



environmental affairs

Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA

Private Bag X447, Pretoria, 0001, Environment House, 473 Steve Biko Road, Pretoria, 0002

Email: Appealsdirectorate@environment.gov.za

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):
Postal address: Second Floor, Springtime Studios, 1 Scott Road, Observatory, Cape Town, 7925	Postal Address: 1st Floor, Block A, The Forum, North Bank Lane, Century City, 7441, Postnet Suite, Milnerton, Cape Town, 7435
Email Address: lgovindsamy@cer.org.za ; zomar@cer.org.za	Email Address: sibonelo@mineralcommodities.com
Telephone number: 021 447 1647	Telephone number: 087 150 4010
Fax Number: 086 730 9098	Fax number: 021 525 1902

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>

GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<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</p>		

<p>should have requested the applicant to apply for a new mining right and 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>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>3. Section 72 of the Mineral and Petroleum Resources Development Amendment Act, 2008 (the Amendment Act), seeks to amend section</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><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 class="list-item-l1"><i>(a) Extend an area or portion of an area, or</i></p> <p class="list-item-l1"><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. Unfortunately, section 102(2) has not been brought into operation:</p>		
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<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 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</p>		
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<p>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>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</p>		

<p>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 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,</p>		
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<p>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>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</p>		
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<p>the requirements of the NEMA environmental management principles or the Constitution. Having a long-term impact on Critical Biodiversity Areas (CBAs) affects both 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>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</p>		

<p>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 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</p>		
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<p>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 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</p>		
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<p>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 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>		
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<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>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</p>		
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<p>“..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 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,</p>		
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<p>means having to consider negative impacts on a CBA in the absence of rehabilitation.</p> <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>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-</p>		

<p>making instruments that have been adopted by the competent authority in respect of the 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</p>		
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<p>remediation must be compensated for through 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>		
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<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 current</p>		

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

<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 health effects, must be paid for by those responsible for harming the environment.</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>32. In response to 2.19 in the Need and Desirability appendix, it is recorded that “<i>Rehabilitation will 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</i></p>		
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<p><i>of rehabilitation in terms of this closure objective.”</i> The life of mine is given as about 11 years.</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 “<i>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.</i>” Also, that “<i>the intention is not to provide an operational plan, but rather the principles that should underpin a detailed rehabilitation action 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</p>		
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<p>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 “ultimately the effectiveness of rehabilitation in restoring species richness can only be evaluated after 10 or more years following rehabilitation.”</p>		
<p>36. A number of environmental or mining-related constraints that retard 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</i></p>		

<p><i>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, "...to achieve sustainable land use conditions and avoid or minimise costs and long-term liabilities to MSR".</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>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>		
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<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 obligations to incorporate NEMA principles into their decision making and to ensure that negative environmental impacts are addressed.</p>		
<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, that the <i>“diversity of the affected area will never be fully restored”</i> 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</p>		
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<p>gaps in determining the flora baseline for the project and uncertainties regarding SCC, and also the uncertainties about rehabilitation outcomes.</p> <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>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</i></p>		
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<p>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". The 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 mining operation in the Critical Biodiversity Area.</p>		
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<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 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</p>		

<p>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 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</p>		
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<p>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 affect both biodiversity pattern and ecological process, and present a material risk of jeopardising the ecological integrity of the affected areas.</p>		
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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.



CENTRE FOR ENVIRONMENTAL RIGHTS

Appellant

2nd Floor, Springtime Studios

1 Scott Road, Observatory

Tel. 021 447 1647

Fax: 086 730 9098

Ref: L Govindsamy / Z Omar

ARR comments by Case Officer

Name & Surname:

Date:

Signature:

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Approved by Superior

Name & Surname:

Date:

Signature:

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