of the administrative fines.
- 1.6 The calculator is based on the following indexes which must be informed by the impacts that have resulted from the unlawful activities:
 - 1.6.1 Social Benefit Index (e.g. intended only for Municipal Infrastructure);
 - 1.6.2 Socio-Economic Impact Index;
 - 1.6.3 Biodiversity Impact Index;
 - 1.6.4 Sense of Place &/ or Heritage Impact Index; and
 - 1.6.5 Pollution Impact Index.
- 1.7 The abovementioned Standard Operating procedure states that the Section 24G Calculator serves as a guideline for the determination of the quantum of the fine to be imposed and should

therefore not be rigidly applied. The section 24G Standard Operating Procedure for the determination of administrative fines further states that a decision-maker may deviate from the administrative fine calculated based on the following reasons, *inter alia*:

- 1.7.1 Aggravating circumstances such as blameworthiness (was the activity committed in flagrant disregard of the law), non-compliance history (repeat or habitual offender), risk of environmental harm and ignoring previous advice from the Department;
 - 1.7.2 Mitigating circumstances, preventative measures, cooperation with the Department, self-reporting, immediate voluntary remediation and personal circumstances of the offender.
- 1.8 On 18 December 2013, sub- sections 44 (1) (aC) and (1B) of the *National Environment Laws Second Amendment Act, 2013 (Act No. 13 of 2013)* ("NELSAA") came into effect. Section 44 (1) (aC) of the NELSAA stated that "*The Minister may make regulations relating to the procedure and criteria to be followed in the determination of an administrative fine in terms of section 24G*". Section 44 (1)(1B) of the NELSAA further stated that "*Until such time that the regulations under subsection (1) come into effect, the existing standard operating procedure, adopted by the Minister for determining administrative fines in terms of section 24G, applies*".
- 1.9 The section 24G calculator distinguishes between the following two categories of offenders:
- 1.9.1 Category 1 offenders are companies, parastatals and government departments.
 - 1.9.2 Category 2 offenders are individual persons.
- The decision-maker was of the opinion that it was appropriate to regard the applicant in this matter as Category 1 offender.
- 1.10 The Department of Environmental Affairs and Development Planning's Director: Environmental Law Enforcement was designated in terms of section 31D of the NEMA to be an environmental management inspector ("EMI") to enforce the provisions of the NEMA such as your commencement with a listed activity without obtaining an EA in terms of the NEMA and Environmental Impact Assessment ("EIA") Regulations.
- 1.11 Guided by the abovementioned NEMA principles which require developments to be socially, environmentally and economically sustainable, the Directorate: Environmental Law Enforcement relaxed the compliance notice's requirement for stopping the use of the Heat Treatment Furnace on the site.
- 1.12 Therefore, the Department does not want the development in question to close down, but it is mandated by the NEMA to enforce its provisions, where there is non-compliance with its provisions, in order to ensure that the environment is protected in light of sustainable development.

Employer In Atlantis

- 1.13 In the matter between the Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others (CCT67/06) (7 June 2007), the Constitutional Court set aside the Record of Decision which authorised a new service station in White River, Mpumalanga and

referred it back to the competent authority for reconsideration based on, *inter alia*, the following grounds:

- 1.13.1 The Environmental Authority did not consider the impact of the proposed development on existing ones and assess the cumulative impacts on the environment of the proposed development.
 - 1.13.2 It stressed that the objective of considering the impact of a proposed development on existing ones is to ensure the economic, social and environmental sustainability of all developments.
- 1.14 The *Constitution of Republic of South Africa, 1996 (Act No. 108 of 1996)* recognises the inter-relationship between the environment and 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(d)(iii) of the NEMA 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*".
- 1.15 The section 24G EIA Report which meets the requirements of section 24G of the NEMA stated that:
- 1.15.1 The **Social Benefit Index** should be weighted on the administrative fine calculator that: "*The activity provides indirect social service / infrastructure to the affected community*". The motivation provided for this weighting states that:
 - 1.15.1.1 Residual gas left in cylinders is always decanted before the cylinders can be worked on. The decanted gas is used by the owner of the facility for his private use at home, for use to power the oven and also staff members are permitted to take gas home with them for their private use if excess gas is available.
 - 1.15.1.2 This decanted gas provides a social service to the employees and their families because many of the employees cannot afford or do not have electricity supply at home.
 - 1.15.2 The **Socio-Economic Impact Index** should be weighted on the administrative fine calculator that: "*The activity will not give rise to any negative socio-economic impacts*". The motivation provided for this weighting states that no negative socio-economic impacts have occurred but positive socio-economic impacts have occurred because PC Revalidation provides 35 permanent jobs and 15 temporary jobs to the Atlantis community each year. The additional information is submitted during this appeal process contains proof of employment of the local residents at the facility.
 - 1.15.3 The **Biodiversity Impact Index** should be weighted on the administrative fine calculator that: "*The activity will not give rise to any impacts on biodiversity*". The motivation
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provided for this weighting states that the facility has been in operation for 9 years. The facility is located within in an existing formalized industrial area, surrounded by industrial activities on all sides. No impacts occurred or are expected to occur to the botanical or freshwater resources / species.

1.15.4 The **Sense of Place &/ or Heritage Impact Index** should be weighted on the administrative fine calculator that: "*The activity is in keeping with the surrounding environment and / or does not negatively impact on the area's sense of place and/or heritage*". The motivation provided for this weighting states that the facility has been in operation for 9 years. The facility is located within in an existing formalized industrial area, surrounded by industrial activities on all sides. It is therefore in keeping with the surrounding environment.

1.15.5 The **Pollution Impact Index** should be weighted on the administrative fine calculator that: "*The activity could give rise to pollution with moderate impacts*". The motivation provided for this weighting states that:

1.15.5.1 The facility, under PC Revalidation ownership, has been in operation since February 2007 (9 years).

1.15.5.2 The significant impacts that have occurred over the past 9 years include the following:

- Air quality impacts of a medium negative significance.
- Soil impacts of a medium negative significance.
- Health impacts of a medium negative significance.
- Safety impacts of a medium significance.

1.15.5.3 However, the recent upgrades to the equipment at the facility and the remediation of contaminated soil has reduced the air quality impacts to a low negative significance, the health impacts to a low negative significance, the soil impacts to a low negative significance and safety impacts to a low negative significance.

Written representations in terms of the section 24G Standard Operating Procedure

1.16 On 11 October 2017, the applicant was requested to submit written representations in terms of the section 24G Standard Operating Procedure including the Administrative fine calculator.

1.17 On 8 March 2018, the following written representations *inter alia* were provided by the applicant:

1.17.1 PC Revalidation cc submitted financial statements from an auditor stating that no profit was made in year 2017 (instead carried over a deficit of R 231 751-00) and up to 28 February 2018 they have a debt of R 852 791-00.

1.17.2 PC Revalidation cc also submitted proof of payment (i.e. financial statements from an auditor and the bank statements) of its employees.

1.18 On 15 May 2017, the application which was submitted by Galvatech (Pty) Ltd in terms of section 24G of the NEMA to obtain a retrospective EA for a listed activity in relation to the unlawful zinc

metal spray at Galvatech on Erf No. 37978, Sacks Circle, Bellville was issued a R 125 000-00 administrative fine. However, this is the only application that relates to the same listed activity that could be retrieved from the Department's database although the merit of this application is different compared to the current section 24G application under consideration.

Essential service to alternative energy providers

- 1.19 The White Paper on Sustainable Energy for the Western Cape Province sets out, inter alia, the sustainable energy goals of the Province, indicating that energy security plays a crucial role in ensuring that the Province can meet its economic, social and environmental objectives and that it will remain an attractive destination for investment.
- 1.20 While the paper does not focus on liquid petroleum gas ("LPG") specifically, it is clear that LPG is a cheap, alternative and renewable energy source which presents numerous significant environmental and socio-economic benefits. Access to energy will play a role in the achievement of the Millennium development goals and objectives. LPG is viewed globally as one of the means which could enable sustainable development. The broader South African energy sector and government are under pressure to introduce alternative energy sources into the market to reduce reliance on electricity which has a history of being unstable and will play a role in the achievement of the Millennium development goals and objectives. Analysis of LPG supply and demand in the South African energy market suggests that increased use of LPG would save Eskom billions of rand, as fewer new power stations would be required.
- 1.21 There has been a lack of development in the production capacity of the local refineries and a lack of funding for infrastructure development which has impacted negatively on the availability of product volumes as well as the security of the supply. The lack of bulk storage facilities has further limited the country's ability to import LPG product.
- 1.22 To ensure that cylinders remain safe and are repaired when identified as damaged, the South African Pressure Equipment Regulations require that only the approved cylinder test stations recertify cylinders. PC Validation is the only cylinder test station approved to recertify LPG cylinders in accordance with SANS 10019 and SANS 1825 in the Western Cape.

In light of the above and the fact that deviation from the use of the administrative fine calculator to determine the administrative fine is allowed, the administrative fine should be R 50 000-00 (Fifty thousand Rand).

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. 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.

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

Yours faithfully



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

DATE: 23/5/2010

CC: (1) Ms Lauren Eiston (Sharples Environmental Services cc)

- (2) Mrs Z Toefy (Sub-directorate: Rectification)
- (3) Ms S Msila (DEA&DP- Financial Accounting)
- (4) Mr I Gildenhuys (City of Cape Town: Air Quality)
- (5) Adv. C Maré (DEA&DP)

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