



environmental affairs

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Environmental Affairs
REPUBLIC OF SOUTH AFRICA

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APPEAL RESPONSE REPORT

PROJECT NAME/TITLE: Appeal against Environmental Authorisation granted to Mineral Sands Resources (Pty) Ltd (MSR) to extend mining operations at Tormin Mine

PROJECT LOCATION: Tormin Mine, West Coast, South Africa (Ten Beaches along the stretch of coastline north of the Mine and to an inland “strand line” mining area on the Farm Geelwal Karoo 262.

PROJECT REFERENCE NUMBER: WC 30/5/1/2/3/2/1 (162 and 163 EM)

DATE PROJECT/ACTIVITY AUTHORISED: 7 June 2019

DETAILS OF THE APPELLANT	DETAILS OF THE APPLICANT
Name of appellant: Centre for Environmental Rights	Name of applicant: Mineral Sands Resources (Pty) Ltd (MSR)
Appellant's representative (if applicable):	Applicant's representative (if applicable):
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INTRODUCTION

1. This is an appeal against the approval of an integrated environmental authorisation (**IEA**) granted by the Department of Mineral Resources (**DMR**) in terms of section 24 of the National Environmental Management Act, 1998 (NEMA) and the National Environmental Management: Waste Act, 2008, read in conjunction with Regulation 21 of the Environmental Impact Assessment (**EIA**) Regulations for mining of heavy minerals (Ilmenite, Leucoxene, Rutile, Zircon, Monazite, Garnet and Staurolite) on remaining extent of the Farm Geelwal Karoo 262 and 10 Beaches adjacent to the remaining extent of the Farm Klipvley Karoo 153, Portion 4, 5, 6, and 7 of the Farm Klipvley Karoo 153, Farm Perseel Weskus 191, 192, 193, 194, 196, 197, 198, 199, 200 201, 202, 203, 204, 205, 206 and Portion 3 of the Farm Graauwduinen 152 in the Varhynsdorp Magisterial District, Western Cape Region.
2. The appellant is the Centre for Environmental Rights (**CER**), a registered non-profit company with registration number 2009/020736/08 that has been accredited as a non-profit organisation by the Department of Social Development under the Non-profit Organisations Act, 1997 with reference number NPO No. 075-863 and registered with the South African Revenue Service as a public benefit organisation under the Income Tax Act, 1962 with reference number PBO No. 930032226.
3. The CER is also a law clinic accredited by the Law Society of the Cape of Good Hope, and operates principally from premises at Springtime Studios, 1 Scott Road, Observatory, Cape Town, Western Cape.
4. The CER's mission is to advance the constitutional right – contained in section 24 of the Constitution – to an environment not harmful to health or well-being.
5. The CER helps communities and civil society organisations in South Africa realise the Constitutional right to a healthy environment, by advocating and litigating for environmental justice.
6. The CER confirms that Ms Li-Fen Chien is registered as an interested and affected party (**IAP**) on behalf of the CER in respect of MSR's application for environmental authorisation in order to extend mining operations at Tormin Mine. Please note that Ms Chien is no longer employed at the CER, as of 8 July 2019 and that Ms Zahra Omar, with email address zomar@cer.org.za should be noted as the registered interested and affected party on behalf of the CER forthwith.

7. The CER have considered the following documents in order to prepare this appeal:

- 7.1. The Environmental Impact Assessment Report and Issues and Responses Summary¹ which appear on the website for SRK Consulting; and
- 7.2. The Notification of Environmental Authorisation and Appeal Procedure in respect of the Extension of Tormin Mine, West Coast South Africa, dated 19 June 2019 and which includes Appendix A: Environmental Authorisation granted by the DMR together with Annexures "1" and "2" of the Environmental Authorisation which sets out the basis on which the DMR granted the decision and departmental standard conditions.

8. The CER's appeal is made in respect of the following:

- 8.1. Objection to granting of environmental authorisation in order to expand an authorised mining area in terms of section 102 of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA);
- 8.2. Flawed approach to assessing impacts;
- 8.3. Questionable assessment and evaluation of impact significance on terrestrial biodiversity
- 8.4. Inappropriate reliance on rehabilitation and revegetation to mitigate negative impacts within a Critical Biodiversity Area
- 8.5. The need for a biodiversity offset
- 8.6. Failure to take a risk-averse and cautious approach
- 8.7. Rehabilitation obligation and liability, financial provision
- 8.8. Need and desirability
- 8.9. Conflict with NEMA principles

¹ <https://www.srk.co.za/en/za-tormin-mine-extension>

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<p>Objection to granting of environmental authorisation in order to expand an authorised mining area in terms of section 102 of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA)</p> <p>1. The CER objects to MSR's reliance on section 102 of the MPRDA to amend its mining right and to expand its footprint significantly without applying for a new prospecting or mining right. Using section 102 to significantly expand an authorised mining area is an unlawful circumvention of the application process for prospecting and mining rights under the MPRDA and we submit that the Department of Mineral Resources (DMR) should have taken into account the intention of the legislature in seeking to amend this section in order to exclude applications for extensions when making this decision. In this regard, although the amendment has not come into effect, it is clear that the legislature intends to exclude extensions in terms of section 102 of the MPRDA and the DMR should have requested the applicant to apply for a new mining right and</p>	<p>Section 102(1) of the MPRDA provides that "A reconnaissance permission, prospecting right, mining right, mining permit, retention permit, technical corporation permit, reconnaissance permit, exploration right, production right, prospecting work programme, exploration work programme, production work programme, mining work programme environmental management programme or an environmental authorisation issued in terms of the National Environmental Management Act, 1998, as the case may be, may not be amended or varied (including by extension of the area covered by it or by the additional of minerals or a shares or seams, mineralised bodies or strata, which are not at the time the subject thereof) without the written consent of the Minister.</p>	

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<p>follow ordinary processes for doing so instead of granting environmental authorisation for the extension of the mine in terms of section 102 of the MPRDA. It was within the discretion of decisionmakers at the DMR to advise applicants of the standard legislative and regulatory processes instead of granting environmental authorisation in terms of a section of the MPRDA that was never intended to be used in this manner.</p>	<p>MSR submits that in this regard, it has not deviated from the prescript of the law and has complied with the current applicable law.</p>	
<p>2. Section 102(1) of the MPRDA <i>inter alia</i> provides that “<i>a reconnaissance permission, prospecting right, mining right, mining permit, retention permit, technical corporation permit (sic), reconnaissance permit, exploration right, production right may not be amended or varied (including by extension of the area covered by it or by the additional (sic) of minerals or a shares or seams, mineralised bodies or strata, which are not at the time the subject thereof) without the written consent of the Minister.</i>”</p>	<p>Correct.</p>	
<p>3. Section 72 of the Mineral and Petroleum Resources Development Amendment Act, 2008 (the Amendment Act), seeks to amend section</p>	<p>Correct.</p>	

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<p>102 of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA).</p> <p>4. We submit that, in the Amendment Act of 2008, Parliament intends to exclude any <u>substantive</u> amendment of a mining right to be effected in terms of section 102(1) of the MPRDA, by introducing section 102(2) in the Amendment Act. That new section 102(2) limits the application of section 102(1) as follows:</p>	<p>Correct, there was a process in Parliament undertaken to amend some Sections of the MPRDA (Act 28 of 2002), including Section 102, however those amendment have never entered into law, and as such the application of Section 102 remains as reflected in the MPRDA (Act 28 of 2002).</p>	
<p><i>"The amendment or variations referred to subsection (1), shall not be made if the effect of such amendment or variation is to</i></p> <p><i>–</i></p> <p><i>(a) Extend an area or portion of an area, or</i></p> <p><i>(b) Add a share or shares of the mineralised body, unless the omission of such area or share was a result of an administrative error."</i></p> <p>5. It is clear that it is the intention of the legislature to limit any extensions or variations of a mining right, to disallow amendments or variations that involved extensions of the area of the operation.</p>	<p>Correct, however, as the appellant very correctly points out, the proposed amendment to introduce Section 102(2) has never been effected. Accordingly, Section 102(1) stands as stipulated in the MPRDA (Act 28 of 2002).</p>	

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<p>Unfortunately, section 102(2) has not been brought into operation:</p> <p>a. The Amendment Act was assented to on 19 April 2009 and it was indicated, in section 94(1), that its provisions “<i>shall come into operation on a date fixed by the President by proclamation in the Gazette.</i>”</p> <p>b. On 23 May 2013, President Zuma issued Proclamation 14 of 2013, in terms of section 94 of the Amendment Act, and declared that it would commence on 7 June 2013. This proclamation would have brought into effect section 102(2). However, on 6 June 2013, a day before the commencement date, the President amended Proclamation 14 of 2013 to prevent section 102(2) (as well as other amendments, but not section 102(1)) from coming into operation.</p> <p>c. The decision by the President to prevent certain amendments from coming into operation may have been motivated by the fact that another amendment to section 102 was being contemplated in further amendments to the MPRDA. These further</p>	<p>Correct, and as such Section 102(2) has not yet been effected through the proclamation by the President. Section 102(1) does not exclude “<i>extension of the area covered</i>”.</p> <p>MSR maintains that Section 102(2) has not been effected yet, and as such Section 102(1) applies as stipulated in the MPRDA (Act 28 of 2002).</p>	

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<p>amendments are contained in Bill 15-2013 (the Bill), which was introduced into Parliament in June 2013. However the President referred the Bill back to Parliament because he had concerns about the constitutionality of certain provisions of the Bill, which concerns did not relate to section 102(2).</p> <p>The intention of the Section 102 process is being misused by MSR to expedite the approval process without complying with the necessary Mining Works Programme and Social and Labour Plan requirements. It also means that the economic viability of the project has not been tested through comprehensive mine economic calculations.</p> <p>We therefore submit that MSR should have followed the standard procedure and applied for a new mining right and should not have been allowed by the DMR to apply for an extension of its mining rights in terms of section 102 of the MPRDA.</p>	<p>MSR submits that it has not misused Section 102 as the section, as it stands, allows for “<i>extension of the area covered</i>”. MSR has not deviated from the prescript of the law and has acted in accordance with what the current law requires.</p> <p>MSR further submits that it has submitted both a Mining Works Programme (MWP) and Social and Labour Plan (SLP), as part of the Section 102 application. Section 29 of the MPRDA (Act 28 of 2002) allows the DMR to “<i>....direct in writing that specified information or data be submitted by-</i></p> <p class="list-item-l1">(a) <i>an applicant for a prospecting right, mining right, retention permit or mining permit, as the case may be</i>”.</p> <p>This dispels the notions by the appellant that MSR misused Section 102 to expedite the approval</p>	

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	<p>process without submitting the required MWP and SLP.</p> <p>MSR therefore submits that it has met all the requirement within the prescript of legislation.</p> <p>The Appellant has failed to demonstrate how it has or will be prejudiced by the Section 102 process as followed by MSR in this application.</p>	
<p>Flawed approach to assessing impacts</p> <p>1. We have previously submitted that the approach to determining significance (Appendix 10 – Impact Assessment) is flawed. In this regard, the possibility that the area will suffer from irreplaceable loss of resources has not been taken into account. Instead, this variable is tagged on to ‘intensity’ of impact (‘the magnitude of the impact in relation to the sensitivity of the receiving environment, taking into account the degree to which the impact may cause irreplaceable loss of resources’). This approach is indefensible, since irreplaceability and intensity are two entirely different measures (an operation could, for example, have a very high intensity impact which could be easily reversed and would not lead to irreplaceable loss of</p>	<p>In response to aspects 1-3:</p> <p>This issue was previously raised and responded to by SRK and specialists in the Issues and Responses (I&R) summary submitted with the Final EIA Report (page 85):</p> <p><i>“SRK and the specialists take the irreversibility of impacts into account and comment on this aspect in the impact description. We believe that SRK’s impact rating methodology provides a clear and useful way of rating and differentiating the significance of different project impacts.”</i></p> <p>The impact assessment methodology has been utilised, and accepted, in a large number of EIAs in South Africa and abroad.</p>	

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<p>resources). According to Appendix 10, ‘high’ intensity impacts would be “site-specific and wider natural and/or social functions or processes are severely altered” – this has no bearing on the irreplaceability of resources.</p> <p>2. The reports conflate ‘long term’ impacts with ‘irreversible’ impacts. Long term describes the duration of impacts and not whether or not they can be reversed. According to Appendix 10, ‘long term’ simply means <i>“more than 15 years”</i>. Neither the permanence nor reversibility of the impact is covered by this approach.</p> <p>3. The Constitution requires ‘ecologically sustainable’ development. Irreplaceable loss of important biodiversity resources would be incompatible with this requirement. The objective of the Environmental Impact Assessment (EIA) process, as set out in the EIA Regulations, explicitly includes (amongst other things) <i>“to determine the degree to which these impacts can be reversed, and may cause irreplaceable loss of resources”</i>.</p>	<p>None of the independent assessments by numerous specialist have come to the conclusion that there will be “irreplaceable loss of important biodiversity”.</p>	

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<p>4. Section 2(4)(a) of the National Environmental Management Act, 1998 (NEMA) specifies that sustainable development requires the consideration of all relevant factors including the following:</p> <ul style="list-style-type: none"> a. that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied; and b. that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised. <p>5. Statements in the Issues and Responses Summary, Appendix 8B that “<i>based on their professional judgment, specialists have not identified any fatal flaws or unacceptable impacts</i>,” are not acceptable in terms of meeting the requirements of the NEMA environmental management principles or the Constitution. Having a long-term impact on Critical Biodiversity Areas (CBAs) affects both</p>	<p>In response to items 4-6:</p> <p>As this project relates to the mining of specific minerals, the fixed location of the mineral deposit dictates possible mining locations.</p> <p>Specialists considered the location of new mining areas and infrastructure footprints within the extension areas and considered environmental constraints identified during their site visits. The terrestrial ecology specialist did not identify any specific areas of high sensitivity within the proposed mining areas and infrastructure footprints that should be designated as “exclusion zones”.</p> <p>The significance of impacts on CBAs was also further elaborated on in response to comments by CapeNature and CER (I&R Summary pages 40 and 89), which stated <i>inter alia</i> that: <i>“In relation to the Tormin Mine extension project, the CBA has been designated to protect the coastal strip and associated ecological processes. Inland mining will adversely affect the function of the CBA, but given the intact nature of the surrounding landscape, the function of the CBA would certainly not be lost completely. Given that most fauna appear to still be using the site, the terrestrial ecology specialist does not deem that inland mining will have a regional</i></p>	

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<p>biodiversity pattern and ecological process, and presents a material risk of jeopardising the integrity of the affected areas.</p> <p>6. We submit that the DMR should have considered this issue carefully instead of relying on the inadequate response of SRK. If the DMR had considered this issue more carefully and scrutinised the approach to determining significance as well as the outcomes of the assessment, the long term impact on Critical Biodiversity Areas (CBA's) would have been apparent and environmental authorisation should therefore not have been granted.</p>	<p><i>impact on connectivity and ecological function in the area."</i></p> <p>SRK and MSR applied the mitigation hierarchy (avoid, reduce and rehabilitate) in refining the project layout and mitigation measures.</p> <p>To avoid impacts as far as possible, SRK compiled a Site Screening Report (in the Pre-Application Phase) based on specialist screening studies of biophysical aspects (aquatic ecology, terrestrial ecology, land capability, heritage) that could be sensitive to disturbance and influence the decision to mine in the area. During this initial phase, the specialists described, assessed and delineated areas of high, medium and low sensitivity in the study area relevant to their area of expertise. Sensitivity was determined by the specialists based on their professional expertise and considering the following criteria:</p> <ul style="list-style-type: none"> • Current condition; • Tolerance to disturbance; • Importance to conservation or scientific understanding; and • Remaining extent / rarity. 	

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	<p>The purpose of the Site Screening Report was to inform MSR's high-level mine planning and identify possible exclusion zones.</p> <p>During the EIA process, MSR initially proposed a layout alternative for the infrastructure / plant expansion area that extended close to the eastern (fenced) boundary of Farm Geelwal Karoo 262. Under advice of the terrestrial ecology specialist, the layout of the infrastructure / plant expansion area was revised to avoid portions of this ecological corridor between the infrastructure / plant expansion area and the eastern fenceline. The revised layout also reduces the overall disturbance footprint in the CBA, as portions of the infrastructure / plant expansion area are now located partly over areas to be mined. Although impacts on the CBA could not be completely avoided, the impact on the CBA was mitigated by revising the layout of the infrastructure / plant expansion area. Mitigation measures specify that areas affected by the project must be rehabilitated.</p> <p>Statements pointing to the presence of a "material risk of jeopardising the integrity of the affected areas" are simply not supported by the specialist studies presented in the EIA.</p>	

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<p>Questionable assessment and evaluation of impact significance on terrestrial biodiversity</p> <p>7. As noted in the specialist report on terrestrial ecology, the vast majority of the affected area under application falls within CBAs. These areas have been designated CBAs mostly in order to promote coastal resource protection and to maintain ecological processes associated with the coastal strip, especially the ability of fauna restricted to this area to disperse along the coast. The development poses a potential threat to the functioning of the affected CBAs, both in terms of a direct impact on species diversity (biodiversity pattern) as well as on broad-scale ecological processes (biodiversity process). The dominant vegetation type on site is Namaqualand Strandveld, which has little formal protection and is steadily declining. An analysis done in 2016 by CapeNature shows that the remaining extent of Namaqualand Strandveld has decreased by more than 20% since 2011. This stretch of coastline and inland area has been identified as an important ecological corridor, the importance of which has been</p>	<p>In response to items 7-10:</p> <p>This issue was previously raised, and responded to by SRK and specialists in the I&R summary submitted with the Final EIA Report, <i>inter alia</i> in responses on pages 40 and 89:</p> <p><i>"Development in CBAs can have and often has high negative impacts. This does, however, depend to some degree on the irreplaceability of the affected CBA.</i></p> <p><i>Where CBAs have a high irreplaceability value, then losses of habitat are highly undesirable and can have regional level impacts. However, in areas where the vegetation is still largely intact and there are no specific features of high value in the CBA, then the loss of vegetation will be less significant.</i></p> <p><i>Where there are multiple options (CBAs) available to achieve a conservation target, then an impact on a single CBA has a local impact only as the loss of vegetation does not compromise the overall ability to meet conservation targets as the targets can still be met elsewhere.</i></p> <p><i>In relation to the Tormin Mine extension project, the CBA has been designated to protect the coastal strip and associated ecological processes. Inland mining</i></p>	

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<p>elevated due to notable loss and degradation of habitat between the Olifants and Sout Rivers.</p> <p>8. The role of CBAs to meet South Africa's international obligations in terms of the Convention on Biological Diversity is not addressed. CBAs are areas which have been scientifically and systematically designated since they are essential if the country is to meet its biodiversity targets, often involving vegetation types and ecosystems that occur nowhere else in the world. CBAs are the most efficient configuration in space, with the least negative impact on land uses, and any negative impacts on these areas are seen to be unacceptable since they are likely to result in long-term (if not permanent) loss of biodiversity. The loss of any material area of critical biodiversity would generally be seen as constituting 'irreplaceable loss' and its significance as being 'very high' or 'high'.</p> <p>9. The terrestrial ecology specialist evaluates the impacts on vegetation and flora in the CBA as being of 'local' extent (i.e. "confined to the mining area and immediate surroundings", as defined in Appendix 10). It appears as if no</p>	<p><i>will adversely affect the function of the CBA, but given the intact nature of the surrounding landscape, the function of the CBA would certainly not be lost completely. Given that most fauna appear to still be using the site, the terrestrial ecology specialist does not deem that inland mining will have a regional impact on connectivity and ecological function in the area."</i></p> <p>Furthermore, <i>"habitat loss within a CBA only constitutes irreplaceable loss where there are specific features or species present within the CBA that are not well represented elsewhere. In many cases, this is indeed the case and CBAs often represent remnant fragments of threatened vegetation types or contain important populations of Species of Conservation Concern (SCC). However, where areas have not experienced a high degree of transformation and human impact, there may be several options (or selection of CBAs) that could be used to achieve a specified conservation target. Impacts on CBAs in such areas have a local impact only as the overall ability to meet conservation targets is not compromised and conservation targets can be achieved elsewhere (but perhaps less efficiently).</i></p>	

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<p>consideration has been given to the regional, if not national, importance of the impact areas, and that the specialist has assessed and evaluated these impacts as if they were in a comparable area outside of a CBA. That is, no adjustment to the impact significance has been allowed in recognition of this underlined importance of the affected area. Given that the impacts are on CBAs, and thus of regional, if not national, importance to biodiversity, the extent should be seen as 'regional' or 'national'. Since the measure of extent informs the significance rating, and an increased extent rating would elevate the significance rating, the specialist's significance rating of 'medium' negative is disputed.</p> <p>10. Statements in the Issues and Responses Summary, Appendix 8B that the "terrestrial ecology specialist is aware of the CBA's and has made recommendations to mitigate impacts," that "CBA's are not formal conservation areas," that the "terrestrial ecology specialist does not deem that inland mining will have a regional impact," and that "as there are no species of very high concern or rare or specialised habitats present in the affected area, impacts are not</p>	<p><i>As there are no species of very high concern or rare or specialised habitats present in the affected area, impacts on the CBA are not considered to have regional significance.”</i></p> <p>Impact and significance were assessed based on local, regional or national significance. Where an impact was found to have a potential footprint or influence outside their immediate area such a rating and assessment was applied and taken into consideration. Accordingly, disputation of the specialist's assessment are without merit.</p>	

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<p>considered to have regional significance" all point to a skewed interpretation of the impacts of mining in a critical biodiversity area as well as a significant underappreciation of the value and importance of these areas.</p> <p>11. We submit that the DMR should have critically evaluated the importance and significance of CBA's instead of relying on the reports of the external consultant in order to approve the environmental authorisation.</p>	<p>The EIA framework in South Africa is set up in such a way that the decision of a competent authority (in this case DMR) is largely informed by the findings of the EIA, including the independent EAP and the independent specialist, who in this project is a recognised and experienced ecological expert. The specialist, Simon Todd, is a past chairman of the Arid-Zone Ecology Forum and has 18 years' experience working throughout the country. Simon Todd is registered with the South African Council for Natural Scientific Professions (SACNASP).</p>	
<p>Inappropriate reliance on rehabilitation and revegetation to mitigate negative impacts within a Critical Biodiversity Area</p> <p>12. Rehabilitation of affected areas is essentially the sole approach to mitigating negative impacts.</p>	<p>In response to items 12-16:</p> <p>These issues were previously raised, and responded to by SRK and specialists in the I&R summary submitted with the Final EIA Report (page 90):</p> <p><i>"Rehabilitation is an important mitigation measure, particularly for areas that are disturbed by the project. The EMPr also lists a large number of other mitigation measures to minimise impacts".</i> As noted</p>	

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<p>13. Namaqualand Strandveld is extremely difficult to rehabilitate and is likely to be very slow. In addition, it is improbable that it will lead to the return of an ecologically equivalent habitat. Clarity is needed on the intended outcome of, and feasibility, of rehabilitation and/or revegetation efforts (as demonstrated by past experience and/or field trials). Rehabilitation of the mined areas is likely to be extremely difficult and cannot be assumed to reduce residual negative impacts of mining without proof of rehabilitation success.</p> <p>14. As noted by the terrestrial ecology specialist (Appendix 11F, page 31), “Provided that the cover of the affected area can be restored to near-natural levels, then the long-term impact of the inland mining on ecological processes would be relatively low. However, the degree to which this ideal will be achieved is unknown and can’t be assumed”. The specialist notes that while “..rehabilitation of the inland mining area can largely ameliorate the long-term impacts on connectivity, the diversity of the affected area will never be fully restored and regardless of the mitigation and rehabilitation applied, some</p>	<p>above in the response to items 4-6, measures were also taken to avoid and reduce impacts through e.g. adjustment of the project layout.</p> <p><i>“Impact ratings must be based on current likely outcomes and achievable targets. The terrestrial ecology specialist confirmed that there are mining areas on the West Coast where good rehabilitation success has been achieved. SRK is also aware of such areas. Successful rehabilitation is therefore achievable and should be used as a benchmark against which to measure rehabilitation success at Tormin Mine.</i></p> <p><i>The Terrestrial Ecology Impact Assessment clearly stipulates that the assessed impacts are based on reasonable levels of rehabilitation being achieved, and should these not be achieved, then impacts would be elevated and any additional mining would have escalating impacts. As such, the terrestrial ecology specialist agrees that successful rehabilitation is a key metric that should be used to evaluate impacts of future mining.</i></p> <p><i>Although it is clear that reasonably effective rehabilitation is possible, MSR must have the resources to ensure effective rehabilitation is achieved. In terms of the EMPr, MSR are required to</i></p>	

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<p>residual impact will remain in this regard"(Appendix 11F, page 32).</p> <p>15. 20. A 'high-level' rehabilitation and revegetation plan is presented (Appendix 6 of the terrestrial ecology specialist report [Appendix 11f]). However, there is no information on the likely outcomes of this plan over time, of demonstrated success of past rehabilitation or revegetation efforts in this vegetation type and setting, and/or of the timeframes that are likely to be needed to meet the stated outcomes (which fall short of restoration of the original biodiversity). The specialist states in the conclusion that "A lot of practical lessons have been learnt in this regard at other mines in the area such as Brand-se-Baai and it would be valuable to investigate the approaches that have been successful here first hand", implying that these approaches and outcomes have not been investigated. Taking a risk-averse and cautious approach, and with no assurance that rehabilitation will be effective, means having to consider negative impacts on a CBA in the absence of rehabilitation.</p>	<p><i>appoint a specialist horticulturalist to assist in the implementation of the Rehabilitation Plan. MSR are also required to monitor the effectiveness of rehabilitation and review and update the Rehabilitation Plan accordingly. The detailed Rehabilitation Plan (to be compiled in terms of the EMPr) will identify responsibilities and required resources (horticulturalist, nursery, hydroseeding) and will need to be updated throughout the Operational Phase as informed by rehabilitation monitoring.”.</i></p> <p>For the avoidance of doubt, “demonstrated success of past rehabilitation or revegetation efforts in this vegetation type and setting” has been highly successful as referred to in the report of JR Blood in 2006 “Monitoring Rehabilitation Success on “Namakwa Sands Heavy Minerals Mining Operation”.</p> <p>“[t]his study indicated that topsoil replacement and plant translocation facilitate the return of similarity, species richness, species diversity and vegetation cover to mined areas. The rehabilitation site that had the greatest amount of biological input (topsoil replacement and plant translocation) appeared to be the most successful technique in facilitating vegetation recovery similar to reference sites.”</p>	

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<p>16. Statements in the Issues and Responses Summary, Appendix 8B that “<i>in terms of the EMPr, MSR are required to monitor the effectiveness of rehabilitation and review and update the Rehabilitation Plan accordingly</i>” do not address the concerns raised in relation to whether the area can be rehabilitated successfully. The DMR’s failure to critically engage with whether or not rehabilitation will be effective or successful in light of past experiences is material and merely requiring the holder of the IEA, in terms of the standard departmental conditions to, “<i>ensure that rehabilitation of the disturbed areas caused by the operation at all times comply with the EMPr</i>”, is insufficient to address the real possibility that the rehabilitation may not be possible.</p>	<p>An iteration approach to rehabilitation is a very successful and effective method whereby a planned methodology is adapted to site specific conditions and experience over time. This is a best practice approach and this adaptive management approach has implemented successfully in the adjacent Namakwa Sands mine as referred to above.</p>	
<p>The need for a biodiversity offset</p> <p>17. According to the NEMA EIA Regulations, any report submitted as part of an application must take into account any applicable government policies and plans, guidelines, environmental management instruments and other decision-making instruments that have been adopted by the competent authority in respect of the</p>	<p>In response to items 17-21:</p> <p>These issues were previously raised, and responded to by SRK and specialists in the I&R summary submitted with the Final EIA Report:</p> <p><i>“The specialists appointed by SRK are experts in their fields and expected to be familiar with the concept of offsets and guidelines pertaining to them. On other projects and where they deem applicable, specialists do recommend offsets. Based on their</i></p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>application process or the kind of activity which is the subject of the application. The report must indicate how the relevant information has been considered, incorporated and utilised.</p> <p>18. Both provincial guidelines and the draft national policy on biodiversity offsets (gazetted 31 March 2017) require that “Biodiversity offsets should be considered to remedy residual negative impacts on biodiversity of ‘medium’ to ‘high’ significance” and that “Residual impacts of ‘medium’ to ‘high’ significance should trigger a requirement for a biodiversity offset”. According to the draft national policy, “Areas of composite biodiversity significance recognised in approved biodiversity policy, bioregional, biodiversity or spatial conservation plans”, such as CBAs are areas in which “impacts [are] preferably to be avoided”, and where an offset ratio of “at minimum 20 times the impacted area” should be applied. Furthermore, offset sites are to comprise “areas of highest conservation priority that are currently without protection”. The need to consider offsets is also set out in DEA’s 2017 Need and Desirability Guideline (“fourthly, unavoidable impact that remain (sic) after mitigation and remediation must be compensated for through</p>	<p><i>professional judgment, specialists have not identified any fatal flaws or unacceptable impacts. The terrestrial ecology specialist has assessed the impact of the project on flora and fauna and has recommended mitigation measures to avoid and/or minimise impacts. The specialist does not consider a biodiversity offset to be warranted based on the significance of the identified impacts.”</i></p> <p>Based on their extensive experience, SRK supports the specialists’ findings.</p> <p>With respect to offsets, environmental offsets are normally recommended where a permanent or long lasting impact will occur that results in the permanent change in land use or land capability. The proposed work and impacts under this application do not result in such an outcome.</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>investigating options to offset the negative impacts").</p> <p>19. Of relevance to this case, in a recent (13 September 2018) Appeal Decision in the matter between the Umgenyana Conservancy, KZN's EDTEA and Gwens Stream Estates (Pty) Ltd, DC22/0039/2017, the MEC acknowledged that the "<i>draft Policy remains a draft</i>", but nonetheless stated that "<i>the principles and the content of that draft Policy have been taken as the correct position on how biodiversity offsets must be implemented</i>".</p> <p>20. It is clear, therefore, that an offset would be required to 'remedy' impacts on biodiversity in accordance with the NEMA principles. It is wholly unacceptable to state that "based on their professional judgment, specialists have not recommended offsets for this project" (as stated in the Issues and Responses Appendix 8B).</p> <p>21. It does not appear that the from the details of the decision made by the DMR that biodiversity offsets were considered for purposes of addressing the residual impacts on biodiversity. This is in direct contradiction of the NEMA</p>		

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>principles as set out in section 2 of NEMA, which applies to the actions of all organs of state, serve as guideline by reference to which 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.</p>		
<p>Failure to take a risk-averse and cautious approach</p> <p>22. Section 2(4)(a) of NEMA ('the NEMA principles') specifies that sustainable development requires the consideration of all relevant factors including that a risk-averse and cautious approach should be applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.</p> <p>23. The specialist states in the Executive Summary of Appendix 11F that "The survey period did not however include the spring season with the result that annuals, forbs and geophytes were not adequately represented in the surveys, which is acknowledged as a limitation of the</p>	<p>In response to items 22-28:</p> <p>SRK previously noted in the I&R summary submitted with the Final EIA Report (page 95) that: "<i>SRK has adopted a risk averse and fit-for-purpose approach throughout the report by consistently assuming actual or worst scenarios, identifying associated risks and impacts, recommending mitigation measures as well as monitoring to gauge compliance and implement corrective action if warranted.</i>"</p> <p>Regarding the spring survey, the drought (and late rains) that persisted during the terrestrial ecology specialist's fieldwork was identified as a limitation for vegetation sampling. However, to address this gap/limitation, the specialist undertook a habitat-based approach to compare the composition of the</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>current study". In addition, that "...the affected area has not been well sampled in the past and it is likely that there is a variety of species of concern present in the affected area that have not been recorded in the past. There are also a number of species of concern present on the adjacent Sere Wind Farm that are not on the list, suggesting that some of these are likely to be present on Geelwal Karoo 262 as well" (Appendix 11F, page 33).</p> <p>24. Appendix 11F (page 36) also states that "Although a follow-up survey of the area during the spring season would unfortunately not be able to contribute to the EIA process... [it] would also potentially be important to identify SCC [species of conservation concern] that should be translocated outside of the mining area prior to the commencement of mining activities".</p> <p>25. This approach to gaps in knowledge that may be essential to understanding the full significance of impacts on biodiversity, is unacceptable: it assumes that, should Species of Conservation Concern (SCC) be found, their translocation would be an acceptable form of mitigation, as opposed to avoidance of impacts. As noted by</p>	<p>vegetation within the project footprint to that outside the project footprint (33 sample plots were evaluated). If the perennial vegetation in and outside of the affected footprint is similar to the vegetation outside the affected footprint, then the other components are also likely to be similar.</p> <p>As a result of the identified limitation, the Terrestrial Ecology Impact Assessment and the EMPr require the appointment of a suitably qualified specialist to undertake a preconstruction walk-through to identify SCC and protected species within the construction footprint and oversee the rescue and relocation of these species.</p> <p>Impact assessments need to gather sufficient data to inform decision-making, and (in this instance) the primary data in conjunction with extensive secondary data is deemed sufficient to assess impacts.</p> <p>Rehabilitation is discussed under our response to items 12-16 above.</p> <p>The identification and relocation of SCC was identified as one of the mitigation measures. Measures taken to avoid impacts are discussed in our response to items 4-6.</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>SANBI in their Guidelines for EIA², there should be “Strong avoidance of 'search and rescue' options for conserving species of conservation concern”, and “in situ conservation is vital and should be recommended as the only option for conserving species of conservation concern”.</p> <p>26. According to the terrestrial ecology specialist, “Although the current footprint is not likely to generate highly significant impacts after rehabilitation”, “[b]ased on the current development footprint, impacts are however expected to be moderate but...are to a large degree contingent on effective rehabilitation of the affected areas after mining” (page 51).</p> <p>27. Given the absence of information on the likely effectiveness or outcomes of rehabilitation and the timeframes for that rehabilitation, the DMR should have taken a risk-averse and cautious approach to assessing and evaluating impacts and their significance, however, it does not appear that the decisionmaker for the DMR applied such an approach or took into consideration the impacts and their significance.</p>	<p>The number of surveys, studies and use of expert and specialist opinions in the EIA and EMP support the robust and risk adverse approach SRK have taken.</p>	

² <http://redlist.sanbi.org/eiaguidelines.php>

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>28. In Appendix 8B, in the issues and responses summary, it is stated that “SRK has adopted a risk averse and fit-for-purpose approach throughout the report by consistently assuming actual or worst scenarios, identifying associated risks and impacts, recommending mitigation measures as well as monitoring to gauge compliance and implement corrective action if warranted.” However, given what is stated above, it does not appear that such an approach has been adopted and the DMR has not interrogated the approach taken in the various studies, thus failing in their duty to abide by NEMA principles in assessing whether or not to grant this integrated environmental authorisation.</p>		
<p>Rehabilitation obligation and liability, financial provision</p> <p>29. Section 2(4)(p) of NEMA states that the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse</p>	<p>Correct.</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>health effects, must be paid for by those responsible for harming the environment.</p>	<p>Correct.</p>	
<p>30. According to section 24P of NEMA, an applicant for an environmental authorisation relating to prospecting, exploration, mining or production must, before the Minister responsible for mineral resources issues the environmental authorisation, comply with the prescribed financial provision for the management of negative environmental impacts. ‘Financial provision’ is defined (section 1) as the insurance, bank guarantee, trust fund or cash that applicants for an environmental authorisation must provide in terms of this Act guaranteeing the availability of sufficient funds to undertake, amongst others, the “remediation of any other negative environmental impacts”.</p>		
<p>31. That is, it is clear that externalities must be internalised; i.e. that the applicant is responsible for ‘paying’ for all public costs to the environment caused by the proposed activities.</p>	<p>MSR’s understanding is that the intention of the financial provision, as it relates to the environmental liability, is to act as a guarantee that should anything happen to the company, the DMR will have sufficient funds to carry out the all necessary rehabilitation of the areas impacted upon by proposed activities.</p>	
<p>32. In response to 2.19 in the Need and Desirability appendix, it is recorded that “<i>Rehabilitation will</i></p>	<p>Correct.</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p><i>take place during the Life of Mine (i.e. concurrent) as well as during the closure phase. MSR will be required to rehabilitate the affected areas to a state as close to a pre-mining condition, as far as is reasonably possible, and monitor the success of rehabilitation in terms of this closure objective.” The life of mine is given as about 11 years.</i></p> <p>33. Reference in the EMPr is made to the Rehabilitation Plan provided in Appendix 6 of the Terrestrial Ecology Impact Assessment (Appendix 11F). This Rehabilitation Plan is a ‘high-level’ plan only, with no reliable indications of the extent and duration of liability of the applicant for rehabilitation, and/or for the likely timeframes in which performance targets for rehabilitation would be achieved in practice. The terrestrial ecology specialist notes clearly that “a generalized high level revegetation & rehabilitation plan is provided in Appendix 6, but would still need to be translated into a detailed action and implementation strategy based on the final details of the mining plan at the site.” Also, that “the intention is not to provide an operational plan, but rather the principles that should underpin a detailed rehabilitation action</p>	Correct	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p><i>and implementation plan for transformed and disturbed areas at the Tormin Mine.”</i></p> <p>34. The scope and the duration of liability of the applicant for rehabilitation is not clear. The specialist states that ‘Monitoring will occur for decades’, but there is no clarity on the timeframes for which rehabilitation activities and associated financial and management responsibility have been provided.</p> <p>35. The terrestrial ecology specialist (Appendix 6 of the specialist report: Appendix 11F) states that “<i>if the plant itself is decommissioned at the end of the life of the mine, then the footprint of the plant and associated infrastructure and cleared areas would also need to be rehabilitated.</i>” <i>“Numerous access roads and other features in the beach mining area north of the plant”</i> would also need to be rehabilitated. While the specialist states that targets ‘should be set’ against baseline cover over a 3-year period (ending with 60% of background cover) the “<i>ultimate goal should be to achieve approximately 80% of the background perennial plant cover</i>”. The specialist notes that “<i>ultimately the effectiveness of rehabilitation in restoring species richness can only be</i></p>	<p>It must be noted that before any rehabilitation plan can be prepared, a detailed rehabilitation plan must be submitted to the competent authority for consideration and, ultimately, approval.</p> <p>This rehabilitation plan will be prepared by a specialist.</p> <p>DMR’s rehabilitation guidelines provides for a period of care and maintenance after rehabilitation and it must be noted that the DMR will not issue the closure certificate until it is satisfied that proper rehabilitation has been undertaken in the affected areas.</p> <p>This means that MSR will remain responsible for the affected areas in question for as long as the DMR has not issued the closure certificate.</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p><i>evaluated after 10 or more years following rehabilitation.”</i></p> <p>36. A number of environmental or mining-related constraints that <i>retard</i> or otherwise limit rehabilitation success are listed. It is noted that “<i>areas remain vulnerable to disturbance for decades</i>”, that “<i>active rehabilitation of these soils is usually met with very poor success</i>”, and that “<i>rehabilitation in the incorrect season may be futile</i>”.</p> <p>37. A Decommissioning and Closure Plan is included in the EMPr (Part B, Section 1(ix)). The objective of this section is to provide recommendations for the decommissioning, closure and rehabilitation of the affected areas at the end of the operational lifespan of Tormin Mine, “<i>...to achieve sustainable land use conditions and avoid or minimise costs and long-term liabilities to MSR</i>”.</p> <p>38. Table 44 includes ‘Site rehabilitation’ in the construction phase: implementation timeframe is ‘Once construction is complete’; or ‘Throughout construction if it takes place in phases / different areas sequentially’.</p>	<p>As mentioned above, a specialist will be appointed to undertake this kind of work and DMR will not issue any closure certificate until it is satisfied that proper rehabilitation has been done.</p> <p>Correct.</p> <p>Correct.</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>39. There is no provision for 'site rehabilitation' during the operational phase (Table 45 in the EMPr).</p> <p>40. Appendix 14, the financial provision, makes no provision for specialist input to prepare a detailed rehabilitation plan. It appears that this calculation makes provision for "<i>2 to 3 years of maintenance and aftercare</i>", which seems wholly insufficient given the points raised above.</p> <p>41. In Appendix 8B, in the issues and responses summary, it is stated that "<i>the financial provision includes the necessary costs to implement the required rehabilitation activities for three years after closure.</i>" Therefore, despite significant evidence on the impacts of the mining activities, for well beyond threes years after closure of the mine, there is still no clarity on how MSR plans to address long term impacts. It appears therefore, that the allocated financial provision is wholly insufficient and that no attempt was made to explain how to address the inadequacies.</p> <p>42. The DMR does not appear to have interrogated the insufficiency of financial provision for the impacts of the mining, thus failing in the</p>	<p>A detailed rehabilitation plan will be prepared prior to commencement of concurrent rehabilitation and the cost will be incurred as an operational cost, hence there is no provision for the rehabilitation plan in Appendix 14.</p> <p>The financial provision guideline make provisions for 2-3 years, however maintenance will take as long as required by the DMR.</p> <p>It must be noted that before any rehabilitation plan can happen, a detailed rehabilitation plan must be submitted to the competent authority for consideration and ultimately approval.</p> <p>The 2-3 years is referenced in the DMR's Financial provision guideline.</p> <p>It is MSR's submission that DMR considered all the information required to make an informed decision,</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
obligations to incorporate NEMA principles into their decision making and to ensure that negative environmental impacts are addressed.	in line with the Guidelines of Financial Provision of the DMR and in compliance with section 24P of NEMA.	
<p>Need and Desirability</p> <p>43. DEA's guideline is clear that "need" is not the same as the "general purpose and requirements" of the activity; the "need" relates to the interests and needs of the broader public.</p> <p>44. The response to Question 1.7 (Appendix 14) of the DEA's Need and Desirability guideline refers. The answer given does not respond to some key points of this question, which relate to ecological integrity and limits of acceptable change. Given that the project will affect a CBA,</p>	<p>SRK acknowledges in the EIA report that: <i>"The principles in NEMA serve as a guide for the interpretation of the issue of "need", but do not conceive "need" as synonymous with the "general purpose and requirements" of the project."</i> The consideration of need and desirability in EIA decision-making therefore requires the consideration of the strategic context of the project along with broader societal needs and the public interest (DEA, 2014). However, it is important to note that projects which deviate from strategic plans are not necessarily undesirable. The DEA notes that more important are the social, economic and ecological impacts of the deviation, and "the burden of proof falls on the applicant (and the EAP) to show why the impacts...might be justifiable" (DEA, 2010b).</p> <p>The section on "need and desirability" in the EIA Report and Appendix 7 (DEA Need and Desirability Guidelines) should be read in their entirety: ecological integrity and limits of acceptable change are explicitly considered.</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>that the “diversity of the affected area will never be fully restored” according to the terrestrial ecology specialist (page 32 of Appendix 11F), and mitigation measures (primarily rehabilitation) have uncertain outcomes, it is clear that the proposed use is unlikely to be justifiable when considering ‘best use’ and ‘intra and intergenerational equity’.</p> <p>45. In response to Question 8, which requires a risk-averse and cautious approach, it appears that this has been misinterpreted to mean the same thing as the mitigation hierarchy. It is stated that “<i>the following risk-averse principles were applied to the investigation and assessment of ecological impacts: Wherever possible, ecological impacts to be avoided; and where ecological impacts cannot be avoided, they will be mitigated as far as practicably possible on site.</i>” This interpretation is incorrect, and it is thus not at all clear how a risk-averse and cautious approach is to be applied, particularly given that there are gaps in determining the flora baseline for the project and uncertainties regarding SCC, and also the uncertainties about rehabilitation outcomes.</p>	<p>SRK previously noted in the I&R summary submitted with the Final EIA Report (page 95) that: “<i>SRK has adopted a risk averse and fit-for-purpose approach throughout the report by consistently assuming actual or worst scenarios, identifying associated risks and impacts, recommending mitigation measures as well as monitoring to gauge compliance and implement corrective action if warranted.</i>”</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>46. No response is given to Question 1.9, namely, <i>“How will the ecological impacts resulting from this development impact on people's environmental right?”</i> Given the long-term and cumulative impacts of medium significance on terrestrial vegetation, flora and fauna, and the fact that the proposed activity is in a CBA, where the main mitigation measure proposed is rehabilitation/ revegetation with uncertain outcomes, it is crucial that the impact on environmental rights is addressed. The admission that <i>“there may be some impacts that are not ecologically sustainable”</i> is hugely problematic and has implications for exercising environmental rights</p>	<p>The response to Question 1.9 was provided with the response to Question 1.10.</p> <p>In stating that <i>“there may be some impacts that are not ecologically sustainable”</i>, SRK is acknowledging that, as is the case for many/most other mining projects or complex projects of this nature, there are going to be environmental impacts (which need to be considered in conjunction with other impacts, both positive and negative). SRK is not suggesting the project is unsustainable.</p> <p>This statement additionally supports our position that SRK engage with a risk-averse approach.</p>	
<p>47. In the response to Question 2.5.11, <i>“Encourage environmentally sustainable land development practices and processes”</i> it is stated that <i>“For the Mine to be commercially viable, there may be some impacts that are not environmentally (ecologically) sustainable. These impacts have been assessed in the EIA Report (see previous responses). Wherever possible, ecological impacts will be avoided and, where ecological impacts cannot be avoided, they will be mitigated as far as is practicably possible”</i>. The</p>	<p>In response to items 47-49:</p> <p>The proposed Tormin Mine extension project will entail so-called triple bottom line costs / benefits, i.e. social, environmental (taken to be ecological and/or biophysical) and economic costs / benefits, in line with the three pillars of sustainable development.</p> <p>As such, no pillar can be viewed in isolation, and after the assessment of individual impacts, the three pillars and anticipated trade-offs between social, environmental and economic costs and benefits</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>applicant thus acknowledges that the proposed activity would not satisfy sustainable development principles.</p> <p>48. In Appendix 8B, in the issues and responses summary, the same statement is repeated, that "For the Mine to be commercially viable, there will be some ecological impacts. These impacts have been assessed by the specialists and have been presented in the EIA Report. Based on their professional judgment, specialists have not identified any fatal flaws or unacceptable impacts." Therefore, instead of addressing the substantive issues raised in respect of the need and desirability of the mining operation, the same statement is repeated in response the concern.</p> <p>49. It appears that the DMR has not questioned these issues at all and merely relied on the reports and specialist studies prepared, without any interrogation thereof, making a generic decision for what is a massive extension of a</p>	<p>need to be considered holistically. The trade-offs are documented in the EIA Report. As shown in the Report, the proposed mine expansion is not expected to have unacceptably significant adverse impacts, while socio-economic benefits are noteworthy.</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
mining operation in the Critical Biodiversity Area.		
<p>CONFLICT WITH NEMA PRINCIPLES</p> <p>50. Annexure 2, paragraph 13 of the Environmental Authorisation states that 'the competent authority is satisfied that the proposed listed activities will not conflict with the general objectives of Integrated Environmental Management stipulated in Chapter 5 of NEMA and that any potentially detrimental environmental impacts resulting from the listed activities can be mitigated to acceptable levels.' The NEMA principles under consideration include:</p> <p>a) section 2(4)(a)(i): 'sustainable development requires the consideration of all relevant factors including...that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot altogether be avoided, are minimised and remedied.';</p> <p>b) section 2(4)(a)(v): 'that the development, use and exploitation of renewable resources and the ecosystems of which they are part</p>	<p>As presented previously, actions were taken to avoid impacts where possible. Where impacts could not be avoided, measures were identified to mitigate, minimise and/or remedy impacts.</p> <p>As with any development or mining project, the Tormin Mine extension project will result in unavoidable adverse environmental impacts.</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>do not exceed the level beyond which their integrity is jeopardised.'</p> <p>c) section 2(4)(a) (vii): that 'a risk-averse and cautious approach is applied, taking into account the limits of current knowledge about the consequences of decisions and actions'.</p> <p>d) section 2(4)(r): 'sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.'</p> <p>51. The CER submits that the decision to grant the Environmental Authorisation does in fact conflict with the NEMA principles as the granting of the authorisation does not demonstrably avoid a Critical Biodiversity Area, in which impacts are</p>	<p>However, none of these adverse impacts are considered unacceptably significant and all can be managed to tolerable levels through the effective implementation of the recommended mitigation measures.</p> <p>SRK has adopted a risk averse and fit-for-purpose approach throughout the report by consistently assuming actual or worst scenarios, identifying associated risks and impacts, recommending mitigation measures as well as monitoring to gauge compliance and implement corrective action if warranted.</p> <p>Based on the nature of the proposed activity, the nature of the receiving environment and the professional experience of the EIA team, SRK appointed specialists to investigate and assess the key potential environmental issues and impacts.</p> <p>Refer to response provided to items 7-10.</p>	

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>likely to cause loss of irreplaceable biodiversity, contrary to section 2(4)(a)(i). In addition, there is insufficient evidence that impacts which would not cause irreversible loss of biodiversity would be minimised and remedied, and that ecological integrity in the CBA would not be jeopardised. Moreover, there is no evidence of special attention to vulnerable and dynamic ecosystems having been paid, or that a risk-averse and cautious approach has been taken.</p> <p>52. In the recommendations to the Environmental Authorisation it is stated that 'any potentially detrimental environmental impacts resulting from the listed activities can be mitigated to acceptable levels'. However, the Environmental Authorisation does not define what 'acceptable level' of mitigation would be; this point is of the utmost importance given the CBA status of the affected area. Moreover, no evidence is provided that mitigation through rehabilitation would be successful and return the affected area to a required 'no further loss of natural habitat' relative to its current status. Moreover, without having had access to the financial provision for rehabilitation/ restoration, the CER cannot comment on its adequacy. Impacts on CBAs</p>	<p>The "acceptable level of mitigation" is based on the extensive experience and expertise of the EIA team and the specialists.</p>	

GROUND OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
affect both biodiversity pattern and ecological process, and present a material risk of jeopardising the ecological integrity of the affected areas.		

CONCLUSION

In the circumstances, the CER requests that the Environmental Authorisation granted by the DMR be set aside on both procedural and substantive grounds.

The appellant confirms compliance with Regulation 4(1) of the NEMA regulations, 2014.

DATED AT CAPE TOWN THIS 9th DAY OF JULY 2019.



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