



N2 WILD COAST TOLL HIGHWAY

REFERENCE NO: 12/12/20/701

APPELLANTS' SUPPLEMENTARY ANSWERING STATEMENT (THIS DOCUMENT SUPPLEMENTS THE APPELLANTS' ANSWERING STATEMENT OF 25 OCTOBER 2010)

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ANNEXES

ANNEX A: The Independent Consultants Agreement.

ANNEX B: All Correspondence relating to the request for the TORs in chronological order (numbered from B1 – B6).

ANNEX C: An email from Mr Motaung, the Deputy Information Officer of SANRAL.

ANNEX D: Sections of the Wild Coast Communities Appeal relating to the imposition of inappropriate restrictions on the Environmental Assessment Practitioner.

ANNEX E: Sections of the Answering Statement relating to the imposition of inappropriate restrictions on the Environmental Assessment Practitioner.



1. INTRODUCTION

1. We act on behalf of the Sigidi, Baleni and Mdatya Communities, and the Khimbili Communal Property Association (referred to collectively in this supplementary statement as “the Wild Coast Communities”) and Mr John Clarke, a social worker acting on behalf of communities in the AmaDiba Tribal Authority area. Our clients (“the Appellants”) submitted an appeal against the decision of the Director-General: Environmental Quality and Protection (“the DDG”) to issue an environmental authorisation in respect of the proposed N2 toll highway dated 19 July 2010 (“the WCC Appeal”). SANRAL (“the Applicants”) then submitted a response to the appeals (“the Applicant’s Response”) and on 25 October 2010 we submitted an answering statement on behalf of the Applicants (“the Answering Statement”).
2. This document supplements the Answering Statement. It has been submitted because on Friday 12 October 2010 the Applicant provided us with the “Independent Consultants Agreement between the South African Roads Agency Limited and CCA Environmental (Pty) (Ltd)” (‘the Agreement’) which confirms statements which we made in the WCC Appeal and which were strenuously denied by the Applicant in the Applicant’s response. The Agreement (which is attached marked **Annex A**) makes it clear that the Environmental Assessment Practitioner (“EAP”) must not assess the upgrading of the existing N2 as an alternative to diverting the N2 through the areas where the communities which we represent, live. This means that the EAP was contractually bound to avoid assessing what was clearly a reasonable and feasible alternative, and it is clear from the Environmental Impact Assessment Report (“EIAR”) that the EAP did not assess this alternative.
3. The fact that the Applicant strenuously denied that this occurred, also casts doubt on the reliability of other unsubstantiated statements made in the Applicant’s Response.
4. This information is of great importance and is highly material to the Minister’s decision because it confirms that the integrity of the EIA process was seriously compromised and that the process did not comply with the mandatory legal requirements that all feasible alternatives must be considered and that the EAP must be independent. Accordingly we submit that administrative justice requires that the Minister take this information into account when deciding the appeal.

2. THE AGREEMENT

5. At the time we filed the Answering Statement we had already made requests to the EAP and several official at SANRAL to provide us with a copy of the EAP’s terms of reference (“the TORs”). Our requests were refused and we were informed that we should file a PAIA request for the documents, which we duly did on 5 October 2010. SANRAL acknowledged receipt on 7 October 2010 (see **Annex B** which contains all correspondence relating to the request for the TORs in chronological order).
6. SANRAL was unable to provide the documents to us by 5 November and requested a 7 day extension. We received the Agreement on Friday 12 October 2010.



7. The TOR's form part of 'Annexure A' which is entitled 'Terms of Reference for Environmental Consultant N2 Wild Coast Toll Road Project'. Annexure A forms part of the Agreement (since there are two Annexure A's to the Agreement we have remarked the TOR's 'annexure A2' for the purpose of clarity, and all further references to annexure A shall refer to annexure A2). Although Section 1.2.13 of the Agreement states that the 'professional services' provided by the EAP are fully described in 'annexure B' of the Agreement, SANRAL have confirmed that this is an error and that 'Annexure A' contains the full TOR's in terms of which the entire environmental assessment process was conducted. The email from Mr Motaung, the Deputy Information Officer of SANRAL states that:

"it is an Error in the agreement. Should read 'Annexure A'... Annexure A refers to Request For Proposals(RFP)and indeed the Terms of Reference in terms of which the entire project was conducted (i.e. there are no other relevant terms of reference which govern the N2 Toll Road EIA, except what we have provided herein)." (This email is attached as Annex C).

8. Section 5 of Annexure A is entitled 'list of issues for the environmental studies'. This section sets out a list of issues that need 'special attention in the execution of the environmental studies.'¹ The list includes, among others, the requirement that there must be:

"[d]ue consideration of alternative options and a strong motivation for excluding the R61 and current N2 as options." (emphasis added)

9. Clearly the EAP could not fulfil this requirement of the TORs unless it did not assess the upgrading the R61 and current N2 as possible alternatives to the preferred route. Upgrading the R61 and current N2 are obvious and feasible alternatives to building a new toll road through the "greenfields' areas where the communities which we represent live. As such, the law requires that these alternatives be considered and assessed. The conclusion that the Applicant contracted with the EAP in a manner that required the EAP to undertake an EIA process that did not comply with the law, is inescapable.
10. The Applicant should not have included such a requirement in the TORs and the EAP should have requested an amendment of the TORs to delete this requirement in order to protect his independence. The EAP did not do so, nor is there any reference in the proposal submitted by the EAP in response to the TORs that it considered this requirement to be unacceptable. A contractual requirement to provide a strong motivation for excluding these alternatives undermines the independence of the EAP and the integrity of the entire process.
11. Furthermore, it is clear from the Environmental Impact Assessment Report ("EIAR") that the EAP acted under the Applicant's contractual direction and excluded the R61 and N2 as options during both the scoping and EIA processes. The EAP also attempted to motivate why these options should be excluded, but was unable to

¹ Page for of Annex A



provide “a strong motivation” for excluding them because there is no good factual basis for doing so (which we pointed out in the WCC Appeal).

3. APPLICANT’S DENIAL THAT IT PRECLUDED CONSIDERATION OF ALTERNATIVE

12. In the WCC Appeal we made the following statement:

“106. The EIA report is based on updated and supplemented versions of the reports prepared during the discredited first EIA process and fails to assess options (in particular the option of upgrading the existing N2 route) which should have been assessed. As set out below, this material omission appears to have occurred either because the Applicant gave the EAP terms of reference (“TORs”) which precluded the consideration of this option, or because the consultants failed to apply their minds properly to this issue.” (emphasis added)

13. In the Applicant’s Response the Applicant strongly denied that it had precluded the consideration of certain alternatives in the TORs, and stated that:

“The speculation by some of the Appellant’s that the terms of reference of the independent consultant specifically excluded the consideration of certain alternatives at SANRAL’s behest is unfounded and incorrect”² (emphasis added).

14. However, despite the fact that the Applicant’s Response was 166 page long (excluding the copious annexures) and the fact that the Agreement was in its possession, the Applicant did not provide any documentary evidence to substantiate its bald denial. It is now clear that had it disclosed the TORs they would have proved that the above statement is false.

15. It is now clear that the TORs substantiate the contentions made in both the WCC Appeal and the Answering Statement. (For ease of reference we have included the relevant statements made in this regard in the WCC Appeal and the Answering Statement in **Annex D** and **Annex E** respectively).

16. Indeed it is apparent from the Agreement and the TORs that SANRAL’s statement (quoted above) is untruthful and incorrect. Since the Applicant was a party to Agreement and was in possession of it, it appears that the Applicant’s Response was intended to mislead the Minister by denying the existence of a fatal flaw in the process. The fact that SANRAL delayed giving us the Agreement until after we had submitted the Answering Statement, and did not quote the TORs in the Applicant’s Response, is consistent with a deliberate attempt to hide the truth from the Minister.

4. MANDATORY REQUIREMENT TO CONSIDER EXISTING ROUTE AS AN ALTERNATIVE

17. In both the WCC Appeal and the Answering Statement we argued that the failure to assess the alternative of upgrading the existing N2 route was a fatal flaw. The consideration of alternatives is a mandatory requirement of the EIA process in terms of the ECA and the General EIA Regulations. In fact, the consideration of alternatives is

² Paragraph 13.9 of the Applicant’s response.



essential to the EIA process and provides a framework for sound decision-making based on principles of sustainable development.

18. The purpose and importance of the adequate consideration of alternatives is eloquently expressed in the DEAT (2004) Criteria for determining Alternatives in EIA, Integrated Environmental Management, Information Series 11, Department of Environmental Affairs and Tourism (DEAT), Pretoria ("DEAT Alternatives Document") ", as follows:

"The role of alternatives is to find the most effective way of meeting the need and purpose of the proposal, either through enhancing the environmental benefits of the proposed activity, and or through reducing or avoiding potentially significant negative impacts.

Consideration of potential alternatives in the EIA process is one of the most critical elements of the scoping phase (DEAT, 2002). Its importance is highlighted by Glasson et al. (1999) and by the Council of Environmental Quality (CEQ) in the United States, which describes the consideration of alternatives as the 'heart' of EIA (CEQ, 1978). By implication, alternatives are essential to the EIA process, yet they are often inadequately handled. It is not uncommon to find that feasible alternatives are omitted deliberately or that alternatives proposed by stakeholders are rejected without adequate justification.

Due consideration of alternatives ensures that the EIA is not reduced to defence of a single project proposal that is the desire of the proponent. Rather, it provides the opportunity for an unbiased, proactive consideration of options, to determine the most optimal course of action.

The manner in which alternatives are addressed in the scoping phase of an EIA is often indicative of the subsequent unfolding of the entire EIA process. An appropriate range of alternatives that would meet the stated need for and purpose of the project has to be considered. Failure to consider alternatives adequately at the outset is often symptomatic of a biased process that is intent on defending a project proposal. Such EIA reports are often referred to as 'sweetheart' reports as they attempt to justify a particular course of action rather than weighing up all the alternatives in an objective manner. They can also lead to stakeholder dissatisfaction through failure to consider relevant suggestions for alternatives from stakeholders and as such may lead to conflicts within the EIA process. The manner in which alternatives to a proposal have been considered is often one of the contested areas of an EIA.

By contrast, recognition of the valuable role of alternatives implies a desire for transparency in the EIA process and a willingness to explore all feasible options in an objective manner, with a view to facilitating balanced decision making in order to achieve sustainable development." (Emphasis added)

19. The guideline document on the General EIA Regulations ("the Guideline")³ and the DEAT Alternatives Document set out that the range of alternatives that should be considered are those that are "reasonable", "practicable", "feasible" or "viable."⁴ The Guideline goes on to state that

³ EIA Regulations, Implementation of section 21, 22 and 26 of the Environmental Conservation Act. April 1998. Department of Environmental Affairs and Tourism.

⁴ See section 3.2.3.1 of the Guideline, and page 7 of the DEAT Alternatives Document.



“Not all alternatives will be investigated in the same detail. **An analysis** of the range of alternatives should be undertaken to decide which ones should be carried forward for further investigation and which ones should be discarded.” (emphasis added).

20. ‘An analysis’ suggests objective scrutiny of the various alternatives to determine which alternatives to carry forward, namely those that are reasonable, practicable, feasible or viable. This is echoed by the DEAT Alternatives document and the DEADP Guideline on the EIA regulations, 2006 which states that:

“The identification of alternatives should be broad, **objectively done** and well documented.”

21. It is thus apparent that alternatives must be considered objectively. Where viable alternatives are not given adequate consideration because the EAP is predisposed to ‘provide a strong motivation for excluding the R61 and current N2 as options’ the entire EIA process is undermined since the consideration of alternatives serves is at the heart of the EIA process and provides the framework for balanced decision-making. The entire process is flawed and must be set aside.

5. INDEPENDENCE OF ENVIRONMENTAL ASSESSMENT PRACTITIONER

22. The General EIA Regulations (GN R1183 in GG 18261 of 5 September 1997) published in terms of the Environmental Conservation Act of 1989 (“the ECA”) require the applicant to “appoint an independent consultant who must on behalf of the applicant comply with these regulations.”⁵ The term “independent” is not defined in the General EIA Regulations, but useful guidance as to how this term should be understood is provided by the EIA Regulations, 2006 and 2010. These regulations define independent as follows:

“**independent**”, in relation to an EAP or a person compiling a specialist report or undertaking a specialised process or appointed as a member of an appeal panel, means—

- (a) that such EAP or person has no business, financial, personal or other interest in the activity, application or appeal in respect of which that EAP or person is appointed in terms of these Regulations other than fair remuneration for work performed in connection with that activity, application or appeal; or
 - (b) that **there are no circumstances that may compromise the objectivity of that EAP or person in performing such work;** (Emphasis added)
23. The objectivity of the EAP is central to the EIA process. The EAP must, through his own judgment and expertise, determine what alternatives are viable and provide a comparative assessment of each to a competent authority to enable him or her to make an informed decision on the application. The applicant may not dictate to the EAP that certain alternatives must be excluded from consideration. This undermines the independence of the EAP and the integrity of the entire process.

⁵ 31A of the general EIA Regulations.



6. MOTIVATION FOR CONSIDERATION OF THIS SUPPLEMENTARY ANSWERING STATEMENT

6.1 General EIA Regulations do not stipulate deadlines

24. The General EIA Regulations do not stipulate deadlines for the submission of answering statements by appellants and accordingly these must be submitted within a reasonable period. As explained more fully below, we believe that the requirements of administrative justice require that the Minister consider this supplementary answering statement in deciding the Appeal.

6.2 Importance

25. The information contained in the Agreement and TORs is of fundamental importance and must be taken into account if the Minister is to make a balanced and informed decision that furthers the goal of sustainable development. Indeed, we believe that this information is decisive and that the Minister cannot validly grant an environmental authorisation on the basis of this fatally flawed EIA process.

6.3 The information was not in our possession

26. At the time we submitted the Answering Statement we were not in possession of the Agreement and the TORs despite our reasonable efforts to obtain them since 9 July 2010 (see all the documents forming part of **Annex B**). Indeed the Applicant repeatedly prevented us from obtaining this information and we were forced make a formal PAIA request to obtain it.

6.4 The Supplementary Answering Statement does not raise new issues

27. This Supplementary Answering Statement contains important factual information that is highly relevant to the decision to be made by the Minister and which support our statements in the WCC Appeal and Answering Statement. It does not raise new issues.

6.5 Applicant has already had ample opportunity to respond to our averments

28. The issue of whether or not the Applicant imposed inappropriate restrictions on the EAP was raised in the WCC Appeal and the Applicant had an opportunity to respond to these allegations in the Applicant's Response. It has had all the necessary facts to do so throughout the appeal process since it drafted the Agreement and has had it in its possession. The Applicant's Response should have responded truthfully to our averments in this regard but instead the Applicant responded with a bare denial of our allegations and an allegation that our 'speculation' was unfounded and incorrect. The Applicant failed to produce the information of its own accord to clarify these issues.

29. In these circumstances the Minister is entitled to consider this information and need not give the Applicant any further opportunity to respond.



7. CONCLUSION

30. The EIA process for the proposed N2 Wild Coast Toll Highway is fundamentally flawed because the independence of the EAP has been undermined by contractual requirements imposed by the Applicant. This has resulted in an unlawful failure to assess viable and feasible alternatives, and has also created a perception that the EIA process as a whole, and in particular the process of selecting alternatives which is at the heart of the EIA process, has been biased,
31. The Minister cannot grant uphold the decision of the DDG or grant a new environmental authorisation on the basis of the information provided in the Final Environmental Impact Assessment Report as the consideration of alternatives is inadequate and the report is tainted by the lack of independence of the EAP. Accordingly the Minister must uphold the WCC Appeal and set aside the decision of the DDG to grant an environmental authorisation.