



To: The Director-General
Department of Forestry, Fisheries and the Environment
Attention: Dr. D. Fischer

By email: dfischer@dffe.gov.za

4 February 2025

Dear Dr Fischer

Re: THE GREEN CONNECTION – COMMENT ON PROPOSED AMENDMENTS TO THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) REGULATIONS AND EIA LISTING NOTICES

1. INTRODUCTION

These brief comments are submitted by the Green Connection.

The Green Connection is a registered non-governmental organisation, that believes economic growth and development, improvement of socio-economic status and conservation of natural resources can only take place within a commonly understood framework of sustainable development. It aims to provide practical support to both the government and non-governmental/civil society sectors, which are an integral part of sustainable development. The Green Connection is an environmental and social justice civil society organisation that promotes sustainable livelihoods and the achievement of environmental rights.

These comments are submitted in response to the Minister of Forestry, Fisheries and the Environment's invitation to submit comments on the proposed amendments to the EIA Regulations the EIA Listing Notices (GN5646 of 6 December 2024).

2. AMENDMENT TO REGULATION 39 OF THE EIA REGULATIONS

It is noted that the Minister proposes to amend regulation 39 of the EIA Regulations.¹

Regulations 39(1) requires the proponent of a listed activity, who is not the owner or person in control of land on which the activity is to be undertaken, to obtain the written consent of the landowner or person in control of land before applying for environmental authorisation in respect of such activity.

Regulation 39(2) provides that the requirement to obtain written consent does not apply in respect of:

- (a) linear activities;

¹ GNR.982 of 4 December 2014: Environmental Impact Assessment Regulations, 2014 (as amended and corrected).

- (b) activities constituting, or activities directly related to prospecting or exploration of a mineral and petroleum resource or extraction and primary processing of a mineral or petroleum resource; and
- (c) strategic integrated projects as contemplated in the Infrastructure Development Act, 2014.²

The proposed amendment seeks to substitute regulation 39(2)(b) with the following:

- (b) an application for:
 - (i) mining activities;
 - (ii) the expansion of a prospecting, exploration, mining or production operation; or
 - (iii) an activity using fracturing technology.

The proposed amendment also seeks to introduce a new category that will not require written consent, namely:

- (d) activities proposed on coastal public property.

Regulation (2)(b)

The Green Connection submits that regulation 39(2)(b) should be amended to align it with the Interim Protection of Informal Rights to Land Act, 1996 (IPIRLA).

Section 2(1) of IPIRLA provides that no person may be deprived of any informal right to land without his or her consent. Section 2(4) provides that, for the purposes of this section, the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.

In the *Baleni* judgment, it was pointed out that in terms of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA), the State is the custodian of all mineral resources on behalf of the people of SA. The judgment found that *'[h]aving accepted that the granting of a mineral right constitutes a 'deprivation' the consent requirement provided for in section 2(1) of IPIRLA for such deprivation appears to have been triggered.'*³ The judgment went to point out that *'[w]hereas the MPRDA is primarily concerned with the promotion of equitable access to South Africa's mineral resources to all South Africans, IPIRLA sets out to protect communities who were the victims of past discrimination and who have deep cultural and religious connection to their land'*.⁴ The judgment also refers favourably to the *Maledu* judgment, where the court *'with reference to the clear purpose of IPIRLA, recognises the right of communities to decide what should happen to their land and that their consent is required before they may be deprived of their land'*.⁵

² Regulation 39(2), wording as amended by GN 326 of 7 April 2017 and by GN 517 of 11 June 2021. Regulation 39(2)(b) was deleted by GN517 of 11 June 2021, but was subsequently reinstated to what it was immediately prior to 11 June 2021 (pursuant to GN 1816 of 3 March 2022).

³ *Baleni and others v Minister of Mineral Resources and others* [2019] 1 All SA 358 (GP), at para 61.

⁴ *Ibid*, at para 64.

⁵ *Maledu and others v Itereleng Bakgat/a Mineral Resources (Pty) Limited and another* [2018] ZACC 41 [reported at 2019 (1) BCLR 53 (CC)], cited in *Baleni* at para 77.

The Green Connection submits that it is anomalous to propose amendments that are intended (among other things) to ‘clarify the competency with respect to mining activities and to better align activities for which permissions, consents, permits or rights are required in terms of the [MPRDA] with the EIA Regulations Listing Notices 1, 2 and 3’ without also aligning the EIA Regulations with the consent requirements of IPIRLA. Failing to do so will inevitably result in applications for environmental authorisation being made (and EIA public participation processes being conducted) relating to listed mineral and petroleum resource activities in respect of land for which consent (as referred to in IPIRLA) has not been obtained or which has been refused by the community concerned.

The Green Connection recommends that the proposed amendments to regulation 39 be aligned with the relevant provisions of IPIRLA by including a provision that, where applicable, the proponent must obtain the communities’ consent (as referred to in IPIRLA) before applying for environmental authorisation to undertake any activities on that land.

It is submitted that this would also be consistent international law. As was stated in *Baleni*, ‘[m]ultiple international instruments require that communities such as the applicants have the right to grant or refuse their free, prior and informed consent to any mining development that will significantly affect them’.⁶

Regulation 39(2)(d)

The Green Connection is opposed to activities proposed on coastal public property being excluded from the regulation 39(1) requirement that the proponent of a listed activity, who is not the owner or person in control of land on which the activity is to be undertaken, must obtain the written consent of the landowner or person in control of land before applying for environmental authorisation in respect of such activity.

Firstly, the Green Connection believes that communities (such as small-scale fishing communities) that are dependent on coastal public property (which includes the oceans off South Africa’s coastline⁷), and who have deep historical cultural, spiritual and customary ties to such property, should be included in the category of person that are legally entitled by operation of regulation 39(1) to provide, or refuse to provide, their written consent in respect of applications for environmental authorisation in respect listed activities (including applications relating to mining and petroleum permissions and rights) that may negatively impact on such property and their livelihoods.

⁶ Baleni, at para 78.

⁷ Section 7 of NEM: ICMA provides that coastal public property consists of:

- (a) **coastal waters**;
- (b) land submerged by coastal waters, including:
 - (i) land flooded by coastal waters which subsequently becomes part of the bed of coastal waters; and
 - (ii) the substrata beneath such land;
- (c) any natural island within coastal waters;
- (d) the **seashore**, including:
 - (i) the seashore of a natural or reclaimed island; and
 - (ii) the seashore of reclaimed land;
- (e) subject to section 66A, any admiralty reserve owned by the State;
- (f) any land owned or controlled by the State declared under section 8 to be coastal public property;
- (g) land reclaimed in terms of section 7C; or
- (h) any natural resources on or in any coastal public property of a category mentioned in [paragraphs \(a\) to \(g\)](#).

The term “**coastal waters**” is in turn defined in NEM: ICMA as meaning:

- (a) the internal waters, territorial waters, exclusive economic zone and continental shelf of the Republic referred to in sections 3, 4, 7 and 8 of the Maritime Zones Act, 1994 (Act No.15 of 1994), respectively; and
- (b) an estuary.

Secondly, the Green Connection believes that organs of state responsible for coastal public property should also be legally entitled to provide, or refuse to provide, their written consent in respect of applications for environmental authorisation in respect listed activities (including applications relating to mining and petroleum permissions and rights) that may negatively impact such coastal public property. The Green Connection submits that this is necessary in order for the State to discharge its duties as public trustee of all coastal public property to:

- (a) ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community; and
- (b) take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations.⁸

3. LISTING OF OFFSHORE SEISMIC SURVEYS IN EIA LISTING NOTICE 1

It is noted that the current EIA Listing Notice 1⁹ requires environmental authorisation (following a Basic Assessment process) for offshore seismic surveys, namely:

- 21B Any activity including the operation¹⁰ of that activity which requires a reconnaissance permit in terms of section 74 of the [MPRDA], as well as any other applicable activity as contained in this Listing Notice or in Listing Notice 3 of 2014, required to exercise the reconnaissance permit, excluding:
 - (a) any desktop study; and
 - (b) any arial survey.

The proposed amendments seek to introduce a new activity to EIA Listing Notice 1 relating to offshore seismic surveys, namely:

- 21F An offshore seismic survey which requires an exploration right in terms of s79 of the [MPRDA], as well as any other applicable activity as contain[ed] in this Listing Notice or in Listing Notice 3 of 2014, required to exercise the exploration right.

The Green Connection believes that offshore seismic should rather be included in EIA Listing Notice 2¹¹ (requiring scoping and a full environmental impact assessment process). Several recent judgments have recognised that offshore seismic surveys do cause environmental harm (and risk irreparable harm), for example:

- In the Shell Wild Coast Seismic Survey urgent interdict application judgment, Bloem J stated that implicit in Shell's contention that harm caused by marine seismic surveys to marine life is not irreparable and that mitigation measures are implemented to minimise this harm, '*is an acknowledgment of harm to marine life, hence the mitigation measures*'.¹² Regarding the evidence of ten experts put up by the applicants to prove irreparable harm, the court noted

⁸ NEM: ICMA, section 12.

⁹ GNR.983 of 4 December 2014: Environmental Impact Assessment Regulations Listing Notice 1 of 2014.

¹⁰ MPRDA s1 defines "reconnaissance operation" as meaning '*any operation carried out for or in connection with the search for a mineral or petroleum by geological, geophysical and photo geological surveys and includes any remote sensing techniques, but does not include any prospecting or exploration operation other than acquisition and processing of new seismic data*'.

¹¹ GNR.984 of 4 December 2014: Environmental Impact Assessment Regulations Listing Notice 2 of 2014.

¹² *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2022] 1 All SA 796 (ECG), para 41.

that despite the massive body of expert evidence on the harm to marine life, Shell did not adduce any expert evidence to neutralise this evidence. Bloem J stated further that the opinions expressed by these experts *'are based on objective facts contained in their reports and affidavits. There is no reason not to accept their evidence. That evidence establishes that, without intervention by the court, there is a real threat that the marine life would be irreparably harmed by the seismic survey'*.¹³

- In the Shell Wild Coast Seismic Survey judgment in the main case, the court referred to the applicants' relying on expert reports for their contention that the anticipated harm to marine and birdlife 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 (Shell) suggested 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.¹⁴ 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'*.¹⁵
- In the Searcher urgent interdict judgment, Thulare J pointed out that:

Physical damage to marine animals has been directly linked to the kind and level of sound emitted during the nature of seismic survey Searcher is undertaking. This is why Searcher has to mitigate the damage... Some species show physiological stress responses and behavioural changes like moving away rapidly and this increased energy consumption and energy costs which reduced time for foraging and the ability to protect itself. There was a specific concern for beaked whales who were particularly sensitive to anthropogenic noise... The impact on fish assemblages was difficult to interpret and there was a lack of research on confounding effects and multiple stressors were a key concern... Zooplankton was the reason the West coast contained important fishery nursery grounds. As a result, impacts on zooplankton could propagate to other groups. Very little was known about the impact of seismic surveys on zooplankton. Existing observations suggested damage to larval and juvenile lobsters of up to... 1.2km from the survey sound source and that zooplankton mortality increased up to three-fold within the survey aera... Snoek will be impacted...a source of food for the impoverished communities of the West Coast and also provided an income to sustain the small-scale communities... Very little is known about the differential impact of seismic activity on young and smaller fish, turtles and cetaceans, and this could impact fish assemblages, abundances and availability. A precautionary approach was necessary.¹⁶

¹³ Ibid, at para 64.

¹⁴ *Sustaining the Wild Coast NPC and others v Minister of Mineral Resources and Energy and others* [2022] 4 All SA 533 (ECG), para 108.

¹⁵ Ibid, para 109.

¹⁶ *Christian John Adams & Others v Minister Mineral Resources and Energy & Others (West Coast Seismic Survey) Part A (March 2022)*, at paras 26 – 33.

In the Searcher urgent interdict seismic survey case,¹⁷ the applicants put up a number of expert affidavits and reports to support their contention that there was a reasonable apprehension that the marine seismic survey would cause irreparable harm to marine species and ecosystems, and that the proposed mitigation measures are not effective in addressing this harm. These expert affidavit and reports are accessible through the link provided in the footnote below.¹⁸

The Green Connection submits that the Minister should also have regard to the significance and sensitivity of the receiving environment when deciding whether to include offshore seismic surveys in EIA Listing Notice 1 or Listing Notice 2. Impacts in offshore areas do not respect geographic boundaries, and are highly likely to both disturb and have an adverse effect on (for example) nearby Marine Protected Areas (MPAs), Critical Biodiversity Areas (CBAs) and their Ecologically and Biologically Significant Areas (EBSAs).

In light of the above, the Green Connection submits that offshore seismic surveys should be removed from EIA Listing Notice 1 and should rather be included in EIA Listing Notice 2.

No comments regarding onshore seismic surveys are included in this submission due to time constraints. In principle, however, the Green Connection also believes that onshore seismic surveys should be included in EIA Listing Notice 2.

Yours sincerely



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The Green Connection

¹⁷ *Christian John Adams & Others v Minister Mineral Resources and Energy & Others* - Annexure JH1 to the Applicants' Founding Affidavit, at p506 - 529, 'Report on Scientific Basis for concerns of significant harm inflicted to marine wildlife by 2D and 3D seismic surveys on the South and West Coasts of South Africa', Harris, Olbers & Wright (14 January 2022).

¹⁸ <https://drive.google.com/drive/folders/1OfSta2iFMtY8iqoZ9zhW54zFKu8zN9r>