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From: **Natural Justice and The Green Connection**
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8 August 2024

Dear Environmental Assessment Practitioner,

**COMMENTS ON THE DRAFT SCOPING REPORT FOR THE PROPOSED EXPLORATION DRILLING
IN BLOCK NORTHERN CAPE ULTRA-DEEP, SOUTH AFRICA**

A. INTRODUCTION

1. These submissions are made by Natural Justice and The Green Connection in response to the Draft Scoping Report published for comment by SLR Consulting South Africa (EAP) for the proposed exploration drilling project in Block Northern Cape Ultra Deep (NCUD), on 8 July 2024.
2. Natural Justice: Lawyers for Communities and the Environment is a non-profit organisation specialising in environmental and human rights law in Africa – with a focus on the pursuit of social and environmental justice for local and indigenous communities. Natural Justice offers support to local and indigenous communities impacted by the ever-increasing demand for land and natural resources.

3. 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.
4. Natural Justice and The Green Connection (collectively referred to as “Organisations”) have an interest in this project, in the interests of protecting the environment, in the interests of protecting the local and indigenous peoples and communities who will be impacted, as well as in the public interest.

B. OBJECTION TO THE EXPLOITATION OF OIL AND GAS RESOURCES

5. The extraction, processing, storage, transport and end-use of oil and gas from the proposed production operations will result in unacceptable significant emissions of greenhouse gases (GHGs), increasing atmospheric GHG levels and resulting in increased adverse impacts on human health and well-being and on the environment (species and ecosystems). Impacts on human health and well-being are likely to include (among others) impacts from increased adverse environmental effects, impacts on food availability and affordability, loss of property due to sea-level rise, direct impacts of catastrophic weather events, and deterioration in physical and mental health and well-being. Environmental impacts are likely to include (among others) increased temperatures, worsening and prolonged droughts, longer and more intense heatwaves, increases in extreme weather events, increased ocean acidity, decline in ecosystems and habitat, and increased rates of species extinction. These impacts are significant and unacceptable. The exploitation of oil and gas resources, and specifically as proposed in this application, is not needed or desirable. Globally, the proven reserves of oil and gas far exceed what can be used without causing catastrophic climate change. There is already sufficient proven oil to supply over double the emissions consistent with 1.5°C, whilst already proven gas resources are nearly three times more than the 1.5°C budget. As a party to the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, South Africa has committed to limiting the increase in the global average temperature to well below 2°C and to pursue efforts to limit the temperature increase to 1.5°C. South Africa is not, however, on track to meet these commitments. According to the Climate Action Tracker, “South Africa’s climate policies and commitments need substantial improvements to be consistent with the Paris Agreement’s 1.5°C temperature limit.”¹ If all countries followed South Africa’s “insufficient” approach to 1 Climate Action Tracker, South Africa, <https://climateactiontracker.org/countries/south-africa/>. climate mitigation, “warming would reach over 2°C and up to 3°C.”² Approving more oil and gas projects, including offshore exploration and production, would push South Africa further away from achieving its international climate commitments. As the public trustee of the environment generally, of biological diversity, of protected areas, and of coastal public property, the State must take measures to ensure that our oceans are used, managed, protected,

conserved and enhanced in the interests of the whole community, for the benefit of present and future generations.

C. COMMENTS ON THE DRAFT SCOPING REPORT

6. INADEQUATE CONSIDERATION OF THE NEED AND DESIRABILITY OF THE PROPOSED PROJECT

6.1. The DSR vaguely distinguishes between exploration and production environmental impact assessments to avoid dealing with the ultimate consequences of the extraction and/or use of fossil fuels (coal, oil and natural gas).¹ It has now been judicially established that a comprehensive assessment that assesses the entire life-cycle of a project is necessary to place all relevant information at the decision-maker's purview.² Unsurprisingly, the DSR zooms into the future activities beyond exploration (production) to justify the need and desirability of the proposed project.³ However, it fails to consider future negative impacts of the proposed project citing minimum requirements for assessing impact of the proposed exploration activities. Consequently, the DSR's assessment of need and desirability is replete with contradictions which we submit can only be cured through a comprehensive assessment that looks at the entire life-cycle of the proposed project in line with our courts' jurisprudence on this issue.

Inadequate consideration of need and desirability in the context of climate change

6.2. The DSR makes reference to South Africa's climate change plans and policies and argues that the proposed exploration activities will not contribute to climate change, that it will in fact assist South Africa to meet its NDC targets.⁴ It further alleges that the Supreme Court of Appeal judgment in *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* 2024 (SCA judgement) supports the argument that exploration activities do not contribute to climate change.⁵

6.3. The DSR misconstrues the SCA judgement insofar as it relates to exploration activities for oil and gas within the context of South Africa's international commitments on climate change. The SCA was merely taking exception to the high court making a finding in respect of whether or not "authorising new oil and gas exploration, ..." complies with South Africa's international climate change commitments, it did not make a determination as to whether or not exploration and/or production of oil and

¹ section 5 of the DSR pages 65-99.

² *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* 2021 par 123-125.

³ see footnote 1 above.

⁴ The DSR par 5.1.3.

⁵ See footnote 4 above.

gas contributes to climate change. The SCA would have erred if it had found that exploration and/or production of oil and gas does not contribute to climate change. This is because it is a globally accepted scientific fact that the extraction and use of fossil fuels (coal, oil, natural gas etc.) is a major contributor to climate change.⁶ Even if we were to accept the DSR's interpretation of the SCA judgement on exploration of oil and gas in relation to climate change, it still does not exempt anyone from complying with the requirement to conduct a comprehensive assessment that assesses the entire life-cycle of the proposed project. Save to say the SCA judgement is being appealed at the Constitutional Court under case no. 196/2024.

Inadequate consideration of need and desirability in the context of economic development

6.4. The DSR refers to economic benefits of future production of natural gas to justify the need for its exploration activities.⁷ It further presents the use of natural gas as a better option and an alternative to coal and oil.⁸ Moreover, the DSR seems to suggest that South Africa's energy transition policies envisage a slow transition from fossil fuels to renewable energy, nothing can be further from the truth. According to the updated NDC targets, South Africa intends to limit its national emissions to between 398 to 510 Mt CO₂-eq for 2025, and 398 to 440 Mt CO₂-eq for 2030.⁹ In light of these NDC targets, it is not enough to reduce emissions contributions, the reduction must take place within a short period of time.

6.5. The DSR completely ignores the fact that exploration activities of oil and gas alone will not result in significant job creation or economic benefits. Furthermore, the DSR does not mention the dangers of methane that comes from gas leaks insofar as emissions are concerned and the need to assess the impact thereof. Methane is said to contribute vast amounts of emissions compared to coal and oil and this is something that negates the desirability of the proposed project. Thus, to accurately determine the need for the proposed project in the context of economic development would require a comprehensive assessment of the entire life-cycle of the project.

7. MARINE BIODIVERSITY IMPACTS

7.1. Block NCUD lies within the Orange Basin, which extends from South Africa as far north as the Lüderitz Arch in Namibia. The Block has been subjected to multiple previous exploration activities, including 2D and 3D seismic surveys, and a number of

⁶ Paris Agreement 2015; Ripple WJ et al "World Scientists' Warning of a Climate Emergency" 2019; Ripple WJ et al "The 2023 state of the climate report: Entering uncharted Territory" 2023;

⁷ The DSR par 5.1.3.

⁸ See footnote 7 above.

⁹ South Africa's NDC Targets for 2025 and 2030 <https://www.climatecommission.org.za/publications/south-africas-ndc-targets-for-2025-and-2030>.

exploratory wells have already been drilled in the Orange Basin. Beyond exploration, there is the intended realisation of production if a significant discovery is made in the NCUD Block. The same holds true in other blocks in the Orange Basin in both South African and Namibian waters, meaning that the area could continue on a path to high offshore oil and gas industrialisation.

- 7.2. Despite the high volume of past, current, and potentially future oil and gas exploration activities in the region, the Scoping Report appears not to comprehensively assess the cumulative marine impacts of the project in conjunction with other activity the area and does not assess all “past, present and reasonably foreseeable future developments or impacts”. NEMA, together with the EIA Regulations, requires that EIAs include, amongst other things, an assessment of the nature, extent, duration and significance of the consequences for or the impacts on the environment of that activity, including the cumulative impacts.
- 7.3. Cumulative impacts must take into account future exploration and production activities in adjacent and near blocks, including DWOB, 3B/4B and PEL39 in the Namibian extent of the Orange Basin. With the proximity of the NCUD Block to Namibia, and the effects of the Benguela Current, a comprehensive assessment of transboundary impacts should also be included in the EIA phase.
- 7.4. The DSR attempts to exclude other exploration activities, as well as future production activities, from the scope of the investigation on the basis that they are “not reasonable foreseeably at this stage”.¹⁰ We disagree that these are not reasonably foreseeable. They are critical to understanding the impact of each of the proposed petroleum projects individually, as well as the cumulative impact.
- 7.5. It is reasonably foreseeable that the proposed exploration activities may lead to eventual production activities, as is their intent. Similarly, it is reasonably foreseeable that proposed or approved seismic surveys (TGS Orange Basin Reconnaissance Permit); exploration (Deep Water Orange Basin Licence Block 12/3/343; TotalEnergies EP South Africa Block 567; Sezigyn ER340; PEL39 in Namibian waters); and production (Sunbird and PetroSA Block 2A) could contribute, along with the proposed exploration, to additive stressors on marine life in the region. We understand that Eco (Atlantic) Oil & Gas has already commenced with exploratory drilling in Block 2B (as of October 2022).¹¹
- 7.6. The cumulative impact of increased background anthropogenic noise levels in marine environments is an ongoing and widespread issue of concern. Impacts across large spatial scales or multiple species are rarely considered, but recent research indicates

¹⁰ Page 41 of the DSR.

¹¹ <https://thelundingroup.com/lundin-group-of-companies/africa-energy-corp/news/africa-energy-commences-operations-on-block-2b-off-122637/>

that repeat seismic surveys reduce cetacean occurrence across large marine ecosystems.¹² Repeat seismic surveys may also disrupt fish migration patterns, as is suspected in Southern Namibian tuna fishing grounds, where catches have severely declined since 2011, and in 2017 dropped off to non-commercial catch rates.¹³

- 7.7. The ESIA must assess the immediate and chronic impacts of cumulative sonar and seismic surveys and drilling activities in the area, not just from a singular exploration project. The ESIA must carefully examine the full footprint of impacts from sonar surveys and drilling activities in the context of their additive nature.
- 7.8. The DSR acknowledges a number of scientific information gaps, including “that the benthic (seabed) fauna beyond the continental shelf break, and within the licence Black area, are not well studied” but also finds that the impacts on benthic communities is one of the most significant impacts that have been identified.
- 7.9. The ESIA must also provide a comprehensive explanation of the baseline environment, which includes analysis of past impacts and current threats in conjunction with the impacts that are likely to result from the proposed activities. The extent of understanding of the benthic environment must be clearly set out, and the precautionary principle must be carefully applied to conclusions and recommendations.
- 7.10. The Scoping Report fails to list in the Marine Ecology terms of reference any analysis of the cumulative impacts of climate change in conjunction with the impacts of the proposed exploration activities (section 9.2.2.2), which will be important to understand the true extent of the project’s impacts.

8. IMPACTS ON CHILDREN AND FUTURE GENERATIONS

- 8.1. As mentioned in these submissions,¹⁴ the fact that fossil fuels (coal, oil, and natural gas) are the major contributors to climate change is undisputed. Accordingly, the extraction and/or use of fossil fuels undoubtedly contributes to climate change, a reality that threatens the existence of the entire planet earth. Climate change impacts are catastrophic for everyone, and children are said to be the most vulnerable to climate change compared to adults because of their developing bodies.¹⁵ Climate change effects on children differs due to pre-existing geographical variabilities and

¹² A. S. Kavanagh *et al.*, *Seismic surveys reduce cetacean sightings across a large marine ecosystem*, 9, Sci. Rep., 19164 (2019).

¹³ Russell, D. ‘Assessing the Impact of Seismic Surveys on South African Fisheries’ (5 April 2018) at 6. Available online at: www.rfalliance.org.za/wp-content/uploads/2018/10/Assessing-Impact-of-Seismic-Surveys-on-South-African-Fisheries-April-2018.pdf

¹⁴ See comments on need and desirability above.

¹⁵ UN Convention on the Rights of the Child Committee (General comment no. 26).

socio-economic disparities within which they live.¹⁶ They are likely to experience heat stress, respiratory and vector-borne diseases, malnutrition with long term implications, as well as being at higher risk of death compared to adults.¹⁷

8.2. South Africa's Constitution provides everyone with the right to a healthy environment as well as the right to have the environment protected for the benefit of the current and future generations.¹⁸ The Constitution also provides that a child's best interests are of paramount importance in all matters concerning the child.¹⁹ The NEMA protects vulnerable and disadvantaged people (this includes children) against environmental injustice.²⁰ The UN Committee on the Rights of the Child (General Comment no.26) has recently advised state parties to adopt a child rights-based approach to environmental protection.²¹ South Africa's Constitution obliges the state to consider international law when interpreting the bill of rights.²²

8.3. In light of the above, it is evident that a child friendly assessment is not only necessary, but it is also a legal requirement which must be complied with. Projects that have a potential impact on the environment fall within the ambit of "matters that concern a child" and triggers the application of sections 28(2) and 39(1)(b) of the Constitution as well as the UN Committee on the Rights of the Child General Comment No.26. The current version of the draft scoping report does not consider the long-term impacts of climate change on children and future generation.

9. IMPACTS ON WOMEN AND GIRLS

9.1. Similarly to the specific impacts on children raised above, the DSR fails to acknowledge the disproportionate impact of oil and gas extraction and production (and subsequently climate change) on women. Furthermore, South Africa is a signatory to the Convention on the Elimination of Discrimination Against Women as well as the Maputo Protocol on the Rights of Women in Africa. This therefore requires a specific understanding of how this project will impact and subsequently violate these specific rights. There is a need to include a specific analysis on the gendered impact of the project as a driver of climate change.

¹⁶ 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.

¹⁷ See footnote 16 above.

¹⁸ Section 24 of the Constitution.

¹⁹ Section 28 (2) of the Constitution.

²⁰ Section 2 (4) f of NEMA.

²¹ See footnote 15 above.

²² Section 39 (1) (b) of the Constitution.

10. SOCIO-ECONOMIC IMPACTS

- 10.1. The DSR correctly highlights the fact that the socio-economic benefits of the proposed project will be temporary and may have an effect of reducing income due to material impact on fishing in the affected area. It then proposes a socio-economic impact assessment in order to mitigate the socio-economic impacts. Considering the aforementioned impact the project will have on fishing in the affected area, it is our submission that the socio-economic impact assessment must also quantify the potential benefits and impacts of the project on the specific fishing community that will be affected by the project.
- 10.2. The terms of reference for the specialist studies (environmental impact assessment (EIA)) must consider short-term to long-term implications of economic impacts for the complete life-cycle of the project including production, paying particular attention to irreversible, permanent and irreplaceable losses of natural and heritage resources. The EIA should assess how economic impacts on both commercial and small-scale fishing, food security, and livelihood development evolve across local, regional, and national context. It should consider different scenarios to analyse potential economic outcomes from various development pathways in South Africa's northern coastal region. The scenarios must be thoroughly appraised to understand their economic implications and include the following:
 - 10.2.1. Addressing climate change and moving to a net-zero economy which involves weighing the costs and benefits of the project. Net Zero commitments that create barriers to oil and gas development and taxes on emissions which may result investment in oil and gas developments being dis-incentivized.
 - 10.2.2. An evaluation of the cost benefits of a business as usual taking into consideration the fluctuation of the global energy prices of oil and gas and the availability of imports
 - 10.2.3. An evaluation of demand within the context of a carbon border adjustment tax regime and transitions to renewable energy systems.
 - 10.2.4. An identification and incorporation of priority ecosystem services for inclusion within the terms of reference. By adopting this approach, the economic assessment can pinpoint the pertinent ecosystem services that necessitate consideration. This aids in identifying the relevant stakeholders that should be actively engaged throughout the assessment.
- 10.3. In conclusion, the EIA should cover the entire project lifecycle, addressing both short-term and long-term effects, particularly irreversible losses of natural and heritage resources. It should consider diverse economic factors such as global

energy prices, carbon taxes, and shifts to renewable energy. The assessment must identify and integrate priority ecosystem services and include a broad range of stakeholders, including fishers with cultural ties to the area. This comprehensive approach aims to capture all potential costs and benefits and ensure that the project's environmental impacts are thoroughly evaluated.

11. IMPACTS ON CULTURAL HERITAGE

- 11.1. The DSR makes mention of the particular impacts that this project will have on culture and heritage, however it fails to provide a list of identified community groups who would be consulted as part of the heritage impact assessment process. This list should have been made available to interested and affected parties during the scoping phase in order for I&APs to identify gaps in the proposed consultation and assessment process. The EIA Regulations require that the person conducting the public participation process ensure that “(a) information containing all relevant facts in respect of the application or proposed application is made available to potential interested and affected parties”. These relevant details include a list of which communities will be consulted, the methodology used to identify the communities to be consulted, the proposed methodology for the consultation itself, and whether the proposed project has been subject to any prior consultation thus far. The Draft Scoping Report fails to include this crucial information and has therefore deprived interested and affected parties of their right to review and comment on the development of the methodology to be adopted and to identify which cultural groups or communities will be consulted.
- 11.2. By relying solely on the EAP’s own information to identify potential I&APs, important groups may be excluded. In *Sustaining the Wild Coast and Others v Minister of Mineral Resources and Energy and Others*, the Eastern Cape High Court found that public participation was inadequate where a database was compiled through “analysis of potential stakeholders and based on stakeholders engaged in previous similar studies in the area” and where the company declined to give further details about how the database was created
- 11.3. The West Coast has a rich history of traditional fishing by coastal communities. Potential impacts from the project may negatively impact on the livelihoods as well as culture of small-scale fishing communities. NEMA requires that environmental management is sustainable, meaning, in part, “that the disturbance of landscapes and sites that constitute the nation’s cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied”. The National Heritage Resources Act, 25 of 1999 (“NHRA”), provides further guidance with respect to which heritage resources are constitute “the nation’s cultural heritage”. One of the aims of the NHRA is to “promote good management of the national estate and to enable and encourage communities to nurture and conserve their legacy so it may

be bequeathed to future generations" (NHRA, Preamble). Pursuant to this objective, "those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations must be considered part of the national estate and fall within the sphere of operations of heritage resources authorities". These heritage resources must be identified and the potential impact on these resources assessed as part of a heritage impact assessment. In addition to the tangible heritage resources, heritage resources which must be considered include "places to which oral traditions are attached or which are associated with living or intangible heritage", and "landscapes and natural features of cultural significance". These could include particular species which hold significant cultural and heritage importance to small-scale fishers

12. PUBLIC PARTICIPATION

12.1. The overwhelming amount of EIA participation processes on the West Coast has led to participation fatigue. Coastal communities, and in particular small-scale fishers, whose livelihoods are directly impacted by oil and gas are unable to meaningfully engage in lengthy processes where technical information is difficult to understand. This, coupled with the fact that the EIA process has been relegated to a tick-box exercise which has resulted in low turnouts and disengagement from coastal communities. The opportunity for future public participation meetings offers an opportunity to try to remedy this.

13. INCOMPATIBILITY WITH THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

13.1. We note that in addition to the mention of UN Guiding Principles on Business and Human Rights (UNGPs) in the DSR, Shell has publicly stated that their business approach is informed by the UNGPs²³. The UNGPs, despite being 'soft law', have increasingly been²⁴. The UNGPs provide a three-pillar framework which requires businesses to respect, protect and remedy any human rights violations. In light of the climate crisis, Shell has a duty of care not to pursue any business activities that will harm human rights. These rights include the right to a healthy environment, the right to equality, the right to food security, children's rights as well as the right to life. The vertical and horizontal application of the Constitution also reiterates the importance of the "respect" pillar.

13.2. Table 7.4 of the DSR makes express mention of the UNGPs and states that: "The objective of the Guiding Principles is to enhance standards and practices with

²³ [UN sustainable development goals | Shell Global](#)

²⁴ Macchi, C. and van Zeven, J., 2021. Business and human rights implications of climate change litigation: *Milieudefensie et al. v Royal Dutch Shell. Review of European, Comparative & International Environmental Law*, 30(3), pp.409-415.

regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization. These Guiding Principles pays particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women...”.

- 13.3. Despite this inclusion, there is no proposed analysis or understanding in the DSR on the rights of women, children and marginalised coastal communities.

14. ITLOS ADVISORY OPINION ON CLIMATE CHANGE

The recent advisory opinion on climate change from the International Tribunal on the Law of the Seas must be taken in to consideration, unfortunately, the Draft Scoping report fails to mention this.²⁵ The advisory opinion, has re-iterated the duties of States to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and ensure policy coherence with this goal. Furthermore, the advisory opinion makes it clear that there is a general obligation on States to combat any form of degradation of the marine environment, including climate change impacts, such as ocean warming and sea level rise, and ocean acidification. Whilst the status of the advisory opinion is non-binding, it is legally persuasive and is likely to inform future State policy and legislation.

D. CONCLUSION

15. The phase out of oil and gas is urgently needed to avert the climate crisis, to protect and promote the State’s obligations to provide basic necessities such as water, food, shelter and an environment that is not harmful to health or well-being. Given this, the exploitation of oil and gas is not needed, is undesirable, is locally and globally irresponsible, is contrary to South Africa’s international climate change and biodiversity commitments and contravenes the State’s obligations under section 24 of the Constitution. The Green Connection and Natural Justice object to the authorisation of the proposed production activities.

²⁵ [C31 Adv Op 21.05.2024 orig.pdf \(itlos.org\)](#)