



IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO NET/196/2016 OF 2016

SAVE LAMU.....1ST APPELLANT
SOMO M. SOMO.....2ND APPELLANT
RAYA FAMAU AHMED.....3RD APPELLANT
MOHAMMED MBWANA.....4TH APPELLANT
JAMAL AHMED ALI.....5TH APPELLANT
ABUBAKAR MOHAMMED TWALIB.....6TH APPELLANT

-VERSUS-

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....1ST RESPONDENT
AMU POWER COMPANY LIMITED.....2ND RESPONDENT

NOTICE OF APPEAL

Rule 4 (1)

VOL 1



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AMU POWER COMPANY LIMITED.....2ND RESPONDENT

NOTICE OF APPEAL

Rule 4 (1)

1. APPELLANTS:

Organisation: **Save Lamu**

Individuals: **Somo M. Somo, Raya Famau Ahmed, Mohammed Mbwana, Jamal Ahmed Ali, Abubakar Mohammed Twalib.**

Physical address for service: **Suyianka Lempaa & Co. Advocates, Ambank House, 3rd Floor, ICPC Suit, Utalii Lane, Off University Way, Nairobi**

Postal Address: **P.O. Box 5436-00100, Nairobi**

Telephone No: **0731 870 874**

2. 1ST RESPONDENT:

Other: **Statutory Authority (National Environment Management Authority)**

Physical address for service: **Popo Road, South C, Off Mombasa Road**

Postal Address: **P.O. Box 67839-00200 Nairobi**

Telephone No: **020 210 1370**

3. 2ND RESPONDENT:

Business: **Amu Power Company Limited**

Physical address for service: **4th Floor, Geminia Insurance Plaza, Upperhill**

Postal Address: **P.O. Box 61872-00200 Nairobi**

Telephone No: **+254 20 272 5334**

4. DECISION/ACTION APPEALED AGAINST (ATTACH COPY IF ANY):

The reviewing and issuing of Environmental Impact Assessment License No. NEMA/EIA/PSL/3798 following Application Reference No. NEMA/EIA/SR/734 by the National Management Authority and all involved public officers involved in the decision at the Authority to Amu Power Company Limited, P.O. Box 61872-00200, Nairobi for the construction of a 1050MW coal fired power plant and associated facilities and amenities at Kwasasi area, Hindi Division, Lamu County. This decision took place on 07 September 2016.

Copy of the EIA License	<i>P. 1 of the Supporting Documents</i>
Statement of Particulars	<i>P. 7 of this Notice of Appeal</i>

5. SUMMARY OF GROUNDS OF APPEAL (ATTACH A DETAILED STATEMENT):

1. The 1st Respondent erred at law by issuing an environmental license based on an EIA Report that contained poor analysis of alternatives and weak economic justifications.
2. The 1st Respondent erred in law by issuing an environmental license based on an unsatisfactory EIA scoping Process that lacked proper public participation.
3. The 1st Respondent erred in law and fact by approving the Project will cause marine pollution through the discharge of thermal effluent on the marine environment by utilizing poor and outdated cooling technologies.
4. The 1st Respondent erred in law by approving the Project which is to be located in an ecologically sensitive area that should not be allocated for such a purpose.

5. The 1st Respondent erred in fact and law by issuing an environmental license based on a fundamentally flawed EIA Report plagued with misrepresentations, inconsistencies and omissions.
6. The 1st Respondent erred in fact and law in approving a Project that will have a negative impact on Kenya's air quality with adverse impacts on human health and biodiversity.
7. The 1st Respondent erred in fact and law by approving a Project that will contribute to adverse climate change impacts and is inconsistent with Kenya's low carbon development goals and commitments.
8. The 1st Respondent erred in fact and law by issuing an EIA License with Conditions that fail to provide any mitigation measures to curb coal dust pollution during coal handling jeopardizes the rights of communities in Lamu and their environment.
9. The 1st Respondent erred in fact and law by issuing an EIA License with conditions that are weak and not specific or detailed enough to mitigate impacts of the Project.
10. The 1st Respondent's failure to examine the project in its entirety in light of the compounding factors cited in this appeal make the Project unviable.

Statement of the Purpose of the Hearing	<i>P. 15 of this Notice of Appeal</i>
Detailed Statement of Grounds of the Appellants' Dissatisfaction	<i>P. 18 of this Notice of Appeal</i>
List of Documents	<i>P. 32 of this Notice of Appeal</i>

6. OTHER RELATED MATTERS FILED IN ANY COURT OR TRIBUNAL (IF ANY):

To our knowledge, no other related matters have been filed in any court or tribunal.

7. THE RELIEF WHICH THE APPELLANT IS SEEKING BEFORE THE TRIBUNAL:

1. That the decision of the 1st Respondent and its decision makers to grant the 2nd Respondent with an EIA Licence be set aside on the basis that it is wholly unreasonable and therefore the licence was issued in violation of the Constitution, the Environmental Management and Coordination Act and its Regulations and the Land Act.
2. That the Respondents have not demonstrated that the proposed project meets the viability requirements of the Constitution, the Environmental Management and Coordination Act and its Regulations and the Land Act.
3. That a new Environmental Impact Assessment Study be conducted by the 2nd Respondent in full compliance with the above-cited laws, including regulations, based on specific and current information, and involving all relevant stakeholders.
4. That each party bears its own costs.

8. SIGNATURE OR MARK OF THE APPELLANT/ADVOCATE:

9. Dated at.....this.....Day of 2016

10. Drawn and filed by:

**Suyianka Lempaa & Co. Advocates,
Ambank House, 3rd Floor,
ICPC Suit, Utalii Lane, Off University Way,
P.O. Box 5436-00100, Nairobi**

11. Fees payable Kshs:

Receipt No:

Action taken

Date.....

12. For Official use only:

Note: To be completed in quadruplicate



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AMU POWER COMPANY LIMITED.....2ND RESPONDENT

STATEMENT OF PARTICULARS

Rule 4 (3)(b)

We, Save Lamu, a juristic person registered as a Community Based Organization in the Republic of Kenya, and Somo M. Somo, Raya Famau Ahmed, Mohammed Mbwana, Jamal Ahmed Ali and Abubakar Mohammed Twalib, all natural persons, and of P.O. Box 317-

80500 Lamu, Kenya, do hereby make the following statement to support this Appeal as follows:

1. THAT this statement provides the particulars leading up to the decision by the National Environmental Management Authority to issue Amu Power Limited Company with an Environmental Impact Assessment Licence for a coal power plant in Lamu County.

Background

2. THAT on the 28th of September 2013, the Ministry of Energy and Petroleum (**MoEP**) put out an Expression of Interest (**EOI**) for the development of a 900-1000MW coal power generation plant in Lamu County, Kenya along the Indian Ocean coastline (the **Project**). This EOI closed on the 25th of October 2013. We attach the relevant EIO as **Exhibit SL 2**.
3. THAT the MoEP received a total of 26 submissions. After evaluation of these submissions between the 28th of September and the 16th of December 2013, only 10 were prequalified for submission of Technical and Financial Proposals by the 15th of April 2014. On that date, the MoEP received 5 submissions from interested firms. This EOI closed on the 25th of October 2013. We attach the relevant Ministry document as **Exhibit SL 3**.
4. THAT on the 1st of September 2014, the MoEP awarded the Project to Gulf Energy Consortium (**Consortium**) (consisting of Gulf Energy, Centum Limited, Sichuan Electric Power Design and Consulting Company, Sichuan No. 3 Power Construction Company, and China Huadian Corporation Power Operation Company).
5. THAT prior to that on 1st November 2016, Gulf Energy incorporated a special purpose project company by the name of Amu Power Company Limited (**APCL**), intended to be a joint venture between Gulf Energy and Centum Limited for the Project.
6. THAT this company represents the face of the Consortium and is wholly responsible for the Project.

Environmental Impact Assessment Study

7. THAT in, around or before January 2015, APCL through a contracted Environmental Impact Assessment (**EIA**) specialist company, Kurrent Technologies Limited (**Kurrent**), to conduct an EIA Study for it given that the project fell under Schedule 2 of the Environmental Management and Coordination Act, 1999 and thus was required.
8. THAT the Lead Expert for the EIA Study was Mr. Sanjay Gandhi, the Chief Operating Officer of Kurrent and a registered National Environmental Management Authority (**NEMA**) Expert, Registration No. 0119.
9. THAT Mr. Gandhi would be assisted by various local and international experts with different expertise including terrestrial ecology, aquatic and marine ecology, archeological and cultural heritage, noise and air quality, sociology, geology and soils, hydrology, hydrogeology, thermal plume modeling, air dispersion, noise and vibration, and visual impact assessment.
10. THAT on the 24th of January 2015 Save Lamu and its members were invited by APCL and Kurrent to a workshop intended to discuss the Project and the EIA Study. This workshop was held in Lamu Town at Mwana Arafa Hall. We attach the relevant invitation letter as **Exhibit SL 4**.
11. THAT during this meeting led by Mr. Gandhi, Save Lamu was informed of what the Project was about, what the components of the proposed power plant were, and what the EIA Study process would be like.
12. THAT after this, Save Lamu was given a chance to present its views touching on the environmental, health and livelihood concerns of the people of Lamu, with Mr. Gandhi assuring that these impacts would be mitigated.
13. THAT during this consultation, no mention of a conveyor belt, a limestone mining concession, or a dedicated berth with coal handling systems at the Lamu Port for receiving imported coal was made. Instead, we were informed of a dedicated jetty in Kwasasi that would serve this purpose.

14. THAT on the 8th of July 2015, the County Assembly of Lamu (**CAL**) passed a motion approving a concept paper submitted by APCL for the Project with the conditions that a full EIA Study must be completed, a Memorandum of Understanding on Corporate Social Responsibility be entered into between Governor of Lamu County and APCL, the National Land Commission (**NLC**) must initiate the allocation process with the CAL's involvement, approval of the Resettlement Action Plan (**RAP**), and for APCL to share any plans or information with the CAL from time to time. We attach the relevant motion as **Exhibit SL 5**.
15. THAT the CAL's motion also revealed that APCL not only received approval from the CAL for the Project, but were also issued a 2,000-acre limestone concession in Witu.
16. THAT on the 22nd of October 2015, we received an email from Cliff Barkatch – the County Office for NEMA in Lamu – with a document titled *Environment Project Study for the Proposed 1050MW Coal Power Plant, Lamu County, Kenya (EPR)* prepared by Kurrent for APCL. We attach the email and the EPR as **Exhibits SL 6 and 7**.
17. THAT in the email, we were informed that in accordance to the Environmental Management and Coordination Act, 1999 (**EMCA**) we had been "*identified as a relevant stakeholder with regard to this matter and your views are considered important*" and were given factors to guide our review of the document. We were given 21 days to present our comments from the date of receipt of that letter.
18. THAT we immediately reached out to our various partners and experts (Natural Justice, Accountability Counsel, Environmental Lawyers Alliance Worldwide, the Sierra Club) to assist us in reviewing the document as we prepared our comments to NEMA as the instructions from Mr. Barkatch's email of the 22nd of October 2015.
19. THAT the concerns Save Lamu raised from this review of the EPR are included as one of the supporting documents to this appeal. Our main demand was for NEMA to require a full and comprehensive EIA Study to be completed with proper mitigation measures cited beyond what was proposed in the EPR. We attach the relevant Cover Letter and EPR Comments raising our concerns as **Exhibit SL 8**.

20. THAT on the 12th of November 2015, 21 days after we received the EPR, we submitted our comments to NEMA, which were acknowledged by them. No further communication on these comments was ever received from NEMA.
21. THAT on the 13th of March 2016, we sent a letter to Francis Njogu, APCL's Chief Executive Officer in which we raised our concerns about the Project's environmental, health and livelihood impacts on the communities of Lamu. We attach the relevant letter as **Exhibit SL 9**.
22. THAT our request to APCL requested that the Project does not move on until a comprehensive feasibility study of alternatives is conducted, meaningful consultation with affected communities is carried out, the conducting of an EIA Study that takes various concerns into account, and obtainment of full and broad support from vulnerable and indigenous communities. APCL never responded to the letter sent to it by APCL.
23. THAT in early 2016 we learned that NEMA had decided to require a full EIA Study to be conducted by APCL and issued them with Terms of Reference for the same.

Environmental Impact Assessment Study Report

24. THAT on the 17th of July 2016 a notice indicating that the EIA Study Report (**Report**) was now publicly available for comments by members of the public was published in the *Daily Nation*. We attach the relevant Notice as **Exhibit SL 10**.
25. THAT on the 18th of July 2016, we managed to get a copy of the full Report from NEMA for perusing, reviewing and preparing comments on the same. We attach the relevant EIA Report as a separate volume due to its bulkiness as **Vol. 2**.
26. THAT on the 29th of July 2016 another notice with a summary of the Report was published in the *Government Gazette* by NEMA's Director General, Geoffrey Wahungu, inviting members of the public to submit comments within 30 days of the notice, meaning that comments would be due by the 29th of August 2016. We attach the relevant *Gazette* notice as **Exhibit SL 11**.

27. THAT again, with the support of the same organizations and individuals with the requisite expertise, we reviewed the Report within the 30-day period with the aim of submitting comments to NEMA.
28. THAT on the 19th of August 2016 a notice indicating that a public hearing meeting for the Project would be held on Friday the 26th of August 2016 at the project site in Kwasasi, a location 21km from Lamu Town, appeared in the *Daily Nation*. We attach the relevant Notice as **Exhibit SL 12**.
29. THAT on the 26th of August 2016, relying on what we believed was a strong legal basis, we objected to attending the public hearing given that it was taking place before the date in which all the comments on the Report were due – the 29th of August 2016. We attach the relevant letter to NEMA as **Exhibit SL 13**.
30. THAT on the 29th of August 2016, together with our partners Natural Justice, we submitted our comments which requested NEMA not to issue APCL with an EIA Licence on the following grounds:
 - a. Lack of proper public participation during the ESIA Study as required under Kenyan law
 - b. Concerns related to the Resettlement Action Plan and Allocation of Land are not Addressed
 - c. Effects of the thermal effluent discharge on the marine environment and criticism cooling system technology
 - d. Poor analysis of alternatives and economic justification
 - e. Segmentation of the scope of the ESIA Study understates the full impact of the project
 - f. Climate change impacts are undermined and inconsistent with Kenya's commitments
 - g. Air and noise quality is compromised and no mitigation cited
 - h. Negative impacts on livelihoods are not sufficiently addressed

- i. Inconsistent and inadequate information in the ESIA Report
- j. Insufficient public hearing that was not in compliance with the law or best practices
- k. Violation of the African Development Bank's Safeguards

We attach the relevant Comments to the EIA Study as **Exhibit SL 14**.

31. THAT on the 5th of September, we managed to access a copy of the *Record of Proceedings During Public Hearing Meeting for the Environmental Impact Assessment Study Report on the Proposed Coal Power Plant Held on 26th August, 2016 at Kwasasi Area, Hindi/Magogoni, Lamu County* which is a reflection of the flawed public hearing process that took place on the 26th of August 2016. This Record is attached as **Exhibit SL 15**.

The Decision – Issuing of an EIA Licence

32. THAT on the 16th of September 2016 we were informed that NEMA had made a decision to issue APCL with an EIA License on the 7th of September 2016 – a mere eight (8) days after the comments were submitted by members of the public. This EIA License is attached to our Notice of Appeal and forms the basis of the decision we are challenging.
33. THAT upon inspection of the EIA Licence's accompanying conditions, we noticed that a great portion of our comments, concerns and queries on the Report were not included in the conditions, indicating a failure to properly consider these comments prior issuing the EIA Licence to APCL.
34. THAT on the 20th of September 2016, aggrieved by the decision to issue APCL an EIA Licence with conditions we deemed weak, through our partners requested NEMA for the reasons and supporting documentation for the decision to approve the Project and issue it with an EIA Licence. We attach the relevant letter as **Exhibit SL 16**.
35. THAT on the 5th of October 2016 via email, a letter dated 28th September 2016 was sent in reply to the letter from the 20th of the same month stating that a Record of

Decision was made based on certain factors and justified NEMA's actions in issuing the EIA Licence. We attach the relevant letter as **Exhibit SL 17**.

36. THAT on the 2nd of November 2016 we delivered a letter to NEMA requesting for the documents guiding the reasons and questioning the lack of a Technical Advisory Committee to assist NEMA in making its decision. We attach the letter as **Exhibit SL 18**.

37. THAT on the basis of the above particulars, Save Lamu decided to lodge an appeal with the National Environmental Tribunal on the decision by NEMA to issue APCL with an EIA Licence for the Project.

That is all we have to state.

SIGNATURE OR MARK OF THE APPELLANT/ADVOCATE:

Dated at.....this.....Day of 2016



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AMU POWER COMPANY LIMITED.....2ND RESPONDENT

STATEMENT OF THE PURPOSE OF THE HEARING

Rule 4 (3) (c)

1. The 2nd Respondent proposes to develop a 1,050MW coal fired plant in the Kwasasi area of Lamu County approximately 21 km from Lamu Town. It developed an

Environmental Impact Assessment Study Report (**Report**) for the necessary environmental authorization from the 1st Respondent.

2. The 2nd Respondent completed the Study in July 2016 and in accordance to Section 59(1) of the Environmental Management and Co-ordination Act (**EMCA**) and Regulation 21 of the Environmental (Impact Assessment and Audit) Regulations, 2003 (**EIA Regulations**).
3. The 1st Respondent issued the 2nd Respondent with an environmental license NEMA/EIA/PSL/3798 on 7 September 2016, a mere eight days after the comments were due.
4. Article 42 of the Constitution is fundamental as it gives every person a right to a clean and healthy environment. Article 10 of the Constitution of Kenya underlines public participation, among others, as governance principle that must be upheld at all times. Article 69(1)(d) of the Constitution further requires the state to encourage public participation in the management, protection and conservation of the environment.
5. First, the National Environmental Tribunal (**Tribunal**) is a statutory body established under section 125 of the EMCA with the sole mandate to operate as an appellate body over the decisions of NEMA, the Director General and the Committees under the 1st Respondent. This appellate jurisdiction should only be invoked by a person who is aggrieved by the decision of the 1st Respondent as expressed in Section 129 of EMCA. The Appellants therefore, clothed with the requisite *locus standi* lodge an appeal with the NET, the appellate body in this matter.
6. Second, the 1st Respondent has repeatedly contravened the provisions of the Constitution, the EMCA (which is the environmental framework law) and the EIA Regulations, throughout the EIA Study process.
7. Third, an examination of the substantive content of the Report prepared by the 2nd Respondent reveals that it contains a myriad of gaps, shortcomings and inconsistencies that prove problematic for Kenya's and Lamu's environmental interests, but which the 1st Respondent chose to deliberately ignore. The project poses huge social and environmental costs and therefore the decision to issue an

environmental license must not be allowed to stand as it compromises all principles of environmental law; sustainable development, polluter pays principles, inter and intra generational equity, and the precautionary principle.

8. The Appellants herein being aggrieved by the decision of the 1st Respondent to issue an Environmental Impact Assessment License on 7 September 2016, appeals to the Tribunal.
9. We propose to ask the Tribunal to set aside the decision of the 1st Respondent to issue the 2nd Respondent, the project proponents, an environmental license and instead substitute it with an order directing the project proponent to conduct a fresh comprehensive environmental impact assessment, taking into account all the concerns raised, shortcomings and inconsistencies that prove problematic for Kenya's environmental interests but also with respect to compliance with key environmental laws as raised by the Appellants.

SIGNATURE OR MARK OF THE APPELLANT/ADVOCATE:

Dated at.....this.....Day of 2016

Drawn and filed by:

Suyianka Lempaa & Co. Advocates,
Ambank House, 3rd Floor,
ICPC Suit, Utalii Lane, Off University Way,
P.O. Box 5436-00100, Nairobi



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**DETAILED STATEMENT OF THE GROUNDS OF THE APPELLANTS
DISSATISFACTION**

Rule 4 (3)(c)

A. ERRONEOUS APPROVAL OF THE EIA REPORT

1. The 1st Respondent and its decision makers has in issuing its approval erroneously relied on the 2nd Respondent's EIA Report, which contains a poor analysis of alternatives and economic justification.
2. This approval contravenes Regulation 16 of the Environmental (Impact Assessment and Audit) Regulations (the "EIA Regulations") which provides that an EIA study should take into account economic issues and should identify and analyze alternatives to the proposed project.
3. This approval further violates Regulation 18 (1) which requires the Report to incorporate alternative technologies and processes available and reasons for preferring them; Regulation 18 (1) (j) which requires a proponent to undertake a proper analysis of the alternatives to the project including the technologies and reasons for preferring the technologies and Regulation 18 (1) (o) an economic and social analysis of the project.
4. This approval by the 1st Respondent and its decision makers is an infringement of Article 10 (2) (d), which requires that the national value and principle of sustainable development bind all state organs and officers when they apply any law or make public policy decisions.
5. The 2nd Respondent's EIA Report has failed to undertake this full and comprehensive analysis and contains poor analysis of alternatives and economic justification.
6. The 2nd Respondent's EIA Report's failure to carry out this comprehensive analysis resulted in a failure to cooperate with the 1st Respondent, a State organ, and its decision makers, State officers, to protect and conserve the environment and ensure ecologically sustainable development in accordance to Article 69 (2) of the Constitution.
7. The EIA Report paints a false image of the need for coal energy in Kenya, fails to assess demand side management alternatives to coal, and falsely discredits

alternative forms of energy such as wind, water and solar – which can better aid in achieving sustainable forms of development.

B. LACK OF PUBLIC PARTICIPATION

8. The EIA Study process lacked proper and effective public participation.
9. The 2nd Respondent failed to comply with Regulation 17 (2) of the EIA Regulations, as it did not have a minimum of at least three meetings with affected people and other concerned parties after approval of the Environment Project Report.
10. The 2nd Respondent also violated Article 10 (1) (a) of the Constitution by failing to take into account the value and principle of public participation in its application of the Environmental Management and Coordination Act.
11. The 2nd Respondent held a number of meetings with various stakeholders in Lamu, however this was prior to the submission and approval of its Environment Project Report to the 1st Respondent.
12. It was not possible for the 2nd Respondent to sufficiently explain the Project and its effects prior to the commencement of the EIA study process. Any comments received from such a flawed process do not meet the requirements of public consultation and do not amount to an effective form of public participation, as at such an early stage, any comments made are not given with full knowledge and proper information of the Project.
13. Additionally, the public hearing carried out for the EIA Study was in contravention of Regulation 22 (1) due to it occurring prior to the submission of comments. This public hearing failed to be an examination of the EIA Report as required under law, but a weak attempt to pit those opposed to the project against those who were in support of it, defeating the purpose of such a hearing.

C. EFFECTS ON THE MARINE ENVIRONMENT

14. The approval by the 1st Respondent and its decision makers of the EIA Report granting an EIA Licence to the 2nd Respondent is in violation of Article 42 of the Constitution that guarantees the right to a clean and healthy environment, which is likely to be breached as a result of damage to the marine environment adjacent to the Project.
15. The approval by the 1st Respondent and its decision makers of the EIA Report granting an EIA Licence to the 2nd Respondent is also in violation of Article 70 of the Constitution given that the right in Article 42 is likely to be denied, violated, infringed or threatened.
16. The Project will cause marine pollution through the discharge of thermal effluent in the marine environment, with adverse environmental impacts on the marine biodiversity, despite the inclusion of Operational Condition 3.3 in the License.
17. The ESIA Report indicates that a significant seawater temperature increase of 9 degrees Celsius is likely as a result of the discharge, but does not fully analyze the impacts this change in temperature will have on the marine ecosystem. The 2nd Respondent state that they will openly violate the Third Schedule of the EMCA Regulations on Water Quality by exceeding the 3 degrees Celsius difference limit at the point of discharge threefold.
18. This is absurd since a temperature change without further specifications is only meaningful at the point of discharge, as is clearly indicated in the law.
19. Furthermore, while the 2nd Respondents claims that an increase in surface water temperatures will not exceed 3 degrees Celsius, there is a zone approximately 800 metres across within which the temperature increase is projected to exceed the lawful limit.
20. Furthermore, by the 1st Respondent failing to consider the uncertainties and margin of error inherent in these kinds of a computer modeling exercises, it cannot be stated with any confidence that the increase in ambient water

temperatures will not exceed the Water Quality Regulations limits, something that the 1st Respondent failed to consider.

21. Shockingly, the 1st Respondent fails to note that the 2nd Respondent's EIA Report fails to include thermal discharge into the sea in its ecological and social impacts, which can have major impacts on a majority of Lamu's residents who are dependent on fishing.
22. Due to these Project impacts, the rights of local community members relying on fishing as a way of life will be infringed including a violation of their cultural rights and traditional way of life as set out in Article 44, right to food and health set out in Article 43 of the Constitution.
23. Further, the Project adopts a once through cooling system technology model, which is not used by many coal plants worldwide as it is likely to endanger marine life as a result of entrainment and impingement. Alternatively, there are other modern cooling system models exist such as re-circulated wet cooling, dry cooling, and hybrid cooling (which are closed forms of cooling) which reduce impacts.
24. Mitigation measures set out by the 2nd Respondent for the use of the once through cooling system are generic and not site specific, and fail to quantify entrainment losses.

D. VIOLATION OF LAND LAWS

25. The location of the Project contravenes land allocation requirements as set out in public land laws.
26. Public land that falls within mangroves, wetlands, riparian areas, the territorial sea, is along beaches or falls within environmentally sensitive areas should not be allocated in accordance with Section 11 and 12 (2) of the Land Act.

27. The areas proximate and adjacent to the specific public land to be used by the Project, particularly on the side nearer the ocean, contain definite environmentally and ecological sensitive areas in the form of mangroves, beaches, tidal areas, the territorial sea, and other wildlife present between the eastern border of the Project area and the sea.
28. The decision to grant an EIA Licence for a project that had land allocated in an unlawful manner in violation of the Land Act is a violation of Article 62 (4), which requires that the use of public land is in accordance with the relevant statute.
29. The Project will impact this sensitive environment (both the land allocated and the territory proximate and adjacent to the Project) in a way that threatens the ecological and environmental systems within the demarcated land and its vicinity.

E. INCONSISTENCIES IN THE EIA REPORT

30. The EIA Report contains inconsistencies that amount to misrepresentations on the part of the 2nd Respondent, and fails to assess certain key components of the Project.
31. Under these circumstances, the its decision makers should not have issued an EIA license in line with Regulation 28(2)(d) of the EIA Regulations, which provides that a license should not be issued to a project proponent where it is established that the information given by the proponent in support of his application for an EIA license was incorrect.
32. The EIA Report contains inconsistent information on crucial issues such as details on the exact amount of land required for the Project. For instance, throughout the EIA Report reference is made to the size of land required as 880 acres; however, in other parts of the Report the land required is listed as 975 acres.

33. As a result of this incorrect and inconsistent information, the Project is likely to have a wider and more grievous impact on the affected community, yet this is not evaluated.
34. The Report leaves out critical information on elements of the Project such as the 2000-acre limestone mine concession, a 15km coal conveyor belt and a coal handling berth at the proposed Lamu Port – issues that were not raised at the ineffective public consultation process. Again, failure to assess the impacts of these significant components is not taken into account in the EIA Report, hence questioning the issue of an EIA License.

F. NEGATIVE IMPACT ON KENYA'S AIR QUALITY

35. The Project will have a negative impact on Kenya's air quality as it will cause air pollution that could potentially lead to adverse health impacts.
36. The 2nd Respondent failed to conduct an assessment of atmospheric impacts on human health. The relationship between increases in ambient air pollution levels, particularly PM2.5, ozone and NO2, and risk of death from diseases such as stroke, ischemic heart disease, lung cancer and respiratory diseases, including lower respiratory impacts in infants, is well established and is routinely used for scientific studies that quantify the health impacts of air pollution.
37. Operational Conditions 3.1 of the EIA License states that the 2nd Respondent shall "*carry out air quality analysis (to act as baseline) before commencing operations of the plant*". This Condition attempts to cure a substantial defect in the EIA Report, namely that it is based on implausible data about existing ambient air quality.
38. Moreover, the above stated Condition is insufficient to the extent that it does not make it mandatory that an air quality analysis is carried out before commencing operations of the plant. This air quality analysis needs to be subsequently vetted by the public and decision-makers, to ascertain the health impacts of the

predicted increases in pollutant concentrations associated with the coal plant emissions. Important air quality analysis should have been carried out at the EIA Study stage and allowed for public comments.

39. Further, Operational Condition 3.5 states that the 2nd Respondent shall ensure that the management of air emissions are done in accordance with World Bank and International Finance Corporation guidelines.
40. The proposed air pollution control equipment in the EIA Report falls short of the state-of-the-art control for mercury emissions. The Conditions are insufficient as they are not specific enough on this issue.
41. The increase in air pollution levels, that the atmospheric impacts analysis despite all its flaws shows would occur, is completely omitted in the assessment of public health impacts and also wrongly only considers the impacts of the emissions in the Project area, yet these impacts will be national and international.
42. Finally, the Project will result in the disposal of vast quantities of fly ash with a heavy environmental footprint. The EIA License condition only deals with the transportation of fly ash (Operational Condition 3.11), and is not specific enough on the management of fly ash as it lacks a requirement for 100% utilization of fly ash so as to avoid the substantial environmental impacts of fly ash disposal, or the Appellants' proposal for the creation of a 100-hectare ash disposal site.
43. The 2nd Respondent failed to assess impacts of radioactive substances emissions into the atmosphere and from the coal dump are not considered. Coal fly ash contains a range of radioactive elements and qualifies as long-lived, low-level radioactive waste under the International Atomic Energy Agency's definitions.
44. The 2nd Respondent fails to cite any coal ash reuse. Furthermore, it fails to recognize that the coal ash pond is a major environmental risk. Furthermore, measures proposed by the 2nd Respondent to keep discharges within water quality limits are not identified resulting in a failure to examine the risk of

accidental releases, undetected leaks or a catastrophic failure of the ash pond as has happened many times elsewhere.

45. The approval by the its decision makers of the EIA Report granting an EIA Licence to the 2nd Respondent is in violation of Article 42 of the Constitution that guarantees the right to a clean and healthy environment, which is likely to be breached as a result of toxic emissions into the atmospheric environment in Lamu and beyond.
46. The approval by the its decision makers of the EIA Report granting an EIA Licence to the 2nd Respondent is also in violation of Article 70 of the Constitution given that the right in Article 42 is likely to be denied, violated, infringed or threatened due to the impacts it will have on human respiratory health.

G. ENLARGED CARBON FOOTPRINT

47. The Project will contribute to adverse climate change, with projected greenhouse gas (GHG) emissions as high as 8.8 million tons of CO₂eq per year in violation of Kenya's commitments.
48. This project is inconsistent with Kenya's low carbon development commitments, as set out in the National Climate Change Action Plan and the Climate Change Act No.11 of 2016 which emphasize the need for a low carbon development pathway; and Kenya's Nationally Determined Contribution (NDC), which has been submitted to the UNFCCC and places a commitment to abate Kenya's GHG emissions by 30% by 2030.
49. To achieve this above stated 30% target, the NDC highlights that priority mitigation activities will include expansions in the national production of geothermal, solar, wind and other renewable and clean energy options.
50. The EIA Report has not conducted a comprehensive analysis of the national low carbon commitments and how the Project impacts the attainment of these goals

and commitments; nor conducted a proper analysis of climate change impacts of alternative forms of energy, which may offer a better alternative to coal.

51. Further, the Report provides misleading information on the climate change impact of the Project. The Report does not inform decision-makers of the full cost of the Project, which includes associated climate change damages and may be as high as \$1.3 billion per year. The EIA License Operating Conditions (3.4 and 3.5) do not adequately remedy this shortcoming of the EIA Report.
52. The approval by the 1st Respondent and its decision makers of the EIA Report granting an EIA Licence to the 2nd Respondent is in violation of Article 42 of the Constitution that guarantees the right to a clean and healthy environment, which is likely to be breached as a result of excessive emissions into the atmospheric environment in Lamu, Kenya and beyond the region.
53. The approval by the 1st Respondent and its decision makers of the EIA Report granting an EIA Licence to the 2nd Respondent is also in violation of Article 70 of the Constitution given that the right in Article 42 is likely to be denied, violated, infringed or threatened.

H. COAL DUST POLLUTION

54. The EIA Report and License Conditions fail to provide any mitigation measures to curb coal dust pollution during coal handling and this would violate Articles 42 and 70 of the Constitution as a result of polluting the environment through coal dust pollution.
55. The imported coal will arrive at the Lamu Port in ships and be offloaded, handled by systems to be installed at the port, conveyed over 15kms to the Project site, then transported around the site and stored.
56. During this entire process, the EIA Report and the Conditions are entirely silent on pertinent matters of handling and storage.

57. The EIA Licence and Conditions do not address the issues of handling and storage facilities that will be located in ecologically sensitive areas (i.e. mangroves).
58. The EIA Licence and Conditions do not address whether the handling and conveying and other transportation systems will be open or closed.
59. The EIA Licence and Conditions do not address what the maximum height coal stacks will be.
60. The EIA Licence and Conditions do not address whether the use of sprinkling water systems will be used to suppress coal dust pollution at every level and whether they will be continuous or not.
61. The EIA Licence and Conditions do not address what measures shall be used to prevent spillage of coal during the entire handling process.
62. The EIA Licence and Conditions does not address what maximum height the peripheral walls should be to prevent blown dust or how often the sweeping of coal shall be done on the site.
63. The EIA Licence and Conditions does not address what technologies and equipment shall be used to load and unload the coal (mechanised or manual).
64. Failure to provide conditions addressing this issue of coal dust pollution will have adverse impacts on the health of people proximate to the entire coal handling stretch of 15kms from Kililana to Kwasasi, the protected ecosystems like mangroves and those who depend on the ocean for their livelihoods.
65. Kenya lacks a law on coal handling; hence without any conditions mandated by the 1st Respondent and its decision makers on the 2nd Respondent to ensure the obligation to minimize coal dust pollution, this impact is not sufficiently mitigated.
66. Coal handling and storage standards are now common practice in the industry. Countries, such as India, have also developed national regulations to guide the handling and storage of coal and can be used as a point of reference.

I. LACK OF SOUND MITIGATION MEASURES

67. The EIA License Conditions fails to fully provide effective mitigation measures that the 2nd Respondent must adhere to in the construction and operation of the Project.
68. Failure to properly include these measures in the EIA License Conditions could potentially result in further negative impacts on the environment, communities and their livelihoods in breach of the State's duty to protect them under Article 42, 69 and 70.

J. COMPOUNDED UNVIABILITY OF THE PROJECT

69. The 1st Respondent and its decision makers' failure to examine the project in its entirety in light of the compounding factors cited in this appeal render the project unviable.
70. The compounded effect of
- a. a poor analysis of alternatives and economic justification for the project,
 - b. ineffective public participation,
 - c. heated thermal discharge into the marine environment that would threaten human livelihoods and marine lives,
 - d. unlawful allocation of land,
 - e. misrepresentation of information,
 - f. poor air quality mitigation measures,
 - g. non-adherence to Kenya's climate change commitments,
 - h. failure to provide sufficient mitigation measures for coal dust pollution, and
 - i. generally weak and unspecific conditions in the EIA Licence that cannot mitigate all potential impacts for this project,

make the Project unviable and not worth progressing forward with.

71. The 1st Respondent's unwillingness to use its discretionary power in setting up a Technical Advisory Committee (TAC) to provide external expertise and assess the viability of the Project in accordance to Section 61 of EMCA to properly analyse the EIA Report and the submitted comments was a failure to act with rationality according to Section 7 of the Fair Administrative Action Act.

72. The 1st Respondent's and its decision makers granting of an EIA Licence to the 2nd Respondent, based on all the above issues, violations of law and unmitigated impacts as a result of the project amount to a dereliction and abdication of duties by the decision-makers involved in violation of Article 47 and Section 7 of the Fair Administrative Action Act.

It is these grounds that the Appellants rely on in this appeal before the Tribunal.

SIGNATURE OR MARK OF THE APPELLANT/ADVOCATE:

Dated at.....this.....Day of 2016

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IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO OF 2016

SAVE LAMU.....1ST APPELLANT
SOMO M. SOMO..... 2ND APPELLANT
RAYA FAMAU AHMED..... 3RD APPELLANT
MOHAMMED MBWANA.....4TH APPELLANT
JAMAL AHMED ALI.....5TH APPELLANT
ABUBAKAR MOHAMMED TWALIB.....6TH APPELLANT

VERSUS

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....1ST RESPONDENT
AMU POWER COMPANY LIMITED.....2ND RESPONDENT

LIST OF DOCUMENTS

Rule 8 (1)

- 1. EIA LICENCE AND CONDITIONS, ISSUED BY NEMA ON 7.09.16 (1 – 6)**
- 2. MINISTRY OF ENERGY AND PETROLEUM EXPRESSION OF INTEREST (EOI) FOR THE DEVELOPMENT OF ONE 900-1000MW COAL POWER PLANT AT LAMU IN LAMU COUNTY, IN KENYA BY PRIVATE INVESTORS (7 - 10)**

3. **MINISTRY OF ENERGY AND PETROLEUM DEVELOPMENT OF ONE 900-1000MW COAL POWER PLANT AT LAMU, LAMU COUNTY, BY PRIVATE INVESTORS (11 – 15)**
4. **KURRENT TECH INVITATION LETTER TO WORKSHOP ON 24.01.2015 (6)**
5. **LAMU COUNTY ASSEMBLY MOTION, FIRST ASSEMBLY, SECOND MOTION, WEDNESDAY JULY 8TH 10:00AM SITTING (17 – 18)**
6. **EMAIL FROM CLIFF BARKATCH, FORMER NEMA COUNTY OFFICER, LAMU WITH EPR ATTACHED ON 22ND OCTOBER 2015 (19 – 20)**
7. **ENVIRONMENT PROJECT STUDY FOR THE PROPOSED 1050MW COAL POWER PLANT, LAMU COUNTY, KENYA, SEPTEMBER 2015 (21 – 156)**
8. **COVER LETTER TO NEMA AND SAVE LAMU EPR REVIEW OF COAL PLANT IN LAMU COUNTY SUBMITTED TO NEMA ON NOVEMBER 12TH 2015 (157 – 188)**
9. **CONCERNS REGARDING THE AMU POWER COAL POWER GENERATION PLANT IN LAMU COUNTY, KENYA SENT TO FRANCIS NJOGU ON 13TH MARCH 2016 (189 – 197)**
10. **NOTICE TO THE PUBLIC TO SUBMIT COMMENTS ON AN ENVIRONMENTAL IMPACT ASSESSMENT STUDY REPORT FOR THE PROPOSED 1050MW COAL FIRED POWER PLANT IN THE KWASASI AREA, HINDI MAGOGONI SUBCOUNTY, LAMU COUNTY ON 17TH JULY 2016 (198)**
11. **KENYA GOVERNMENT GAZETTE NOTICE ON COAL POWER PLANT EIA VOL. CXVIII – NO. 84 DATED 29TH JULY 2016 (199 – 202)**
12. **DAILY NATION NOTICE OF PUBLIC HEARING IN KWASASI DATED 19TH AUGUST 2016 (203)**
13. **LETTER TO NEMA ON 26.08.2016 REQUESTING FOR PUBLIC HEARING TO BE POSTPONED (204 – 206)**
14. **COMMENTS BY SAVE LAMU AND NATURAL JUSTICE TO NEMA ON THE EIA REPORT SUBMITTED ON 29TH AUGUST 2016 (207 – 265)**
15. **RECORD OF PROCEEDINGS DURING PUBLIC HEARING MEETING FOR THE EIA REPORT 26TH AUGUST, 2016 (266 – 299)**
16. **LETTER TO NEMA ON 20TH SEPTEMBER 2016 REQUEST FOR REASONS AND SUPPORTING DOCUMENTATION FOR THE DECISION TO APPROVE THE PROJECT (300 – 301)**

**17.NEMA RESPONSE TO REQUEST FOR DOCUMENTS RECEIVED 5.10.2016
(302 – 303)**

18.LETTER TO NEMA IN RESPONSE TO IT'S REPLY ON 1.11.2016 (304)

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