CULLINAN & ASSOCIATES
Environmental and green business attorneys

TRANSMITTED BY EMAIL

TO:	**SLR Consulting (South Africa) (Pty) Ltd**	Date:	7 December 2022
ATT:	TEEPSA Stakeholder Engagement Team Mr Jeremy Blood		TEEPSA-567@slrconsulting.com jblood@slrconsulting.com
FROM:	Ricky Stone		ricky@greencounsel.co.za
Total pages:	10	Our ref:	E040-027

Dear Sirs,

ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT (ESIA) FOR A PROPOSED OFFSHORE EXPLORATION WELL DRILLING IN BLOCK 5/6/7, SOUTH-WEST COAST, SOUTH AFRICA: TOTALENERGIES EP SOUTH AFRICA BLOCK 567 (PTY) LTD – COMMENTS ON THE DRAFT ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT

1. We continue to act for the EMS Foundation ("*client*"), a registered Interested and Affected Party ("*I&AP*") in respect of the proposed offshore exploration well drilling in block 5/6/7, South-West Coast, South Africa ("*Project*").

2. SLR Consulting (South Africa) (Pty) Ltd ("*SLR*") has been appointed by TotalEnergies EP South Africa Block 567 (Pty) Ltd ("*TEEPSA*") as the environmental consultants ("*EAP*") for the Project and SLR is authorised to take responsibility for the public participation process ("*PPP*") and to prepare the Environmental and Social Impact Assessment ("*ESIA*") on TEEPSA's behalf.

Introduction

3. We thank you for granting a forty-four (44) day period for I&APs to submit comments on the draft ESIA. We do however point out that such a period is still too short to allow I&APs the opportunity to engage their own experts to provide substantive comments and critique on the Specialist Studies and the various Modellings, such as the Drillings Discharges, the Oil Spill, and the Underwater Noise

Modelling. It must be appreciated that these are highly technical Studies and Modellings, and I&APs should be afforded sufficient time, of at least ninety (90) days, to consult their own independent experts to ensure that they can meaningfully contribute to the final ESIA and place the necessary (conflicting) expert evidence before the decisionmaker so that they can make an informed decision.

3.1. The need to provide sufficient time for I&APs to engage their own experts becomes more pertinent when the specific EAP, in this case, SLR, and the Specialists, in this case, Capricorn Marine Environmental, have rendered professional advice and services to TEEPSA in respect of the self-same "block" for the prior seismic surveys which were undertaken by TEEPSA.

3.2. The independence and objectivity of SLR and Capricorn is therefore questioned as their continued "business" and "financial" interests in Block 5/6/7 does not meet the requisite standard of independence and objectivity required by Regulation 13 of the EIA Regulations made under the National Environmental Management Act, 107 of 1998 ("*NEMA*").

4. At the outset and considering TEEPSA's significant interests in various offshore licence blocks in South Africa, wherein it holds exploration rights and has applied / is applying, for production rights, our client considers it highly appropriate, and indeed necessary, that TEEPSA commissions and undertakes a Strategic Environmental Assessment ("*SEA*") before embarking on any further exploration or production activities.

4.1. We therefore request that to the extent that the Competent Authority is inclined to approve this application for an Environmental Authorisation – which we submit it should not – then the Competent Authority should make it conditional on TEEPSA <u>first</u> undertaking an SEA in respect of all of its offshore interests generally, and the cumulative effect of TEEPSA's interests and those of other oil and gas companies more broadly. The outcome of such SEA would then determine whether the proposed Project is both needed and desirable (and whether the myriad other exploration and production applications are equally needed and desirable).

5. Our comments on the draft ESIA, as submitted on our client's behalf and special request, will be shaped under the following themes which go to the heart of the flaws in the draft ESIA:

5.1. Public Participation Process

5.1.1. Adequate Public Participation;

5.1.2. Social Licence to Operate;

5.2. Need and Desirability of the Project; and

5.3. The National Environmental Management: Integrated Coastal Management Act.

Public Participation Process ("*PPP*")

Adequate Public Participation

6. I&APs are now well accustomed to being subjected to PPP that are neither adequate nor meaningful. In essence, that the PPP continues to be a mere tick-box exercise undertaken by applicants such as TEEPSA and EAP's such as SLR. It is reasonable to draw such a conclusion when one has regard to the Comments and Response Report, in that, regardless of the substantive nature of the specific comment or comments received from the respective I&AP; SLR has merely referred the I&AP to a section of the draft ESIA, instead of meaningfully responding to the specific comment in a manner which would constitute an answer to the concern raised by the I&AP, or in a fashion which shows that the proposed Project will be varied and/or reconsidered in light of such comment/s.

7. As SLR would know, the Petroleum Agency of South Africa ("*PASA*") has published Guidelines on Consultation with Interested and Affected Parties ("*Consultation Guidelines*"). The most recent version of the Consultation Guidelines, dated 23 February 2016, therefore finds application in addition to the principles enshrined in the Constitution, NEMA, and the EIA Regulations, 2014.

    7.1. In terms of paragraph 1 of the Consultation Guidelines, "*(c)onsultation serves to provide the necessary and enabling tool for interested and affected parties to protect their rights*". Furthermore, the Consultation Guidelines "*…are meant to serve as a tool to assist applicants to undertake proper consultation as prescribed by the Act and interpreted by our courts.*"

    7.2. Paragraph 2 of the Consultation Guidelines, under the heading "What Constitutes Consultation" goes on to record that "*(i)t is clear that consultation, as envisaged by the Act and interpreted by our courts, is more than a mere formal process and it requires a genuine and effective engagement of minds between the consulting and the consulted parties."*

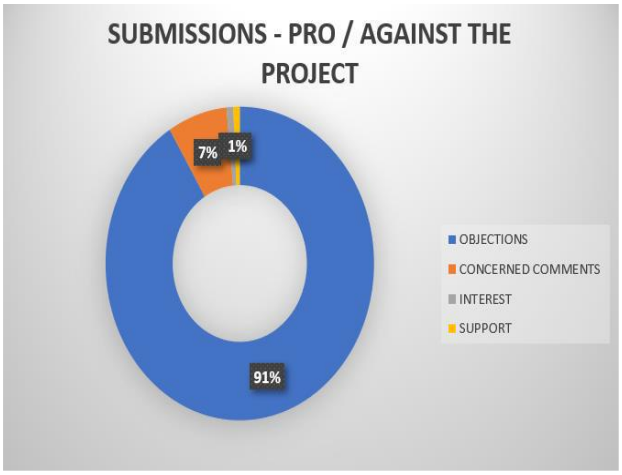
8. Accordingly, the formalistic approach adopted by SLR when undertaking the PPP for the proposed Project on TEEPSA's behalf falls short of what is required by the Consultation Guidelines (and the NEMA framework), since SLR has not attempted to genuinely and effectively engage the minds between the consulting and the consulted – substantive comments raised by I&APs are merely responded to with reference to a section in the draft ESIA without actually engaging with the substance of the I&APs comment/s in any meaningful manner, and without taking the substance of the specific comment/s into account and amending the scope of the proposed Project accordingly.

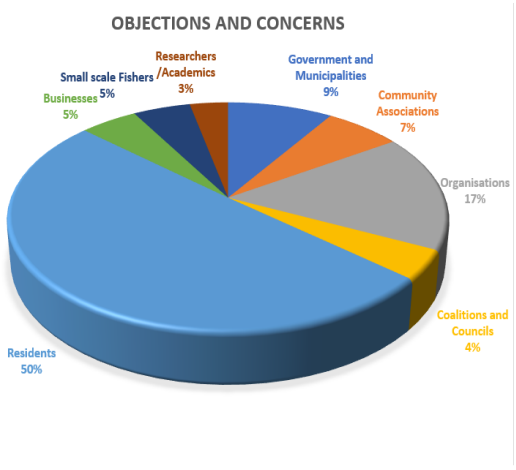
Social Licence to Operate

9. We note from the Comments and Response Report included in the draft ESIA that an overwhelming majority of I&APs have expressed their objection to the proposed Project. The objecting I&APs range from individuals, community-based organizations, registered non-profit organizations or companies, to local government institutions, such as Municipalities.

10. We have accordingly analysed the mix of comments submitted on the draft Scoping Report and captured those results in graphs to provide the decisionmaker and Competent Authority with a visual

illustration of the number of objecting I&APs versus those that have indicated support for the proposed Project.





11. We submit, with respect, that the absence of any true support (being less than 1% support) for the proposed Project is indicative that TEEPSA, as a fact, has not received its so-called "Social Licence to Operate".

11.1. The status of the Social Licence to Operate in projects which may have a detrimental effect on the environment is something which PASA itself has publicly remarked as a necessity in considering applications for the exploration (and production) of offshore oil and gas.

11.2. The importance of the Social Licence to Operate is intrinsically linked to the legal concept and right encompassing Free, Prior and Informed Consent ("*FPIC*"). That is, a specific right that pertains to Indigenous Peoples and which finds its legal recognition in the United Nations Declaration on the Rights of Indigenous Peoples ("*UNDRIP*").

11.3. UNDRIP, in turn, by giving effect to the FPIC right, allows Indigenous Peoples to give or withhold consent to a project that may affect them or their territories. Furthermore, the FPIC right enables these Indigenous Peoples and Communities to negotiate the conditions under which a project will be designed, implemented, monitored and evaluated. The FPIC right is also embedded within the universal right to self-determination.

11.4. We note and record that the Comments and Response Report, read with the minutes of the meeting convened between SLR (on TEEPSA's behalf) and the West Coast Guriqua Council, explicitly records that some of the most affected Indigenous Peoples and Communities have exercised their FPIC right and withheld consent.

11.5. As such, the proposed Project has not garnered the support and consent of those Communities protected by the UNDRIP nor has TEEPSA more broadly obtained its Social Licence to Operate from the registered I&APs, the majority of whom have expressed that they do not support, and therefore object to, the proposed Project.

12. On the aforementioned basis, the public participation process cannot be deemed to have been meaningful in any sense, and the Competent Authority is accordingly justified in refusing to grant TEEPSA an Environmental Authorisation for the Project on this basis alone.

Need and Desirability of the Project

13. When considering an application for an Environmental Authorisation, the Competent Authority must take into account the considerations specified in section 24O of NEMA, these include:

    13.1. any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused;

    13.2. measures which may protect the environment from harm or prevent or mitigate any environmental impact; and

    13.3. where appropriate, **any feasible and reasonable alternatives to the activity, including feasible and reasonable modifications to the activity**, which includes the option of not implementing the activity.

    (Our emphasis).

14. An EIA process is intended to achieve various objectives, including:

    14.1. to determine the nature, significance, extent, duration and probability of the impacts occurring to inform the identified preferred **alternatives**;

    14.2. to **describe the need and desirability of the proposed activity**; and

    14.3. to determine the nature, significance, consequence, extent, duration and probability of the impacts occurring to inform identified preferred alternatives, and the degree to which these impacts can be reversed, may cause irreplaceable loss of resources, and can be avoided, managed or mitigated.

    (Our emphasis).

15. Furthermore, the Competent authority must take into account any guideline published in terms of section 24J of NEMA and any minimum information requirements for the application for Environmental Authorisation.

    15.1. These guidelines include the 2017 *Guideline on Need and Desirability, Department of Environmental Affairs* (DEA), Pretoria, South Africa ("the Guideline").

    15.2. Chapter 4 of the Guideline states that the "*need for and desirability of a proposed activity should specifically and explicitly be addressed throughout the EIA process when dealing with individual impacts and specifically in the overall impact summary by taking into account the answers to inter alia the following questions*." Detailed questions are then set out.

15.3. The Guideline also states that the assessment of "need and desirability" must include considerations of how the "*geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity*" (p.9 of the Guideline).

16. It is accordingly not sufficient to pass the "need and desirability" requirement to be awarded an Environmental Authorisation that an applicant, such as TEEPSA, can rely exclusively on State policy in respect of energy needs, including the mix of gas that may or may not be required to form part of the Just Transition to a decarbonised future.

16.1. Much more is required, and TEEPSA is required, factually, to show that the proposed Project is both needed and desirable, and that no alternatives exist, for example, that they are unable to explore for gas elsewhere nor to apply to produce gas elsewhere (which we record it is busy applying for in block 11B/12B).

16.2. Plainly, the consideration is the extent to which there is a need to explore to discover further deposits of oil and gas, and whether it is desirable to do so given the climate crises, South Africa's obligations to reduce it emissions of greenhouse gasses, and that exploration activities are ecologically harmful. Globally, the proven reserves of oil and gas far exceed what can be used without causing catastrophic climate change. Such change would also result in catastrophic impacts on human rights. These are issues that TEEPSA is required to deal with under the need and desirability requirement, yet it has failed to do so.

16.3. Indeed, TEEPSA wishes to explore for oil and/or gas for the sole purpose of discovering deposits that they can then exploit. In other words, exploration activities and production activities are both steps in a single process, and it is artificial to exclude consideration of the impacts of the production process, or of the need for, and desirability of, producing oil and gas, when deciding whether or not to authorise exploration activities.

17. If the exploitation of oil and gas in the area proposed by TEEPSA is not necessary or is not desirable, then exploring for that oil and gas cannot be necessary or desirable, particularly given the ecological risks associated with the proposed exploration. In other words, any assessment of the need and desirability of exploration activities, inevitably requires an assessment of the need and desirability of undertaking long-term hydrocarbon production in those areas.

18. Impacts related to production activities are reasonably foreseeable impacts eventuating from exploration. If the impacts and risks associated with production are unacceptable, then any and all risks and impacts associated with exploration activities are unnecessary, undesirable and completely avoidable.

19. Companies such as TEEPSA apply for exploration rights and are willing to invest very significant amounts of money and effort into oil and/or gas exploration on the basis that they will be authorised to exploit any deposits that they may discover. If no assessment of the anticipated impacts of production are made before initiating a process that is intended to lead to production, the project will acquire a momentum (by virtue of the investment of large amounts of money and effort by both the applicant, TEEPSA, and the regulators, PASA). If the full adverse environmental impacts of

production only become known once exploitable oil and/or gas deposits have been discovered (at great cost), then TEEPSA will suffer significant losses if they abandon the Project and the prospects of a regulator or the court stopping the production is significantly lower.

20. In any event, most of the discovered reserves of oil and gas cannot be burnt if we are to stay on the pathway to keep global average temperature increases below 1.5 degrees Celsius. Therefore, authorising new oil and gas exploration, with its goal of finding exploitable oil and/or gas reserves and consequently leading to production, is not consistent with South Africa complying with its international climate change commitments.

National Environmental Management: Integrated Coastal Management Act, 24 of 2008 ("*ICMA*")

21. The draft ESIA, under the Administrative and Legal Framework section in Chapter 2, only contains a broad stroke reference to the ICMA. There, SLR paints a somewhat vague picture of the integral part that the ICMA plays in the decision-making process by only referring to two (2) of the requirements contained in Section 63 of the ICMA (whilst ignoring the objects of the ICMA as a whole), and which requirements (in addition to the other legislated requirements) the decisionmaker must take into account when deciding whether or not to grant TEEPSA an Environmental Authorisation for the proposed Project.

22. The integrated coastal management approach, as regulated in South Africa through the ICMA, is widely accepted internationally as an appropriate means of managing human activities and protecting the environment within the complex and highly dynamic marine and coastal environment.

    22.1. The ICMA was therefore enacted with the specific purpose of introducing an integrated approach to coastal management in response to the failures of traditional management approaches in which different organs of state regulate activities within the coastal zone independently of one another and without proper consideration of the interactions between, and cumulative impacts of the various activities.

    22.2. Indeed, one of the objects of the ICMA is: "*to provide, within the framework of the National Environmental Management Act, for the coordinated and integrated management of the coastal zone by all spheres of government in accordance with the principles of cooperative governance*;" (section 2(b)).

23. The ICMA was accordingly introduced to establish an integrated system for managing activities within the coastal zone and affords a particularly high level of protection to "*coastal public property*".

    23.1. "*Coastal public property*" has a special legal status which is intended to ensure that coastal and marine environments receive a particularly high degree of protection; are used, managed, protected, conserved, and enhanced in the interest of the whole community; and are safeguarded by the State as trustee on behalf of all South Africans, including future generations.

23.2. One of the objects of the ICMA is "*to preserve, protect, extend and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans, including future generations*" (section 2(c)).

23.3. The purposes for which coastal public property is established includes, "*to protect sensitive coastal ecosystems*" (section 7A(1)(b)).

23.4. Coastal public property is owned by the citizens of South Africa (i.e., not by the State) and cannot be alienated (section 11). Thus, coastal public property is held in trust by the State on behalf of the citizens of South Africa (section 11(1)).

24. The draft ESIA, however, seemingly ignores the fact that the area where TEEPSA intends to drill exploratory wells enjoys a special legal status, by virtue of the many Marine Protected Areas and Critical Biodiversity Areas situated within close proximity (and in some cases, overlapping) to the Area of Interest. This affords the environment within this area a particularly high level of protection and necessitates that decisions affecting it be taken in a manner that complies with the requirements of the ICMA as a whole (and not only the considerations contained in section 63).

24.1. As is apparent from the locality maps contained in the draft ESIA, this area is situated within South Africa's territorial waters and/or exclusive economic zone (EEZ). This means that for the purposes of the ICMA:

24.1.1. the Area of Interest of the proposed Project is situated within "*coastal waters*", which are "*coastal public property*" and fall with the "*coastal zone*"; and

24.1.2. undertaking the drilling of exploratory wells would constitute "*coastal activities*" and consequently, when deciding whether or not to grant an Environmental Authorisation to TEEPSA, the decisionmaker is required to consider the factors referred to in section 63(1) of the ICMA.

25. Section 63 of ICMA therefore requires that decisionmakers that are responsible for making decisions regarding Environmental Authorisations for coastal activities must take account of specific issues, some of which are relevant to the determination of need as desirability, such as:

25.1. the extent to which the proposed project is consistent with the purpose for establishing and protecting coastal public property (section 63(1)(c));

25.2. the socio-economic impact if the activity is authorised and if it is not authorised (section 63(1)(e));

25.3. whether the proposed project is inconsistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations (section 63(1)(h)(i)); and

25.4. whether the proposed project would be contrary to the interests of the whole community (as required by section 63(1)(h)(vii)).

26. The Competent Authority, as decisionmaker, is therefore required to evaluate, and TEEPSA is bound to place the necessary information before them, that when making their decision to either grant or refuse TEEPSA's application for an Environmental Authorisation:

    26.1. that the decisionmaker is required to make their decision as a public trustee responsible for safeguarding coastal public property owned not by the State, but by all South Africa citizens; and

    26.2. that, as public trustee of coastal public property, they are required by law (*i.e.*, the ICMA):

        26.2.1. to ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community (section 12(a));

        26.2.2. to 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 (section 12(b)); and

        26.2.3. to engage in the process of coastal management in a manner that requires the application of an integrated and holistic approach to the regulation of coastal activities that takes account of potential adverse effect on people, future generations and other living organisms.

Conclusion

27. Our client's submissions and comments on the draft ESIA, in summary, are that the Competent Authority should find that:

    27.1. the Public Participation Process has been neither adequate nor meaningful;

    27.2. TEEPSA has not obtained its Social Licence to Operate nor received the Free, Prior, and Informed Consent of the Indigenous Peoples and Communities who will be most impacted by the adverse effects resulting from TEEPSA's exploration activities;

    27.3. the proposed Project is neither needed nor desirable;

    27.4. TEEPSA has failed to demonstrate that its proposed Project is consistent with the ICMA as a whole, including that it is needed or desirable in the interests of the whole community; and

    27.5. TEEPSA has failed to place the necessary relevant information before the decisionmaker to allow them to make a decision which is consistent with the provisions of the ICMA.

28. For the avoidance of any doubt, our client's submission of these comments on the draft ESIA should not be construed as support for the Project, and to the necessary extent, our client's rights to oppose the Project remain reserved.

29. We look forward to hearing from you in due course.

Yours sincerely,

CULLINAN & ASSOCIATES INC.

per: Ricky Stone