



To:

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Re: Basic Assessment Reports for the proposed prospecting projects WC30/5/1/1/2/1053PR; WC30/5/1/1/2/10345PR; WC30/5/1/1/2/10346PR; WC30/5/1/1/2/10352PR

From:

Natural Justice

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Natural Justice: Lawyers for Communities and the Environment is a non-profit organisation specialising in environmental and human rights law in Africa – with a focus on the pursuit of social and environmental justice for local and indigenous communities.

Natural Justice offers direct support to local and indigenous communities impacted by the ever-increasing demand for land and resources, through legal empowerment. Natural Justice also conducts comprehensive research on environmental and human rights laws, as well as engaging in key national and international processes with, for and alongside indigenous peoples and local communities.

The organisation has an interest in these particular Environmental Impact Assessment (EIA) reports with regards to how the EIA reports intend to address the impacts both direct and indirect that will be brought upon the environment and the local and indigenous peoples and communities who reside within proximity of the proposed development project in the West Coast areas of Leopoldt, Lamberts Bay, Doring Bay, Ebenezar.

Concerns/Comments:

General comment

Overall, the BARs are vague and high-level and fail to provide site specific assessments of impacts of the proposed activities. The BARs fail to provide sufficient details upon which a decision-maker can make informed and defensible decisions.

Specific comments/concerns in relation to Needs and Desirability Assessment outlined on pages 25-27 of the Basic Assessment and the EMPR

1. In compiling an environmental assessment report, the EAP ought to take into account all of the factors set out in 24O of NEMA, including the need and desirability for the proposed project, any guideline published in terms of section 24J and any minimum information requirements for the application. This includes the 2017 Guideline on Need and Desirability, Department of Environmental Affairs (DEA), Pretoria, South Africa (“the Need and Desirability Guideline”).
2. Chapter 4 of the Need and Desirability Guideline sets out questions to be engaged with when considering need and desirability. They state that the “need for and desirability of a proposed activity should specifically and explicitly be addressed throughout the EIA process when dealing with individual impacts and specifically in the overall impact summary by taking into account the answers to inter alia the following questions.
3. The need and desirability assessments contained in the respective reports is barely more than a page, is vague, and fails to consider the factors set out in the Need and Desirability Guideline. In particular, it (amongst other things):
 - a. fails to consider the planning, environmental, heritage and economic policy content, other than a vague reference to policy objectives that promote the Applicant’s own prospecting and mining plans;
 - b. consequently fails to provide an objective policy assessment in relation to need and desirability;
 - c. fails to consider need and desirability from a climate change perspective, including greenhouse gas contributions from future envisaged mining activities;
 - d. fails to consider South Africa’s international commitments, including its climate change related commitments; and
 - e. fails to consider need and desirability from a site-specific perspective.
4. The EAP places an over reliance on perceived long-term benefits of prospecting and associated activities, but fails to consider the long term and associated impacts of these activities linked to this particular project. In so doing, we submit that this runs counter to the NEMA principles set out in Chapter 2. The need and desirability assessment (and indeed the assessment as a whole) fails to consider the NEMA section 2 principles, such as those of intra- and inter-generational equity in the context of sustainability, and cumulative impacts, taking into account intended future phases of this project, site specific need and desirability.

5. Furthermore, the Appellants submit that the Basic Assessment and the EMPR failed to give effect to the Guideline in the following respects:
 - Alternatives, including the no-go option, have not been fully explored when assessing need and desirability. The Guideline requires that “considering the need and desirability considerations, it must be decided which alternatives represent the “most practicable environmental option””. Need and desirability must take into account all alternatives, and this must necessarily include the no-go option. The no-go alternative has not been assessed at all in terms of need and desirability. The Guidelines state: “in terms of having to follow the impact mitigation hierarchy, it is not acceptable to not follow the hierarchy in terms of, for instance not investigating alternatives to avoid negative impacts and simply investigation options to mitigate impacts.
6. According to the West Coast District Municipality IDP and Spatial Development Framework Plan, traditionally the West Coast District’s primary economic sectors consisted of agriculture and fishing.¹ Agriculture remains one of the districts primary economic activities. Two of the other more important economic sectors, namely trade and manufacturing, are strongly linked to the agricultural sector, with a large proportion of their activities involving the sale or processing of agricultural products. Cultivated crops such as wheat, canola, olives, grapes (table and wine), rooibos tea, fynbos, fruit, and livestock. There is currently large amounts of groundwater being abstracted to support potato and other crops in the region.² These particular produce and activities are popular and which drive economic activity and enhance food security for local residents. Agriculture is also the biggest user of water in the district, mostly under irrigation, despite the district being considered as water scarce.³ As such the West Coast District Municipality recognises climate change as a threat to the environment, its residents, and to future development.
7. Given the threat that these potential prospecting and mining developments pose to the primary economic sectors of agriculture and fishing which remain sensitive to climate change impacts, we submit that the developments are not needed or desirable given that agriculture remains one of the most important drivers of economic growth in the district, relying heavily on access and use of water to sustain and develop the sector for the benefit of the local economy and for the benefit of providing for food security. The WCDM and its local municipalities have a crucial role to play in facilitating climate resilience through the performance of mandated responsibilities such as mainstreaming climate change response to climate risks. These potential projects represent climate change risks which cannot be considered desirable given that the WCDM IPD outlines that as part of its implementation plan, it commits itself to effective and integrated pro-active day-to-day climate change responses inclusive of monitoring, mitigation, and

¹ West Coast Integrated Development Plan 2017-2022 as amended for 2020-21. Accessible here [*Amended-IDP-2020-21-V4-1.pdf \(westcoastdm.co.za\)](#)

² West Coast Integrated Environmental Programme. Accessible here [West Coast IEP \(westcoastdm.co.za\)](#)

³ See above at page 46-59. at page 46-59.

adaptation, thereby reducing environmental degradation and socio-economic vulnerability while building resilience against climate variability.⁴

Failure to assess the “no development option”

The vague assessment of the no development options does not meet the requirements for impact assessment as contained in the EIA Regulations and associated guidelines. Other than being vague and devoid of sufficient detail, the no-go option is assessed only from a negative impact perspective, and fails to assess positive impacts associated with the no-go option.

Failure to assess water supply

The BAR indicates that water will be sourced from nearby towns. However, this fails to take into account that the prospecting sites are situated in an arid environment, with continued water scarcity constraints. No attempt is made to quantify the volume of water that will be needed for the prospecting activities (or later, the envisaged mining activities), nor determine its source or availability in nearby towns. Consequently, the impacts of the proposed activities on water resources cannot be assessed. This is a fatal flaw.

Failure to consider availability of licenced waste disposal sites

The BAR indicates that the contaminated soil will be disposed of at “an appropriate facility that provides a safe disposal certificate”. No attempt is made to determine the proximity of licenced hazardous waste disposal sites, and accordingly, the impacts associated therewith cannot be assessed.

Failure to adequately assess biodiversity

The respective BARs contain only reference to general high level biodiversity aspects. No attempt has been made to assess site specific biodiversity impacts. This constitutes a fatal flaw.

Failure to adequately assess transport mechanisms

The BAR fails to adequately consider the impacts associated with the use of existing roads and “if none is available, to drive into the veld ... trying to miss shrubs etc”.⁵ It is unclear how often existing roads will be used, and how often the contractors will simply “drive into the veld”. Conceivably, driving over pristine and other veld could lead to significant and irreversible impacts on biodiversity (and watercourses) and therefore must be assessed in detail.

Specific comments/concerns in relation to the Public Participation Process as set out on pages 28-31 of the EIA Reports

Section 38(1)(a) of the Minerals and Petroleum Resources Development Act stipulates that the holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit “must at all times give effect to the general objectives of integrated environmental management laid down in Chapter 5 of the National Environmental Management Act 1998 (Act No. 107 of 1998). Given this provision, the assessment of conduct relating to prospecting must be determined in accordance with the objectives of NEMA and its regulations. It is therefore imperative that the EAP considered the following:

⁴ See West Coast District Municipality IPD at page 50.

⁵ Page 15 of the BAR.

1. Regulation 41(2)(b)(i) of the EIA Regulations requires that occupiers be provided with written notice of the application for environmental authorisation, in any of the manners set out in section 47D of NEMA. Notably, the requirement to notify occupiers is the primary requirement of regulation 41(2)(b)(i), and it is only where occupiers are not also the landowners, that landowners should be notified. Accordingly, the notification of landowners cannot justify a failure to notify occupiers. There is no indication in pages 29- 31 that the EAP made any effort at all to notify and engage with occupiers, where occupiers were not also landowners. Occupiers could include farm workers, subsistence and community farmers, and water users (community and non-agriculture related including women and caregivers). Occupiers of the affected properties are therefore conceivably the most impacted of all potential interested and affected parties, and their exclusion from the process is material, rendering the public participation process fatally flawed.
2. In conducting its public participation process, the EAP failed to ensure the participation of vulnerable and disadvantaged persons (Section 2(4)(f) of NEMA. Importantly, the Department of Environmental Affairs has provided guidance on PPP requirements, among others, by means of the “Public Participation Guideline in Terms of National Environmental Management Act, 1998 Environmental Impact Assessment Regulations” (the “PPP Guideline”). The PPP Guideline states that a PPP must provide an opportunity for all I&APs to obtain clear, accurate, and understandable information about the environmental impacts of a proposed activity in order to be informed and to voice their support, concerns, and questions in relation to the proposed activity (pages 6-7 of the Guideline). Importantly, compliance with this requirement is predicated on successful identification, or reasonable efforts to do so, of all I&APs in accordance with regulation 41(2)(a) to (d) of the EIA Regulations or proposed alternative reasonable methods as provided for in regulation 41(2)(e) of the EIA Regulations. Notwithstanding any public participation activities undertaken after identification of I&APs, then, failure to make these reasonable efforts constitutes a fundamental flaw in a PPP.

Considering the points 2 and 3, we are concerned that the EAP failed to identify a critical number of I&APs such as the Guriqua communities, as well as occupiers thereby failing to provide them with an opportunity to obtain clear, accurate, and understandable information about the environmental impacts of a proposed activity in order to be informed and to voice their support, concerns, and questions in relation to the proposed activity. The resultant affect was the failure of these interest groups to be identified and thereafter meaningfully consulted in the EIA process. It is our view that these processes were not followed nor concluded in accordance with the steps outlined by NEMA.

3. Different consultation methods are required in different social contexts. These methods should account for different languages, varying levels of access to technology (e.g. e-mail and internet), different levels of understanding of technical information, diverse social structures and protocols, and different political contexts. Our concern in this regard is that the need for on-going communication taking into account the different social contexts of local traditional communities (even just to advise that there is a delay

in terms of timeframes, and why) and consistency in the mechanisms of consultation, are basic factors that ensure meaningful consultation. It is unlikely that the EAP has been able to comprehensively conduct consultation processes that adequately facilitate the above-mentioned factors in a manner that addresses the concerns of traditional Guriqua communities in relation to the potential direct and indirect impacts that may result from this proposed prospecting projects. Certainly, it appears that any notifications were in English, and there is no evidence to suggest that the EAP determined which other appropriate languages should be utilised.

4. Pages 29-31 of the EIA reports set out the public participation activities conducted by the Applicant. It is clear from the activities set out by the EAP that the EAP failed to heed the PPP Guideline's guidance that additional effort should be made to include rural and historically-disadvantaged communities or people with special needs by facilitating their participation by other means, including announcing the PPP on a local radio stations in a local language (paragraph 4.2 of the PPP Guideline). Community radio stations in both English and Afrikaans would have been an effective alternative means of notifying many I&APs who otherwise would remain unaware of the Project. Given the expanse of the projects and affected area, the application should have been advertised through several community radio stations, and local media outlets covering the entire West Coast District Municipality Region.
5. Furthermore, the EAP failed to account for the fact that many I&APs, particularly those that are vulnerable and significantly disadvantaged through disabilities, would be limited in being able to have access to the internet, and so could not download the EIAR. Similarly, many I&APs do not access public libraries, where the draft basic assessment report and draft EIAR and EMP were released, and so could not be reasonably found to have been able to access these documents.

Specific comments/concerns in relation to the Archaeological cultural and heritage impact assessments for prospecting right areas as set out in the EIA Specialist Reports Annexure 7

In light of the findings made with regards to the Heritage Impact Assessment, regard should be had to the comments below:

1. South Africa's National Heritage Resources Act provides that when something is described as being of "cultural significance" the tag refers to such an object or activity's aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance. The protection of cultural heritage resources is further perceived to be one of the factors that influences a person's perception or experience of his or her state of well-being. This is also the case in South Africa, where the section 24 environmental right in the Constitution explicitly encompasses peoples' "well-being". Similarly, natural resources such as rivers, streams, forests, mountains and rock formations may have cultural meaning for a particular community or may be at the centre of certain cultural practices. This implies that the conservation of such natural resources is necessitated, for example, by the important role they play in the survival of particular cultural practices. The Act defines "heritage resources" as any place or object of cultural, social, and spiritual significance. It can therefore be deduced that

culturally relevant places and objects fall within the purview of its protection and therefore requires significant consideration throughout the assessment process.

2. The National Heritage Resources Act also defines "living heritage," a phrase which refers to the intangible aspects of inherited culture, which may include cultural tradition, oral history, performance, ritual, popular memory, skills and techniques, indigenous knowledge systems, and the holistic approach to nature, society and social relationships. Section 5 of the Act outlines the principles for the management of heritage resources in South Africa, and the following sections are of specific importance:
 - Section 5(4) which states: "heritage resources form an important part of the history and beliefs of communities and must be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management"
 - Section 5(7) subsections (a)-(e) which provide: The identification, assessment and management of the heritage resources of South Africa must-
 - (a) take account of all relevant cultural values and indigenous knowledge systems;
 - (b) take account of material or cultural heritage value and involve the least possible alteration or loss of it;
 - (c) promote the use and enjoyment of and access to heritage resources, in a way consistent with their cultural significance and conservation needs;
 - (d) contribute to social and economic development;
 - (e) safeguard the options of present and future generations.

The region is famous for its Khoisan artefacts, some of which have been dated to the early and middle stone-age and hundreds of rock art paintings of the late stone-age. More recent agricultural colonisation of the west coast and the development of the fishing industry are reflected in the cultural landscapes that give the region a rich cultural fabric. The Guriqua community has developed an international human rights tool known as a Biocultural Community Protocol (BCP). In the management and use of biological resources, indigenous and local communities (ILCs) have very intimate linkages with their surrounding environment. These close connections form the basis of their identity, culture, language, and way of life (Shrumm and Jonas 2012).⁶ Biodiversity and culture are particularly well-knit interdependent components. Cultural and spiritual values are often enshrined in the bioresources, ecosystems, and ancestral landscapes of ILCs, which can help sustain this biodiversity and related traditional knowledge; in return, their utilization helps sustain the traditional knowledge and cultural values of the ILCs.⁷ Local communities have developed customs to regulate and assert rights over such resources. These customs provide the foundation for many laws in most systems of jurisprudence and are grounded in principles and justice.

⁶ Shrumm, H; Jonas, H (eds) (2012) Biocultural community protocols: A toolkit for community facilitators. Cape Town: Natural Justice. <http://www.compasnet.org/blog/wp-content/uploads/2010/11/EDM-6.pdf> (accessed 26 September 2013).

⁷ Swiderska, K (2012) Making the Nagoya Protocol work at the community level. <http://www.scidev.net/global/indigenous/opinion/making-the-nagoya-protocol-work-at-the-community-level.html> (accessed 1 November 2014)

Customary rules and procedures, also known as ‘community protocols’, help ILCs to regulate conduct and interactions between themselves and outsiders; manage resources in their immediate surroundings; and uphold social relationships. During negotiations and community consultations, a community protocol can be a valuable tool for identifying the right holders of the bioresources and knowledge. BCPs are useful for putting external actors on notice about a community’s identity and ways of life, customary values and laws, and procedures for engagement. Articulation of a community protocol can also facilitate constructive dialogue and collaboration to support community plans and priorities in appropriate ways that fit with local conditions. It is for this reason that it would be worthwhile for the EAP to consider the Guriqua’s BCP, as this should inform the manner of consultation with the community as it relates to the impacts of these proposed developments on biodiversity and cultural landscapes linked to the cultural heritage of the Guriqua

In light of the above, we are concerned that the specialist report (Annexure 7) has not yielded results that sufficiently and adequately comply with the above section, particularly subsections (b), (c) and (e) in that the report has not taken into account the likely effects that direct impacts of prospecting (drilling) will have on all relevant cultural resources, and materials stemming from the cultural heritage of the indigenous knowledge systems of the Guriqua communities within the Lamberts Bay, Matzikama, and Cederberg areas which make up the West Coast District Municipality Region, as forming part of its heritage impact assessment report. Furthermore, as part of the West Coast District Municipality Priorities for Coastal Management as outlined in the IDP, priority 7: Heritage resource management commits the WCDM to appreciating and conserving the rich heritage and cultural resources that are found within the WCDM.⁸ We are concerned that the authorisation of these prospecting projects would run counter to this priority as outlined in the IDP.

3. Apart from the 1996 *Constitution*, *NEMA* defines the "environment" to mean the surroundings within which people exist, which are made up *inter alia* of "aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being". This definition of the environment links environmental factors with cultural heritage, which international cultural law principles requires states to consider in reaching decisions regarding sustainable development. Section 2(b) of *NEMA* provides that environmental management must be integrated, acknowledging that all elements of the "environment" (with links to cultural heritage) are "linked" and "interrelated," and it must take into account the effects of decisions on all aspects of the "environment" and all people in the "environment" by pursuing the selection of the best practicable environmental option. Therefore, it is implied that measures and governance in furtherance of environmental protection can be extended within applicable limits to issues of culture and heritage impacts, in the sense that **due consideration must be given to issues of culture when applying measures and governance in furtherance of environmental protection.**
4. In this particular context, members of the cultural and traditional communities belonging to the Guriqua (residing in close proximity to the proposed development) have been known to be deeply connected to certain sacred sites in Lamberts Bay,

^{8 8} See West Coast District Municipality IPD at page 34-38

Matzikamma and Cederberg areas in which the development is likely to occur, and in the greater West Coast District Municipality Region. These places or sites are sacred mainly because they carry with them a whole range of sacred rules, rituals and regulations regarding the communities' behaviour in relation to a set of cultural, spiritual and traditional beliefs. Such sacred sites constitute part of a particular community's cultural heritage, connecting the land with the cultural values, spiritual beliefs and kin-based relationships of the people in that community. Sacred sites (as linked to cultural and heritage rights) have often become subject to threats of destruction in the interests of what the destructive parties motivate as "development". In most instances, development activities, in this case prospecting activities such as drilling, have been known to cause noticeable degradation of natural ecosystems where adequate attention has not been given to environmental conservation.

5. In light of the comments above, the findings set out within the draft report on the Heritage Impacts are questionable to the extent that it does not comprehensively take into account all relevant "heritage resources" as contemplated by section 5 of the Heritage Resource Act as encompassed by all relevant cultural values and indigenous knowledge systems pertaining to natural resources such as rivers, streams, forests, mountains and rock formations, archaeological remains, graves and sacred sites, which all have cultural and spiritual meaning for a particular community or may be at the centre of certain cultural practices for all interested and affected local and traditional communities. It is questionable whether the findings in question have adequately addressed the concerns of all interested and affected traditional and local communities with regards to the protection of cultural heritage resources, and their associated cultural management practices and traditions as an extension of their well-being as envisaged in s 24 of the Constitution, s 2(b) of NEMA and section 34, 35, 36 and s 38 of the National Heritage Resources Act.

Specific comments/concerns in relation to the Climate Change Impacts as set out in the Basic Assessment, EIA specialist assessments and EMPR

1. It is imperative that the EAP consider the ways in which the proposed project area will be impacted by climate change and the extent to which the project would aggravate these impacts. In other words, it is of concern whether the current draft report has significantly considered the project's impacts on the area's climate resilience and ability to adapt to a changed climate. Given that this is a long term and large-scale project, consideration must be given to the ways in which climate change will impact on the area and communities where the project will be based, and how the project's own impacts will affect the area's resilience or vulnerability to the effects of climate change as they intensify. It is also of concern whether the current EIA addresses the ways in which the effects of climate change will impact on the project itself, and its ability to operate optimally and efficiently for its full anticipated lifespan given the climate change emission safeguards according to South Africa's climate change commitments.

Specific comments/concerns in relation to the Environmental Impacts to Environmental Sensitive Sites in the proposed prospecting sites as outlined in pages 52-62 as well as annexures 1-7.

1. Given the draft report has indicated that the potential negative impacts of the proposed development on the natural, cultural, palaeontological, and agricultural environment of the proposed prospecting sites and the region by virtue of Phase 2 to 4 activities, may in all likelihood, outweigh the identified positive impacts associated with the potential medium social and economic development benefits, it is greatly concerning that the draft report has not identified the direct and indirect impacts that local communities will be exposed to should the development go ahead. Furthermore, the potential release of toxic chemicals into the air, the land and water resources in which the project will be situated will in all likelihood result in the pollution of the air, pollution of water sources and the destruction of the land on which local communities depend for the production of food and their socio-economic and cultural survival. These environmental impacts will severely affect a wide range of other rights including the right to health, right to life, rights to adequate food and housing, and minority rights to culture.

Having reference to the West Coast District Integrated Environmental Programme, key roleplayers of the environmental initiatives in the West Coast District are concerned with implementing strategies which promote good environmental Planning Conservation and Management. Given water scarcity is an issue in the West Coast District Municipality, it is imperative that consideration is given to the West Coast IEP, particularly as it relates to efforts and strategies which attempt to introduce effective water conservation and limit further developments that will affected the already stressed resources within the Framework of the National Water Act.

2. Related to these direct impacts as stated above, are potential indirect impacts which the proposed prospecting project may contribute towards. The use of drilling activities may lead towards forms of land disruption and displacements which may contribute towards impacts on the right to culture, particularly where the identity of the community, in this case the Guriqua, is closely related to the land, and where there are several ancestral graves on the land where the Guriqua communities observe significant cultural and spiritual practices and ceremonial events.