



**To:**

*Per email:*

**From:** Natural Justice and The Green Connection

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26 July 2024

Dear Environmental Assessment Practitioner,

**COMMENTS ON THE DRAFT BAR FOR THE PROPOSED SEARCHER SEISMIC RECONNAISSANCE PERMIT**

**PASA/DMRE REF: 12/1/048**

**INTRODUCTION**

1. These submissions are made by Natural Justice and The Green Connection in response to the Basic Assessment Report (BAR) published for comment by Environmental Impact Management Services (Pty) Ltd for the proposed Searcher Seismic Reconnaissance permit over 12/1/038 on 21 June 2024.
2. Natural Justice and The Green Connection have previously submitted comments on the Draft BAR in 2022 where we set out our objection to the exploitation of oil and gas resources. We stand by those comments.
3. In this document, we deal with the BAR for the new reconnaissance permission that was awarded to Searcher. Insofar as the contents of this document do not specifically change our previous comments, our previous comments stand.

**COMMENTS ON THE DRAFT BASIC ASSESSMENT REPORT**

**I. PASA’S ACCEPTANCE OF MULTI-CLIENT SPECULATIVE SURVEYS IS UNLAWFUL**

4. We submit that the acceptance of Searcher’s reconnaissance permit application in circumstances where exploration rights are held by another person/s over the area, is unlawful. In terms of s74 of the MPRDA, ‘any person’ who wishes to apply to the Minister for a reconnaissance permit must lodge the application as indicated in subsection (1)(a) to (c), and PASA must within 14 days accept an application for a reconnaissance permit if, among other things, ‘no other person holds<sup>3</sup> a technical co-operation permit, exploration right or production right for petroleum over any part of the area’(emphasis added). 4 If the application does not comply with the requirements of this section, the designated agency must notify the applicant in writing within 14 days of the receipt of the application and provide reasons
5. In the Searcher judgement referred to above, Thulare J interpreted the meaning of the wording in s75(1)(c) of the MPRDA. While dealing with the issuing of a reconnaissance permit, the wording of s75(1) is similar to the wording used in s74(2): s75(1) provides that the Minister must issue a reconnaissance permit if the provisions of s75(1)(c) are met, namely that the reconnaissance will not result in unacceptable pollution, ecological degradation or damage to the environment and that an environmental authorisation is granted. Thulare J explained what is required as follows:
6. There must be evidence that the proposed reconnaissance will not result in unacceptable pollution, ecological degradation or damage to the environment, an environmental authorization is mandatory and the Minister would act unlawfully in granting a reconnaissance permit where section 75(1)(c) was not satisfied.
7. Applying the reasoning of Thulare J to section 74(2) of the MPRDA, it follows that there must be evidence that no other person holds an exploration right for petroleum over any part of the area, and that PASA would be acting unlawfully if it accepted a reconnaissance permit application where section 74(2)(b) was not satisfied.
8. The BAR indicates that the survey area covers a number of blocks:

<b>Petroleum License Blocks Covered by Application Area</b>	The following license blocks are covered by the application area: <ul style="list-style-type: none"><li>• 12/3/274 ER;</li><li>• 12/3/343 ER;</li><li>• 12/3/339 ER; and</li></ul>
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9. This clearly indicates that three exploration rights have been granted in respect of three of the Petroleum License Blocks covered by the application area. These exploration rights are held by other persons, not Searcher

10. We submit further that there is no statutory basis in the MPRDA for the granting of reconnaissance permits to seismic survey companies to conduct speculative multi-client seismic surveys in Blocks where exploration rights are held by other persons, and that the Minister would be acting ultra vires the enabling provisions of the MPRDA should he grant a reconnaissance permit to Searcher.

#### **I. PRECAUTIONARY PRINCIPLE**

11. The cumulative impact of seismic surveys on the marine environment has not been researched extensively and there is no scientific consensus on the impacts of seismic surveys on the marine environment. In other words, there is no indication that seismic surveys do not cause ecological damage. The Precautionary Principle is an established environmental law principle that necessitates caution in the absence of scientific certainty on the significance of a proposed project's harm. This principle therefore is relevant not only in the awarding of Environmental Authorisations, but also in the environmental impact assessment phase as an environmental management tool. We therefore submit that it is not acceptable to apply a 'subjective approach' in the absence of scientific certainty or guideline recommendations to reach a conclusion on the significance of harm. Instead, the precautionary principle should be applied, and noise impacts of seismic surveys on fish eggs and larvae should be assumed to be unsafe in the absence of credible science.

12. In the Shell Wild Coast Seismic Survey judgment in the main case, the court referred to applicants' relying on expert reports for their contention that the anticipated harm to marine and bird life is a fundamental consideration, noting that these experts were in agreement that there is a reasonable apprehension of harm to marine and bird life and that the mitigation measures proposed by Shell did not adequately manage the threat of harm. The court also referred to the experts relied upon by Shell to refute the suggestion of possible harm to marine life, and noted that the respondents suggest that the detrimental effect of seismic surveys are not known and that, in so far as there is a possibility of death or stranding of marine animals from exposure to sound from seismic surveys, there are appropriate mitigating and monitoring measures in place. The court went on to point out that '[b]ecause of the apparent dispute between the experts as to the adequacy of the mitigation measures minimising the known effects of seismic surveys, it would be incumbent on the decision-maker to invoke the precautionary principle'.

#### **II. FAILURE TO CONSIDER CLIMATE CHANGE AS PART OF NEED AND DESIRABILITY ASSESSMENT**

##### **Refusal to consider climate change impacts**

13. In an attempt to justify the desirability of the proposed project, the BAR expressly rejects the need to consider climate change impacts that may result from the activities of the proposed project. The relevant passage of the report reads as follows:

“From a climate change perspective, it is not currently possible to accurately assess the risks associated with oil and gas activities, given that the specific details of these potential future activities are not known and therefore climate change impacts would need to be assessed in detail during any subsequent Scoping and EIA processes for any potential subsequent oil and gas production projects.” (par 5.2).

14. According to the BAR, this refusal to consider climate change impacts in respect of the activities proposed is informed by the fact that NEMA lists activities for seismic surveys separate from those of production activities, and that production activities require their own separate EIA processes. This argument and the allegation that it is not possible to accurately assess the risks associated with oil and gas activities at this stage is flawed and incorrect. Section 1 of NEMA defines “environment” as, amongst other things, surroundings within which humans exist and that are made up of the land, water and atmosphere of the earth. Section 24O of NEMA requires decision-makers to consider all relevant factors including environmental impacts.

15. It is a globally accepted scientific fact that fossil fuels (oil, coal, and natural gas) are the biggest contributors of greenhouse gas emissions which result in climate change (see Paris Agreement 2015). The South African government made several commitments to reduce greenhouse gas emissions, it set a fixed target for greenhouse gas emissions levels (NDC 2015 updated in 2021) and developed an investment plan to transition the country's energy sources away from non-renewables to renewables (South Africa's Just Energy Transition Investment Plan 2023-2027).

16. Likewise, the impacts of climate change have already been factually established (see IPCC Special Report on global warming, amongst others). It is also accepted by our courts that a comprehensive assessment that looks at the need and desirability of a project may result in information that is pivotal for decision-makers or the competent authority (see *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk) paragraph 125; *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* 2017 2 All SA 519 (GP) paragraph 115).

17. Contrary to its findings on the possibility of assessing climate change risks, the BAR mentions future economic benefits of the project to justify its desirability (paragraph 5.2.), despite its finding that production activities which may take place in the future are subject to a separate environmental assessment. On one hand, the BAR finds the proposed project desirable because of its future economic benefits and on the other hand, it argues that future climate change impacts are impossible to assess this is not a production EIA. This is a contradiction that can be avoided by conducting a comprehensive assessment that assesses, *inter alia*, climate change impacts.

18. Furthermore, the BAR missed an opportunity to assess the impact of climate change, environmental degradation, and food insecurity on children and their environmental rights. There is consensus amongst scholars and researchers that climate change affects children in different parts of the globe differently (see *Sheridan Bartlett "Understanding the impacts for children of factors related to climate Change" 2008*; *Sheffield P E and Landigan P J "Global Climate Change and Children's Health: Threats and Strategies for Prevention" 2011*; *Currie J and Deschênes O "Children and Climate Change: Introducing the Issue" 2016*; *Akresh R "Climate Change, Conflict and Children" 2016*. etc). The difference in how climate change affects children is thought to be largely influenced by the preexisting social and economic disparities and geographical variabilities. Notably, according to the BAR, the project will require highly skilled personnel and therefore there will be limited jobs for interested and affected communities. This makes it difficult to even argue in favour of the economic development part of the project. The impacts are uniquely different for children compared to adults because of the vulnerability of their developing bodies. The warm spells and heat waves caused by climate change exposes children to heat stress, respiratory and vector-borne diseases, and malnutrition with long term implications. Heavy precipitation events and intense tropical cyclones put children at higher risk of death than adults, exposes them to water-borne /water washed illnesses and malaria, reduces their options for play and social interaction etc. Furthermore, extreme high sea levels may increase the risk of death and bad health for children.

#### **Failure to consider negative impacts of exploration drilling or production**

19. The stated objective of engaging in the proposed seismic survey is to discover oil and gas reserves to explore. The Eastern Cape High Court judgment in *Sustaining the Wild Coast and Others*, held that seismic surveys are stages leading to oil and gas production, which contribute to greenhouse gas emissions, worsening climate change and affecting people's livelihood and food security. The court underscored the fact that a comprehensive assessment of the impact of new oil and gas reserves is required for proper assessment of the need and desirability of the project. The BAR fails to evaluate the negative long-term effects of oil and gas production, and totally ignores risks to coastal communities' livelihoods.

#### **Reliance on benefits of production to justify need and desirability of reconnaissance activities**

20. The BAR highlights future benefits of exploiting oil and gas to justify need and desirability of the proposed activities. However, it deliberately avoids dealing with negative impacts of such exploitation. While acknowledging the importance of understanding the full scope of seismic data, the BAR focusses on the perceived advantages, including using natural gas as a transition fuel, reducing greenhouse gas emissions, supporting renewable energy initiatives and creating jobs. It does not adequately assess the long-term risks associated with oil and gas exploration and production.

#### **Assumption of gas as transition fuel**

21. The BAR argues that natural gas can act as a transition fuel to help South Africa meet its climate goals, citing its lower carbon dioxide emissions compared to coal and oil. It argues that natural gas emits significantly less carbon dioxide than coal and oil, especially when using Combined Cycle Gas Turbines. However, these claims are unsubstantiated. The BAR overlooks the lifecycle impacts of natural gas which includes potential methane leaks during extraction and transportation which makes natural gas more harmful than coal.
22. It is worth noting that, the impending global carbon border adjustment mechanisms will restrict the exportation of products with high carbon footprints. This will make South Africa's economy vulnerable if it relies on gas for electricity generation instead of cleaner renewable options. In sum, investing in fossil fuels is not a sustainable approach for South Africa to balance its climate commitments with economic development.

### **Conclusion**

23. The BAR failed to adequately assess the need and desirability of the proposed project by failing to consider and assess climate change long-term impacts.

### **III. INTEGRATED COASTAL MANAGEMENT**

24. Section 63 of NEM: ICMA requires a competent authority to take account of additional considerations when deciding whether or not to grant an environmental authorisation under the NEMA for 'coastal activities'. Whilst the BAR sets out the requirements of the ICMA, it passes the buck in terms of actually evaluating and assessing the considerations in the BAR itself to the Competent Authority. This is unacceptable.
25. Notably, it fails to describe Searcher's compliance with previous authorisations.

### **IV. SUBSTANTIVE CONCERNS IN PREVIOUS SUBMISSIONS**

26. Natural Justice and The Green Connection submitted comments in the previous EIA process, and appealed against the decision to grant environmental authorisation. In our view, the issues raised therein have not been addressed either through the appeal process, or in the current EIA.
27. We therefore reiterate our concerns, as raised in the appeal, which we attach as Annex A for convenience, we summarise those concerns below.

### **The seismic survey activities will result in unacceptable, significant impacts on the marine environment that cannot be effectively mitigated.**

28. As part of its comments on the 2022 EIA Report, and attached to its appeal, Natural Justice appended a report by WILDTRUST marine scientists, Dr Kendyl Wright, Dr Jennifer Olbers and Dr Jean Harris contesting many of the findings and mitigation measures in the Final BAR. These scientists concluded:

- 28.1. that there is a high likelihood and risk that environmental harm will occur when seismic surveys are undertaken, and that harm is likely to be significant;
- 28.2. that the proposed mitigation measures are insufficient to allay fears of environmental harm; and
29. that very little biological and ecological data exists in respect of the seismic survey area, and the FBAR is based on the entire Orange Basin Area. Substantive information relating to the specific area, species and ecosystems that are at risk is absent. The subjective rating system, despite data gaps, does not provide confidence of no harm during reconnaissance activities. Some of the proposed mitigation measures are irrelevant for species and ecosystems in the seismic survey area.
30. These gaps in information and concerns regarding the impacts and inadequate mitigation measures have not been addressed by the information contained in the new BAR.
31. These impacts were not adequately addressed by the Minister in her 2023 appeal decision and no changes have been made to mitigation measures in this application which would adequately mitigate the impacts. More is also required to demonstrate understanding of baseline conditions, and we note that Searcher has not taken the opportunity during its previous surveys, or during this new application, to advance understanding of baseline conditions.

**Noise impacts have not been adequately assessed**

32. The assessment of noise impacts is woefully inadequate. It does not consider cumulative impacts of noise and does not consider the impacts of noise before the 160dB threshold.
33. Further, the mitigation measures associated with noise impacts are designed to only attempt to avoid permanent threshold shifts. They also do not include any seasonal avoidance considerations, which would help to reduce harms on species undertaking activities particularly sensitive to acoustic disturbance.
34. Despite concerns raised in the previous process, no new mitigation measures are proposed, and no new noise assessments accompany this application.

**The FBAR focuses inappropriately on the direct ‘footprint’ impacts of the project and ignores the wider landscape, indirect and cumulative impacts, and the heightened legislative protections afforded to the coastal environment**

35. Direct and indirect impacts can overlap in time and space. In the marine environment, the spatial relationship of direct and indirect impacts is complex due to ecosystem interconnectivity and also the variable spatial extent where impacts occur across different features.
36. NEM:BA, NEM:PAA and the NEM:ICMA play a critical role in terms of protecting and conserving the three identified CBAs within the survey area, as well as the nearby EBSAs and MPAs. However, the

value of these areas and the extent of potential negative impacts of exploratory activities on these areas have not been considered.

37. The DBAR and the Marine Ecology Assessment do not adequately assess, consider, or present the legislatively mandated protection and conservation objectives in these three SEMAs with regard to the broader seascape impacts. The legislative status of these areas and the importance of their protection are minimized on the basis that none of the numerous sanctuaries, marine protected areas (MPAs) that exist offshore and along the Western Cape's coastline, overlap with the Reconnaissance Permit Area.

**The BAR does not contain a proper and objective assessment of the negative impacts of the project on people's human rights**

38. Small-scale and subsistence fishers, who fish around the West Coast fish to meet basic food and livelihood needs and are integral members of the communities in which they reside. For many small-scale fishers and their communities, the ocean and the fish in it represent far more than just subsistence, it also represents a way of life.

39. The geographical area in which prominent coastal fishing towns are situated, such as Port Nolloth, Hondeklipbaai, Alexander Bay, supports the vibrant small-scale fisheries sector, which has been recognized as a critical economic sector in the Western and Northern Cape provinces, the full value of which both the monetary and non-monetary, has not been assessed in the BAR.

40. The socio-economic report fails to evaluate the cascading impacts on food webs, and how this will impact on the right to access of sufficient food.

**The spiritual and cultural rights, identities and practices of coastal communities were not adequately assessed**

41. Neither the BAR nor the Cultural Heritage Report provide evidence that the concerns raised during previous processes by coastal communities about their cultural and heritage associations with the ocean have been considered.

42. Further, the proposed and authorised mitigation measures are totally inadequate. The mitigation measure set out in the EMPr is to re-assess impacts post-project.<sup>1</sup> This is flawed for a number of reasons, including:

42.1. firstly, it in no way mitigates the impacts of the operations and cannot be described as a mitigation measure;

43. secondly, the measure is aimed at providing “resources and support for communities to develop and undertake safeguarding measures or plans to enhance the mitigation capacity of their intangible

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<sup>1</sup> Page 30-31 of the EMPr.



cultural heritage by fostering dialogue, mutual understanding and reconciliation between and within communities”, which in no way holds Searcher accountable for any impacts caused by the reconnaissance activities; and

44. thirdly, it fails to comprehend and mitigate any of the economic or other harm to livelihoods, and cultural and heritage practices and identity.
45. The pre-mitigation significance given to this impact is rated as Medium, and then Low post mitigation. If mitigation does not actually change the impact then it cannot change the rating. There is no rational connection between the results of the arbitrary, and somewhat absurd, mitigation measure and any change in the impact caused by the reconnaissance activities on coastal communities.
46. Further, and unacceptably, cumulative impacts on these rights have not been considered: “At this stage, cumulative impacts are purely speculative. Still, the potential for the future increase in cumulative impacts due to current and future seismic surveys and the potential for future Oil and Gas production cannot be excluded but is not quantifiable at this stage for cultural heritage.”<sup>2</sup>

#### **Failure to notify Namibian government or Convention bodies of transboundary impacts**

47. South Africa is a party to the Benguela Current Convention and the Abidjan Convention, and is bound by the obligations of the Conventions. Although Namibia has not ratified the Abidjan Convention, the Namibian territorial waters form part of the Convention Area.
48. The DBAR merely lists the Benguela Current Convention as one of many international marine conventions which may be applicable to the proposed seismic activities, and it does not mention the Abidjan Convention. It does not consider the obligations under these conventions at all.

#### **Failure to assess transboundary impacts.**

49. Despite the proximity of the seismic survey area to the territorial waters of Namibia, the DBAR fails to identify and assess impacts that are transboundary in nature. This is especially concerning, given the significance associated with the three Ecologically or Biologically Significant Areas (“EBSAs”) spanning the border between South Africa and Namibia,<sup>3</sup> that the Benguela Current flows in a generally northerly direction, and that “[t]he major feature of the Benguela Current is coastal upwelling and the consequent high nutrient supply to surface waters leads to high biological production and large fish stocks”.<sup>4</sup>
50. Given international law obligations, the EIA process should have included an assessment of transboundary impacts. Failure to do so renders the assessment deficient.

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<sup>2</sup> Page 195 of the DBAR.

<sup>3</sup> Page 127 of the DBAR.

<sup>4</sup> Page 47 of the DBAR.

## V. FAILURE TO CONSIDER ALTERNATIVES

51. The Guideline requires that:

*“the consideration of ‘need and desirability’ during an application process... must consist of a primary description of the relevant considerations... in relation to feasible and reasonable alternatives. During the actual assessment stages of an EIA process the need and desirability must be specifically assessed and evaluated, including specialist input/studies as required.”<sup>5</sup>*

52. Reasonable and feasible alternatives include the option of not implementing the activity.

53. The need and desirability evaluation directs the reader to section 6 of the report. Section 6 says only the following regarding the No Go Alternative:

*The no go alternative would imply that no seismic survey activities are undertaken. As a result, the opportunity to identify potential oil and gas resources within the survey area would not exist. This will negate the potential negative and positive impacts associated with the proposed survey activities.*

54. Consequently, the option of not implementing the activity has not been assessed adequately, or at all.

55. We submit that the no-go alternative has not been adequately assessed, and that the BAR should include consideration of the negative implications of potential future oil and gas development and attendant economic and social costs that will or may result. This would necessarily include the economic and social costs of GHG emissions that would result from future oil and gas development, as well as the social and economic costs that would result from a major oil spill arising from an uncontrolled wellhead blow-out (during any subsequent exploration or production well drilling). We are also of the view that a proper assessment of the no-go alternative should identify and assess the potential ecological and socio-economic benefits of the no-go option for small-scale fishers and fishing dependent communities. The assessment should also necessarily include a consideration of alternative means to generate energy and provide sustainable feedstocks for associated industrial applications, including renewable energy alternatives that do not pose a significant inter-generational ecological and socio-economic risk.

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<sup>5</sup> Page 9 of the Guideline.

## **VI. PUBLIC PARTICIPATION CONCERNS**

We note that this BAR notes concerns about participation fatigue in the specialist reports. This has the potential of hollowing out the purpose of the public participation process and given that the BAR covers the same area that was previously surveyed, people who are opposed to the project may not see the purpose in participating in this process once again. Previous public participation processes have failed to meaningfully engage concerns around the impacts of these projects and there is no indication as to how this process will differ to ensure that this is reached.

## **VII. DOCUMENT REQUEST**

56. The 2023 EA included a number of monitoring conditions. This includes:

57. Condition 5.7.1: The holder of this authorisation must submit daily and monthly environmental monitoring reports during seismic survey operations.

57.1. Daily MMP and PAM reports

58. The approved EMPR also contained a number of monitoring, auditing and reporting requirements.

59. Notably, the EA was defective in that did not include mandatory auditing requirements, despite the requirements of regulation 26(e), (f) and (h) of the EIA Regulations. However, given regulation 34, read with Appendix 7, remained applicable, and Searcher was required to undertake auditing processes, and make those audit reports available to the public.

60. We therefore request:

60.1. copies of monitoring reports;

60.2. copies of audit reports; and

60.3. associated responses from the competent authority.

## **CONCLUSION**

61. We request that our comments are taken into consideration and that the DBAR be updated to address the inadequacies of the existing assessment.