



CULLINAN & ASSOCIATES
ENVIRONMENTAL & HERITAGE LAW SPECIALISTS

76 Strand St
Cape Town 8001

P O Box 227
Cape Town 8000
South Africa

t: +27 (0)21 425 7068
f: +27 (0)21 425 7065

www.cullinans.co.za

COMMENTS ON DRAFT ENVIRONMENTAL IMPACT ASSESSMENT REPORT

Submitted on behalf of:

Mr John GI Clarke (social worker working with the residents of the AmaDiba Tribal Authority Area)
the Sigidi, Baleni and Mdatya communities of Pondoland
the Khimbili Communal Property Association

Prepared by:

Cormac Cullinan
Nathi Mjexane
Megan Adderley

22 January 2009

Our ref. CP Cullinan/Im/S54-001

Cullinan&Associates Incorporated (Registration No. 2001/001024/21)

Directors: C P Cullinan BA (Hons) LLB LLM (Environmental Law) G N Daniels Bluris LLB LLM (Marine and Environmental Law) S D Kvalsvig BA LLB

Attorneys: GS Nel BA LLB LLM (Environmental Law) N E Mjexane LLB L Mahomedy LLB LLM (Medical Law) LLM (Environmental Law)

Branch Office: 2 Nimmo Close Morningside Durban 4001

TABLE OF CONTENTS

1.	INTRODUCTION.....	1
2.	LEGAL STANDARD FOR AN EIAR.....	1
3.	DRAFT EIAR DOES NOT MEET REQUIRED LEGAL STANDARD.....	3
4.	MISLEADING CHARACTERISATION OF PROJECT AS A REGIONAL SOCIAL DEVELOPMENT INITIATIVE.....	4
4.1	The Project is not designed to benefit local people.....	4
4.2	The Project is not consistent with the SDI strategy.....	4
4.3	The Project doesn't take account of other relevant policies and plans.....	5
4.4	Inadequate justification for the choice of route.....	6
4.5	Inadequate evaluation of alternatives.....	6
5.	MISLEADING ASSESSMENT OF BENEFITS AND IMPACTS OF SECONDARY DEVELOPMENT.....	6
6.	INADEQUACY OF MITIGATION MEASURES.....	7
6.1	Unrealistic reliance on local government to take mitigation measures.....	7
6.2	Unrealistic measures to mitigate impacts on natural ecosystems.....	7
7.	FAILURE TO ASSESS THE SOCIO-ECONOMIC IMPACTS OF TOLLING.....	8
8.	FAILURE TO ASSESS CUMULATIVE IMPACTS OF MINING AND TOLL ROAD.	8
9.	INADEQUATE CONSULTATION WITH INTERESTED AND AFFECTED PARTIES	8
9.1	Failure to identify, record and address issues of concern to affected communities.....	9
9.2	Ineffective and inadequate modes of communication.....	9
9.3	Language constraints.....	10
9.4	Venues for consultations.....	10

9.5 Specialist studies.....10
9.5.1 Heritage, graves and sacred sites.....10
9.5.2 Relocating people.....10
9.5.3 Land claims.....10

9.6 Influx of herb collectors and other people.....10

9.7 Other social impacts.....11

10. CONCLUSION11

1. INTRODUCTION

We are submitting these comments on the draft environmental impact assessment report for the proposed N2 Wild Coast Toll Highway (“draft EIAR”) on behalf of: Mr John Clarke, a social worker acting on behalf of communities in the AmaDiba Tribal Authority Area, the Sigidi, Baleni and Mdatya communities, and the Khimbili Communal Property Association. Accordingly, most of the comments in this document focus on the section of the proposed N2 toll road known as the “green field section” which passes through Pondoland.

In preparing these comments we have had the benefit of reading the comments on the draft EIAR prepared by *Sustaining the Wild Coast* (“SWC”) and support the views expressed by the SWC. This document does not attempt to repeat the detailed input provided by the SWC but where appropriate we have reiterated and quoted from their comments in this document.

As this document makes clear, it is apparent that considerable further studies and detailed and comprehensive discussions with local communities, including our clients, must take place in order to prepare a final EIAR that complies with the requirements of National Environmental Management Act¹ (“NEMA”). However, notwithstanding the limitations of the draft EIAR, it is clear that the proposed N2 Wild Coast Toll Highway (“the Project”) :

- (a) will result in severe and irreversible environmental degradation, particularly to the plants and ecosystems of the globally significant Pondoland Centre of Endemism (“PCE”);
- (b) will have very severe negative impacts on the cultural heritage and landscape of the Wild Coast and thereby both undermine the potential for ecotourism and other sustainable development options that would allow local communities to improve their economic circumstances while retaining their cultures;
- (c) will not be ecologically sustainable; and
- (d) cannot be regarded as justifiable economic and social development particularly given the strong opposition from the alleged beneficiaries of the Project in the Pondoland area.

What is not apparent from the draft EIAR is the very strong and widespread opposition to the Project among many of the communities of Pondoland. This must be investigated and addressed in the final EIAR.

2. LEGAL STANDARD FOR AN EIAR

The draft EIAR has been prepared as part of the process to obtain an environmental authorisation under NEMA. It is important to appreciate at the outset that the function of an EIAR is to place before the decision-maker sufficient information to satisfy that person that the procedures followed for the investigation, assessment and communication of the potential impacts of the Project have been undertaken in a manner complies with the law (primarily NEMA and the EIA Regulations made under it) and thereby places the decision-maker in a position to ensure that the State fulfils its obligations under section 24 of the Constitution.

NEMA provides in section 24(1) that:

”In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on the environment of listed activities must be considered, investigated, assessed and reported on to the competent authority charged by this Act with granting the relevant environmental authorisation.”

¹ Act 107 of 1998.

Section 24(4) sets out minimum criteria which must be met by environmental impact assessment (“EIA”) procedures. One of the requirements is that the procedure that is followed must ensure that the organ of state that is required to make a decision (e.g. to decide whether or not to issue an environmental authorisation for the Project), must take into account:

- (i) the findings and recommendations flowing from the investigation into the environmental impacts (which would be contained in the EIAR);
- (ii) the general objectives of integrated environmental management set out in NEMA (particularly section 23); and
- (iii) the principles of environmental management set out in section 2 of NEMA.²

Integrated environmental management is dealt with in chapter 5 of NEMA and the general objectives of that chapter are set out in section 23 which states that:

“23(2) The general objective of integrated environmental management is to –

- (a) ...
- (b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2;
- (c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;
- (d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;
- ...”

Many of the principles set out in NEMA section 2 are relevant to the decision that must be made regarding whether or not to grant an environmental authorisation in respect of the N2 Wild Coast toll road. These include the following:

“2(3) Development must be socially, environmentally and economically sustainable.

(4)(a) Sustainable development requires the consideration of all relevant practice including the following:

- (i) that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (ii) ...
- (iii) 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;
- ...
- (viii) that negative impacts on the environment and on people’s environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

(f) The participation of all interested and affected parties and environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

² NEMA section 24(4)(h).

- (g) Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.
- (k) Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.”

The interpretation of NEMA must in turn be informed by the environmental right in section 24 of the Constitution which states that:

“Everyone has the right –

- (a) to an environment that is not harmful to their health and well-being; and
- (b) to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

3. DRAFT EIAR DOES NOT MEET REQUIRED LEGAL STANDARD

In practical terms, the effect of the legal provisions quoted above is that an EIAR must describe the EIA process and indicate how it complied with the requirements of the law, and place the decision-maker in a position to decide how to exercise his or her discretion to refuse an environmental authorisation or to grant it subject to conditions, so that the environment is protected for the benefit of present and future generation. In doing so the decision-maker must be guided by the objectives of integrated environmental management and the environmental management principles referred to above in order to arrive at a decision that will

- “(i) prevent pollution and ecological degradation;
- (ii) promote conservation; and
- (iii) secure ecologically sustainable development and use of national resources while promoting justifiable economic and social development.”

In our view, for the reasons set out below, the draft EIAR falls short of the requisite legal standard and cannot safely be relied upon by a decision-maker. In particular the draft EIAR:

- (a) is **misleading**, for example it seeks to justify the Project on the basis of alleged social and economic benefits which the Project was never designed to attain (and which are unlikely to occur) and gives the impression that the public consultation conducted as part of the EIA process met the standards required by law;
- (b) is **deficient** in that it is the product of a flawed process (particularly in relation to public participation), does not disclose or evaluate the widespread and strong opposition to the Project among the people of Pondoland nor address many of their concerns, and does not contain important information and studies relevant to the decision to be made; and
- (c) is **biased** in that it consistently overemphasises the alleged positive socio-economic effects of the Project (often based on highly speculative assumptions regarding the economic development in the area which will be generated by the road) while ignoring or underestimating the negative socio-economic impacts of the Project (e.g. the impacts of dividing communities, of encouraging the influx of outsiders into cohesive rural

communities, and the environmental impacts of uncontrolled development initiated by the construction of the toll road).

These comments are elaborated upon in the following sections.

4. MISLEADING CHARACTERISATION OF PROJECT AS A REGIONAL SOCIAL DEVELOPMENT INITIATIVE

4.1 The Project is not designed to benefit local people

The main thrust of the EIAR is that despite the negative social and environmental impacts of the Project it is justifiable because it will play a major role in encouraging economic development in the former Transkei and contribute to the attainment of government policy objectives such as those in the Government's Spatial Development Initiative (SDI) strategy.³ This is fundamentally misleading because a close examination of the Project reveals that it was designed with very different objectives in mind and any positive socio-economic benefits which may accrue to people in areas such as Pondoland would be fortuitous.

The Project originated from an unsolicited business proposal prepared by a consortium of companies that construct roads. The road itself is designed to be a "limited access, high speed national route which optimises user safety." This is clear from the design parameters of the road, i.e. that "speeds of a 120 km per hour should be achievable with safety and that the route is the best route from a technical road design and construction, cost efficiency and road user perspective." Thus in conceptualising the Project, a very limited class of beneficiaries were considered, namely those companies that would construct, maintain and toll the road and motorists (with money to pay the toll) who could benefit by quickly, and with greater safety, transit between East London and Durban. Very little, if any, thought was devoted to the local inhabitants who live and transit within the area proposed for the Project and the environmental significance of the area. The consequences of this approach are now evident in the unsuccessful attempts made in the draft EIAR report to justify a Project designed to benefit a small sector of society on the basis of its supposed contribution to the socio-economic development of rural people in another region.

4.2 The Project is not consistent with the SDI strategy

The draft EIAR report claims that the Project will provide "necessary linkages to local communities" and "enhance access to the region and ... facilitate development of the eco-tourism potential of the area" in line with Government's Spatial Development Initiative (SDI) strategy.⁴ In fact, although the Project may result in more people transiting through the area, local inhabitants' access to transport services and a wide variety of resources (such as shops, schools, family and friends to which they currently have access) is likely to be reduced due to the proposed restricted access to and across the highway.⁵ This leads to fragmentation of communities. Furthermore many would not be able to afford toll costs, business costs will increase, as will the costs of accessing services and employment for those reliant on public transport.⁶

Furthermore, although the route is designed to ensure the safety of motorists, having a high speed national route through this area is likely to negatively affect local inhabitants as it poses a danger to children and livestock who will be exposed to high volume and high speed traffic.⁷ The risk of this

³ Draft Environmental Impact Assessment ("EIA") Report, page 3-6.

⁴ Draft Environmental Impact Assessment ("EIA") Report, page 3-6.

⁵ EIA Report, Appendix 5, Part A, iii

⁶ EIA Report, Appendix 5, Part A iii to iv

⁷ EIA Report, Appendix 5, Part A, iii

occurring has not been adequately assessed and will be significantly influenced by the distance between underpasses and bridges – information that is not available.

The claim that ecotourism will be facilitated by enhancing access to the region reveals a grave misunderstanding of the nature of ecotourism. Eco-tourists are attracted to areas that are relatively wild and “undeveloped”, areas that are not traversed by major roads. The Wild Coast is unique precisely because it is “wild” and populated by people with strong and distinctive cultures. Once a major toll road bisects these areas secondary developments along the route are likely to follow (as is acknowledged in the draft EIAR). These developments may have a devastating and irreparable effect on this prime ecotourism asset (particularly if mining rights are granted) and may threaten the integrity of local communities. Tourism facilitated by a high speed national road is likely to be fundamentally different in the nature from ecotourism; it is likely to be large-scale tourism which benefits big companies rather than local inhabitants and has a detrimental effect on the environmental sustainability of the area.

The SDI strategy aims to enhance access to the Wild Coast and facilitate the ecotourism potential of the area.⁸ However, as discussed above, the Project is not rooted in this strategy, nor is it likely to facilitate it. Any infrastructural developments taking place in the area must take into account its unique unspoilt character and the needs of the local community. This should be incorporated into a holistic Regional Spatial Development Plan (RSDP). This will allow for an integrated and comprehensive approach to regional development. Any infrastructural developments can then be integrated into a more holistic plan geared towards meeting real local, social and economic development needs. The draft EIAR does not identify any coherent plan to ensure that any secondary developments which arise from the Project will benefit local inhabitants and preserve the unique environmental character of the area. Furthermore it is assumed that local authorities will be able to mitigate negative impacts and direct development in the area without a plan to guide them.

It is clear that SANRAL wishes to be able to justify the Project on socio-economic grounds, and indeed must if the Project is to be approved because section 24 of the Constitution of the Republic of South Africa requires the State to take reasonable measures to ensure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. However it is clear that the EIAR is misleading in its presentation of the supposed benefits for the people of rural Pondoland and other areas and the conclusions drawn by EIAR that the Project will facilitate the objectives of Government’s Spatial Development Initiative (“SDI”) strategy for the area are not adequately supported.

4.3 The Project doesn’t take account of other relevant policies and plans

The draft EIAR fails to take account of other relevant government policies and to highlight the extent to which the proposed Project is inconsistent with other policy instruments. These include the National Framework on Sustainable Development (“NFSD”), the Wild Coast Conservation and Sustainable Development Plan (“WCCSDP”) and the Wild Coast Spatial Development Initiative (“Wild Coast SDI”). The fact that the Project is being considered in isolation rather than in the context of other integrated development initiatives and strategies and without first developing a strategic regional development plan makes it inevitable that the EIAR will fail to capture and evaluate many relevant considerations and implication of building the proposed toll road. Indeed, it is likely that if any strategic development plan for the region were developed, it would conclude that it was inappropriate to construct a high speed, limited access, toll road through the area, either at all or on the proposed route. Even if such a plan were to be developed after the approval of the Project, it would not be able to mitigate the adverse impact of an incorrectly sited and unjustifiable toll road.

⁸ Draft Environmental Impact Assessment (“EIA”) Report, page 3-6

4.4 Inadequate justification for the choice of route

The SWC and other commentators have drawn attention to the fact that both the 2004 EIA reports and this draft EIAR are characterised by an absence of a convincing explanation for the particular choice of routes of the N2, particularly in relation to the green fields section. In circumstances where there are very good reasons for avoiding the route chosen (e.g. because it bisects communities and the PCE) it is incumbent upon the developers to provide cogent reasons why the particular route was chosen, and also to examine alternatives. Indeed on the basis of the precautionary principle the toll road should be re-routing away from the PCE, particularly in circumstances where the draft EIAR fails to provide a convincing justification as to why it is essential for the road to bisect this area.

The draft EIAR is deficient in that it neither provides a cogent justification for the road itself, the route selected or for constructing the green field section when an upgrading of the existing N2 was a possibility.

4.5 Inadequate evaluation of alternatives

The draft EIAR should have evaluated different routes and alignment of the road and the upgrading of the existing N2 as potential alternatives. However the cursory manner in which the option of upgrading existing roads is dismissed (instead of being properly evaluated) effectively means that the decision-maker will not be in a position to evaluate the difference between the socio-economic impacts of upgrading the existing route and those generated by the proposed route. This is particularly significant in relation to the distribution of the socio-economic benefits. Most of the benefits of the proposed toll road will accrued to people who wish to transit the area at high speed whereas an upgrading of the existing N2 (particularly if accompanied by appropriate upgrading of other roads in the area as requested by local communities) would almost certainly generate significantly more benefits for the inhabitants of the region. The failure to assess this important alternative is a major failing of the draft EIAR.

5. MISLEADING ASSESSMENT OF BENEFITS AND IMPACTS OF SECONDARY DEVELOPMENT

The EIAR identifies increased regional economic development in the region as a major benefit of the Project.⁹ This is based largely on the idea that secondary developments such as agriculture (e.g. sugar cane), forestry, manufacturing, construction, finance, tourism and trade will occur as a result of the Project. It is assumed that these will create a “multiplier effect”.

However although the draft EIAR assesses the alleged positive socio-economic effects which these secondary developments would bring about if stimulated by the construction of the toll road, it fails to consider the cumulative negative socio-economic and environmental impacts that may result from these secondary developments. Consequently the EIAR paints an unrealistically charitable picture of the benefits of the Project as only the benefits are taken into account without weighing this against the negative cumulative impacts on the environment. This is a grave deficiency in the draft EIAR which must be rectified to provide a more balanced representation to the decision maker.

The absence of a regional strategic development plan to control and direct the orderly development of the area in a manner that optimises the use of local resources and minimises the degradation of the environment means that there is a very significant risk (in fact, a high probability) that if the proposed toll road were authorised, it would spark uncontrolled and sub-optimal development. As the SWC have indicated in their comments, this will compound the already high environmental impacts of the toll road itself and:

⁹ EIA Report, Appendix 5, Part H, page 137

“Without the constraints of a regional development plan geared towards protecting the interests of grass-roots communities and the natural resources that they are dependent upon, and which builds local capacity and human skills, a development such as the N2 is liable to result in increasing environmental pressures on sensitive environments, leading to increased environmental degradation at a spiral of increasing poverty and inequality.”

The risk of this occurring is particularly likely given the very limited capacity of local government in the area (both in terms of skills and finances). Unplanned and uncontrolled “development” of this nature will make it more difficult to achieve a sustainable development path and prejudice future generations by degrading the environment and resource base on which the local economies depend. This is particularly critical in areas such as Pondoland where many communities are highly dependent on natural resources for their livelihoods.

6. INADEQUACY OF MITIGATION MEASURES

The fact that the proposed N2 toll road will inevitably have very severe negative environmental and socio-economic impacts, means that it is difficult for the authors of the draft EIAR to formulate plausible mitigation measures. In fact the inadequacies of the proposed mitigation measures is a clear indication of the fact that it is highly probable that most of the most significant impacts of the proposed N2 will not be adequately mitigated.

6.1 Unrealistic reliance on local government to take mitigation measures

Many of the mitigation measures rely on completely unrealistic assumptions about the ability of local government to control and direct developments in the area. For example, the draft EIAR states that:

“Mitigation can only take place by planning regions for appropriate development through consultation with relevant local authorities, and by the National Roads Agency providing input into development planning at the local level.” (Page 68)

As the SWC comments point out:

“There is nothing in the recent history of the Eastern Cape to suggest that local and regional government has either the capacity or the skills to effectively control negative impacts that might arise from secondary impacts, and everything to suggest that the Eastern Cape authorities do not currently have the capacity to effectively release negative impacts and thus the effective agents for mitigation control.”

A heavy reliance on local government to mitigate the impacts of the toll road is clearly an unrealistic strategy for mitigation given the limitations on the capacity of local authorities in the area and the fact that there are no regional spatial development plans that set planning goals and limits for developments along the route. It is inappropriate to make such assumptions without evaluating the capacity of local government to undertake these tasks.

6.2 Unrealistic measures to mitigate impacts on natural ecosystems

As pointed out in the SWC comments, many of the mitigations in relation to biodiversity are based on the assumptions that the Pondoland Park will be created and operational before the toll road is constructed. The likelihood of this occurring is remote.

The use of biodiversity offsets as a mitigation measure in relation to the anticipated impacts on the Pondoland Centre of Endemism is highly questionable. There is insufficient information about the threatened flora and fauna in the area or about the availability of alternatives to “offset” any losses to them. In any event, the use of offsetting as a mitigation tool when dealing with areas of unique biodiversity such as the Pondoland Centre of Endemism is highly questionable.

As the SWC have pointed out:

1. the available evidence suggest that even very small parts of the PCE may be vital;
2. the impacts on the PCE will occur not only as a result of the direct impacts of the physical construction of the road but also as a result of secondary impacts such as ribbon development;
3. since the PCE is a globally recognised centre of plant diversity and endemism, impacts on it are of global significance and should be assessed in the context of South Africa’s obligations under international law, particularly in the Convention on Biological Diversity;
4. the conclusion that “it is considered very unlikely that the road will result in loss or extinction of plant species” (emphasis added) is misleading given the very significant gaps in knowledge regarding the PCE and biodiversity in the region.

7. FAILURE TO ASSESS THE SOCIO-ECONOMIC IMPACTS OF TOLLING

The failure to assess the impacts of tolling (on the basis that the intent to toll process is separate) has the effect of excluding very significant negative socio-economic impacts and obscuring the fact that many of the people in the area will not be able to afford to use the toll road. The failure to consider this important socio-economic implication of the proposed N2 is inconsistent with the requirements of NEMA that all environmental and socio-economic impacts of a proposed project must be assessed in an integrated manner.

8. FAILURE TO ASSESS CUMULATIVE IMPACTS OF MINING AND TOLL ROAD

The draft EIAR does not assess the environmental and socio-economic impacts arising from the cumulative impact of the N2 and the major mining project which has been authorised at Xolobeni. This is curious given the fact that much is made of the fact that the toll road will stimulate a range of other secondary economic activities. It seems reasonable to assume that the authorisation of the proposed N2 will have a significant impact on the viability and functioning of the proposed mining activities, and *vice versa*. Indeed there is evidence that the construction of the toll road will have a major impact on the financial viability of the mining operations. In short the fates of the Xolobeni mining and N2 toll road projects are interlinked and this important fact is not even mentioned. The cumulative socio-economic and environmental impacts of these projects, and should be investigated and reported upon in the EIAR.

9. INADEQUATE CONSULTATION WITH INTERESTED AND AFFECTED PARTIES

Perhaps the greatest deficiency of the draft EIAR is that it conceals the fact that the public consultation process was wholly inadequate and consequently many affected communities have been denied their legal right to participate effectively in the process and many of their concerns have not been identified, assessed or reported on. Many of the communities, including our clients, are aggrieved by the

inadequate consultation and accordingly strongly opposed to the finalisation of the EIAR report without significant further consultation with them.

South African law requires that interested and affected parties should be given a genuine opportunity to be heard. before the mind of the decision-maker becomes fixed. Merely holding meetings where there is no possibility that the process or the outcome will be affected, does not meet the requirements for proper consultation.¹⁰ Furthermore the right to dignity demands that people be allowed to participate meaningfully in matters that will affect them,¹¹ and particularly where it will affect matters of fundamental importance such as their attachment to the place where they reside.¹²

This means that interested and affected parties such as our clients must have the nature and implications of the Project fully explained to them in language that they understand, must be given an opportunity to ask questions, and sufficient time and opportunity to be meaningfully heard. Their concerns and views must then be taken into account in investigating, assessing and reporting on the potential impacts of the Project.

The inadequacies of the public participation process is clear from the fact that when we consulted our clients they had a number of real concerns and unanswered questions about the Project and the EIA process, which are not recorded in the draft EIAR despite the fact that they are reported to have been consulted.

9.1 Failure to identify, record and address issues of concern to affected communities

The EIAR fails to address a number of issues which are critical to the communities of the Wild Coast, particularly the communities falling under the Amadiba Tribal Authority. These communities were not consulted about the proposed route of the toll road. For example, despite the concerns expressed by the communities they were not informed about critical issues such as the location of bridges for the people and underpasses for animals, nor about how compensation for demolition of their properties would be calculated in the event that the Project is approved. They were also not informed about the type of jobs that would be created by the Project.

The specialist studies fail to detail what type of skills the Project will require. This prevents the communities from evaluating the potential benefits of the Project to them in the event that it is approved.

9.2 Ineffective and inadequate modes of communication

According to our clients, the consultations conducted by the environmental consultants were very confusing and mainly consisted of displaying posters and diagrams for comment. This is problematic as some of the community members in this area are visually impaired and therefore could not see the diagrams and in any event they did not disclose many important details. The draft EIAR fails to identify and discuss such limitations of the consultation process.

¹⁰ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 244; *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*, CCT 41/07, unreported judgment Constitutional Court of 13 June 2008 at paras 46 and 51.

¹¹ *Matatiele Municipality and Others v President of the Republic of South Africa and Others (2)* 2007 (1) BCLR 47 (CC) at paras 66-67.

¹² *Matatiele* at paras 79-80.

9.3 Language constraints

Many members of the Amadiba Community are elderly people most of which do not read, speak or understand English. The consultants in conducting their meetings failed to take cognisance of this issue and conducted their presentations in English. The consultants also wrote letters to community members in English which resulted in serious confusion amongst community members and therefore limited their participation in the public consultation process. The use of English also prevented effective participation by the majority of the people in these communities.

9.4 Venues for consultations

The venues for public participation were very distant from other areas in this community and elderly people who own livestock or were ploughing fields could not travel such long distances and therefore could not make it to the consultations. Some venues were not accessible to general members of the public and many people could not gain access to such consultation venues. The above excluded a considerable number if not the majority of the community from fully participating in the process.

9.5 Specialist studies

The specialist studies failed to deal with the most critical issues that affect these communities including those discussed below.

9.5.1 Heritage, graves and sacred sites

The draft EIAR fails to deal with the issue of graves and sacred sites in these communities. It only deals with the royal family graves.¹³ This is not acceptable to the Amadiba Tribal Authority as a lot of their ancestral graves occupy the vast area of land where the toll road development is proposed. The community wants a clear map indicating all of their grave sites and sacred sites and how these will be affected by the proposed development.

9.5.2 Relocating people

The specialist studies fail to adequately address the issue of relocating people whose properties fall on the land that is earmarked for development. There is no proper plan to move people and their livestock including their ancestral graves to a new location. The specialist reports also fail to adequately deal with the manner in which the communities are going to be compensated in the event of relocation.

The abovementioned failure is due to a failure by the consultants to conduct adequate public participation with communities within the Amadiba Tribal Authority.

9.5.3 Land claims

Some of the land within the Amadiba Tribal Authority is subject to a land claim. In addition, there is a Communal Property Association in this area which acts as a custodian of the land in question on behalf of the larger group of land claimants. This Association was not consulted at all about the effects of the proposed development on their land. This failure is part of the general failure by the consultants to conduct proper and adequate consultation with affected communities.

9.6 Influx of herb collectors and other people

The proposed development may attract a lot of herb collectors from neighbouring towns due to the fact that the highway will make travelling from far distances easy. People from other areas from other areas

¹³ Para 6.8 of Appendix 7, cultural and historical heritage report.

may descend on to the area to exploit the herbs within the Amadiba Tribal Authority area which would result in significantly disturbance of the ecosystems in this area and cause an unwanted conflict between such herb collectors and community members. The specialist studies fail to deal with this issue due to the fact that there was no adequate consultation with the communities where such issues would have been raised.

9.7 Other social impacts

The Amadiba Tribal Authority communities are traditional communities with very rich cultural and traditional practices. The proposed development may attract a lot of foreign practices that may conflict with these abovementioned practices. The trucks that would be travelling along the highway between Durban and East London may attract an unwanted practise of prostitution in the area, which would in turn clash with traditional beliefs of these communities. This is not adequately dealt with in the specialist studies and this is yet another indication of inadequate consultation with local communities, as this would have been raised as a possible social impact of the proposed Project during consultation.

10. CONCLUSION

The draft EIAR fails to address, either adequately or at all, many of the significant impacts that the proposed Project will have on the communities in and around the Amadiba Tribal Authority. Furthermore, it is the product of a public participation which our clients regard as deeply flawed and lacking in credibility. The deficiencies in the public participation process must be rectified by conducting far more extensive and genuine consultations and discussions with our clients and other communities and traditional leaders before preparing a final EIAR. If this is not done the outcome of the process will be regarded as illegitimate and conflict with local communities could ensue, particularly since many regard the Project as an attempt to dispossess them of their land. It is incumbent on the environmental consultants to consult widely, thoroughly, effectively and in good faith to avert this risk.

Furthermore, as outlined above, the draft EIAR has serious deficiencies which must be rectified as far as possible and where the necessary information cannot be obtained, or effective mitigation measures cannot be identified this must be stated. In particular, the link between the Project and the alleged economic and social benefits to the local people has not been substantiated and at present it is not clear that any resulting economic and social benefits will accrue to local inhabitants, (whose needs must be given priority). Without clear substantiation of this link approval of this Project would be contrary to section 24 of the Constitution.

In our view it is unlikely that the proposed Project as presently conceived will ever contribute to ecologically sustainable development but it is important that the final EIAR reflect the facts fully and correctly to enable the decision-maker to make a fully informed decision in this regard. The full and effective participation of the communities most affected is fundamental to this process and must be revisited.

DATED at CAPE TOWN on this 22nd day of January 2009.

CP CULLINAN