



## environmental affairs

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### APPEAL RESPONSE REPORT

**PROJECT NAME/TITLE:** Tormin: Environmental Authorisation in respect of the Unlawful Commencement of Activities (Section 24G) at Tormin Mine, West Coast, South Africa

**PROJECT LOCATION:** The Remaining Extent of the Farm Geelwal Karoo 262, in the Magisterial District of Vanrhynsdorp: Western Cape

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

**DATE PROJECT/ACTIVITY AUTHORISED:** 18 June 2019

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

1. This is an appeal against the approval of the environmental authorisation granted by the Department of Mineral Resources (DMR) in terms of the National Environmental Management Act, 1998 (NEMA) and the Environmental Impact Assessment (EIA) Regulations, 2014 in respect of the unlawful commencement of activities (Section 24G), which application was made by Mineral Sands Resources (Pty) Ltd (MSR), on the Farm Geelwal Karoo 262, situated in the Magisterial District of Vanrhynsdorp, Western Cape.
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 their 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.
7. The CER confirms that Ms Li-Fen Chien registered as an interested and affected party (IAP) on behalf of the CER in respect of MSR's application for environmental authorisation. 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](mailto:zomar@cer.org.za) should be noted as the registered interested and affected party on behalf of the CER forthwith.
8. The CER's grounds of appeal are as follows:

- 8.1. Lack of independence of Environmental Assessment Practitioners, SRK Consulting
- 8.2. The location of the Remaining Extent of the Farm Geelwaal Karoo within the following areas of biodiversity importance:
  - 8.2.1. A Critical Biodiversity Area
  - 8.2.2. An important ecological corridor: Namaqualand Strandveld
  - 8.2.3. A terrestrial biodiversity hotspot: Succulent Karoo
  - 8.2.4. A biodiversity priority area
- 8.3. The sensitivity of the receiving environment has not been adequately considered: cumulative impacts of the activities on the Critical Biodiversity Area

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<p><b><u>LACK OF INDEPENDENCE OF ENVIRONMENTAL ASSESSMENT PRACTITIONERS, SRK CONSULTING</u></b></p> <ol style="list-style-type: none"> <li>1. The CER submits that the environmental assessment practitioners acting in this application, SRK Consulting, are not independent as required by regulation 13(1) of the EIA regulations.</li> <li>2. The DMR, in refusing to grant MSR an integrated environmental authorisation for the proposed expansion of Tormin, noted that <i>“the Environmental Assessment practitioner and the applicant did not disclose the information at their disposal in that they failed to notify the Department, state organs and the general public of the NEMA contraventions within the application area in relation to the clearance of vegetation, construction of the reservoir, and pipeline.”</i> The DMR quoted the requirements of an independent environmental assessment practitioner, as set out in the EIA Regulations.</li> <li>3. SRK were the appointed environmental assessment practitioners in MSR’s expansion application, and as such, should have disclosed to the DMR, and interested and affected parties, that MSR had</li> </ol>	<p>In response to items 1 - 4:</p> <p>This issue was previously raised and responded to by SRK in the Issues and Responses (I&amp;R) summary submitted with the Final Section 24 G (s24G) Application (Appendix Q, pages 3-4): <i>“SRK contests this allegation. SRK had been appointed to conduct an EIA process for the proposed expansion of the Tormin mine, and, in good faith, provided all information at SRK’s disposal, including all stakeholder comments that alleged transgressions, to the DMR. It is SRK’s understanding that the monitoring of existing activities forms part of the auditing and oversight / enforcement processes related to the existing authorisation, and that SRK as the EAP appointed for the proposed expansion EIA process cannot meaningfully undertake such tasks within the appointed scope of work. In this context, SRK understands that, for example, EMPr Performance Assessments were undertaken and submitted by MSR. However, SRK withheld no information relating to the existing operation during the expansion process Scoping Phase.”</i></p> <p><i>“Section 13 (1)(f) of the EIA Regulations, 2014, as amended, requires the EAP to “disclose to the proponent or applicant, registered interested and affected parties and the competent authority all material information in the possession of the EAP and, where</i></p>	

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<p>unlawfully commenced listed activities without authorisation.</p> <p>4. This issue of independence was raised by the CER in its objections addressed to SRK on 12 March 2018 and 4 June 2018 respectively.</p>	<p><i>applicable, the specialist, that reasonably has or may have the potential of influencing—</i></p> <p><i>(i) any decision to be taken with respect to the application by the competent authority in terms of these Regulations; or</i></p> <p><i>(ii) the objectivity of any report, plan or document to be prepared by the EAP or specialist, in terms of these Regulations for submission to the competent authority;</i></p> <p><i>unless access to that information is protected by law, in which case it must be indicated that such protected information exists and is only provided to the competent authority.</i></p> <p><i>In this regard SRK has not failed to disclose any material information in our possession.”</i></p>	
<p><b><u>LOCATION OF THE FARM GEELWAL KAROO WITHIN AREAS OF BIODIVERSITY IMPORTANCE</u></b></p> <p>1. The area in respect of which MSR has been granted environmental authorisation to commence and continue the section 24G activities, is the Remaining Extent of the Farm Geelwaal Karoo 262, situated in the Magisterial District of Vanrhynsdorp.</p>	<p>To the extent to which the s24G application area overlaps the area of the prospecting right application in respect of 10262PR, we note that the s24G application relates to very specific activities that were undertaken on that property, and that are unrelated to prospecting.</p>	

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<p>2. We note that this is the same area in respect of which MSR has applied and been granted environmental authorisation for a prospecting right (Reference no. 10162PR). The CER lodged an appeal to that decision in March this year and that appeal currently remains under consideration by the Department of Environmental Affairs.</p> <p>3. In that appeal, we raise as a concern the significance of the subject area (the Remaining Extent of the Farm Geelwal Karoo 262) from a biodiversity perspective. We reiterate those concerns here:</p>	<p>All concerns that were raised in the appeal against granting of the EA for application 10262PR were addressed in the responding statements to that appeal, however we will endeavour to answer again, in relation to this specific project. Please see below.</p>	

### **Critical Biodiversity Area (CBA)**

4. The area under application, which is located in the Matzikama Local Municipality, falls within a CBA and close to an aquatic Ecological Support Area (ESA). This is shown on the map and associated table from the Western Cape Biodiversity Spatial Plan (WCBSP) Handbook<sup>1</sup> attached as **Annexure A** (the area under application is the blue shaded area marked as “Site 2” on the map)
5. CBAs are defined in the WCBSP Handbook as *“Areas in a natural condition that are required to meet biodiversity targets, for species, ecosystems or ecological processes and infrastructure.”*<sup>2</sup> These biodiversity targets relate directly to South Africa’s international conservation obligations in terms of the Convention on Biological Diversity, and include all areas needed to meet species and ecosystem targets, highly threatened ecosystems, critical corridors to maintain landscape connectivity and all areas needed to meet ecological infrastructure targets.
6. As is shown on the map attached as **Annexure A**, much of the area under application falls within a CBA Type 1 (namely, an area in a natural condition). According to the Handbook, the desired management objective for a CBA Type 1 is to

In response to items 4 to 10:

This issue was partially raised before and responded to by SRK in the I&R summary submitted with the Final s24G Application (Appendix Q, pages 8-9):

The CBA has been designated to protect the coastal strip and associated ecological processes.

While the construction of the expanded process area and new process water dam (and the existing mine and other activities in the same habitat) may affect the CBA, the activities are unlikely to have significantly altered the overall functioning of the CBA, as significant areas of intact Strandveld vegetation remain.

The clearance of vegetation for the expanded process area and new process water is a local impact on 8 ha of habitat, resulting in local habitat fragmentation and disruption to ecological connectivity. SRK considered the activities to have a local impact on connectivity and ecological function in the area. The terrestrial ecology specialist concurred with the impact ratings presented in the s24G Application.

Furthermore, in response to similar comments raised by CER in their appeal of the Environmental Authorisation granted for the Tormin Mine Extension, the following appeal response was provided:



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<p><i>“Maintain in a natural or near natural state, with no further loss of habitat. Degraded areas should be rehabilitated and “only low-impact, biodiversity-sensitive land uses are appropriate.”<sup>3</sup></i></p> <p>7. These areas have been designated CBAs mostly in order to promote coastal resource protection and to maintain ecological processes (including ecological corridor function) associated with the coastal strip, especially the ability of fauna restricted to this area to disperse along the coast. The proposed prospecting activities, which presuppose further mining in the area, therefore pose 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.</p> <p>8. The area under application for the prospecting right also lies near to an aquatic Ecological Support Area Type 1, defined as an area that is <i>“still likely to be functional”</i>.<sup>4</sup> According to the Handbook, these are <i>“Areas that are not essential for meeting</i></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>It is not clear why reference is made to the prospecting application, which is not the subject of the s24G application.</p>	

<sup>1</sup> Pool-Stanvliet R, Duffell-Canham A, Pence G, and Smart R. 2017. Western Cape Biodiversity Spatial Plan Handbook. Stellenbosch: CapeNature.

<sup>2</sup> As above, p 55.

<sup>3</sup> As above, p 55.

<sup>4</sup> As above, p 52.

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<p><i>biodiversity targets, but that play an important role in supporting the functioning of PAs or CBAs, and are often vital for delivering ecosystem services.”<sup>5</sup></i></p> <p>The desired management objectives for these areas are to “<i>maintain in a functional, near natural state. Some habitat loss is acceptable, provided the underlying biodiversity objectives and ecological functioning are not compromised.</i>”<sup>6</sup></p> <p><b><u>Important ecological corridor</u></b></p> <p>9. 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>10. The role of CBAs to meet South Africa’s international obligations in terms of the</p>		

<sup>5</sup> As above, p 55.

<sup>6</sup> As above, p 55,

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<p>Convention on Biological Diversity does not appear to have been considered or addressed in the Environmental Authorisation. 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><b><u>Globally recognised terrestrial biodiversity hotspot</u></b></p> <p>11. Importantly, the area is also one of three globally recognised biodiversity hotspots, being located in the Succulent Karoo. A map indicating this area is attached as <b>Annexure B</b><sup>7</sup>. There are 34 globally</p>	<p>In response to item 11:</p>	

<sup>7</sup> This map was taken from the 'Climate Change Adaptation Plans for South African Biomes' report, published by the DEA in 2015, and is available at: [https://www.environment.gov.za/sites/default/files/reports/climatechangeadaptation\\_plansforsouthafricanbiomes\\_report.pdf](https://www.environment.gov.za/sites/default/files/reports/climatechangeadaptation_plansforsouthafricanbiomes_report.pdf).

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<p>recognised hotspots and the Environmental Authorisation granted by the DMR, falls into one of these hotspots. It is therefore important to note that in addition to the area under application falling into national biodiversity priority areas, the area also falls under a globally recognised biodiversity hotspot.</p> <p><b><u>Concluding point</u></b></p> <p>The decision by the DMR to grant Environmental Authorisation to continue these activities in a CBA is therefore flawed as essential information relating to the CBA does not appear to have been taken into account.</p>	<p>The location of the activities within a biodiversity hotspot was considered in the assessment of the activities' impact on biodiversity.</p>	
<p><b><u>FAILURE TO ADEQUATELY CONSIDER THE SENSITIVITY OF THE RECEIVING ENVIRONMENT: CUMULATIVE IMPACTS ON THE CBA</u></b></p> <p>1. In Appendix H to the section 24G application (SRK Consulting Report No: 527693/1, April 2018), SRK explains that <i>"the expanded process area and new process water dam lie within a CBA [Critical Biodiversity Area]"</i> and that <i>"[c]learing for the expanded process area and new process water dam have caused physical disturbance to and the removal of intact vegetation habitat, and individual plants of SCC [species of conservation concern] and other protected species were probably destroyed by vegetation clearing"</i>.</p>	<p>In response to items 1-3:</p> <p>This issue was previously raised and responded to by SRK in the I&amp;R summary submitted with the Final s24G Application (Appendix Q, page 27): <i>"The impact of activities which are the subject of this application are assessed in the s24G application. The (cumulative) impact from the existing Tormin Mine is reflected in the baseline and thus taken into account in the impact assessment."</i></p> <p>While the construction of the expanded process area and new process water dam (and the existing mine and other activities in the same habitat) may affect the CBA, the activities are unlikely to have significantly altered the</p>	

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<p>2. SRK then goes on to conclude that the area affected by the activities which are the subject of this application has a local impact on a relatively small area and that <i>“the activities are unlikely to have significantly altered the overall functioning of the CBA, as significant areas of intact Strandveld vegetation remain”</i>. SRK’s overall assessment of the impact is deemed to be “of low significance”.</p> <p>3. This assessment of the impact is misleading, as it does not appropriately assess the cumulative impacts of the activities on the CBA, when considered together with the existing mining activities on the site, the proposed expansion of the Tormin mine (under SRK reference number 507228), and the recently approved prospecting application alongside the banks of the Olifants river.</p>	<p>overall functioning of the CBA, as significant areas of intact Strandveld vegetation remain.</p> <p>This is supported by the separate assessment of the Tormin Mine Extension project, which considers the impact of inland mining and infrastructure / plant expansion with a much larger footprint adjacent to the s24G activity areas on the CBA. In that assessment, the terrestrial ecology specialist determined that the Tormin Mine Extension project <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 [the project] will have a regional impact on connectivity and ecological function in the area.”</i></p> <p>Also refer to the response provided to the appeal ground “Location of the Farm Geelwal Karoo Within Areas of Biodiversity Importance” above.</p>	

## **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 9<sup>th</sup> DAY OF JULY 2019.**



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**CENTRE FOR ENVIRONMENTAL RIGHTS**

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