



18 August 2015

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## **CONCERNS REGARDING SHALE GAS MINING IN SOUTH AFRICA**

### Introduction

1. This letter is directed to you on behalf of an alliance formed to monitor the progress all actions relating to shale gas mining in South Africa ('the Alliance'), and consisting of Afriforum and Treasure the Karoo Action Group ('TKAG').
  - 1.1. AfriForum is a non-profit civil rights organisation with its main business as the advancement and advocacy of democracy in the South Africa by stimulating civil society in participation of constitutional rights.
  - 1.2. TKAG is a non-profit organisation striving to ensure awareness, advocacy and accountability around the issue of shale gas mining in South Africa.
2. As you are aware, shale gas mining involves a variety of activities, including deep drilling, horizontal drilling and hydraulic fracturing, known as 'fracking'. Also, as you must appreciate by now, shale gas extraction is highly controversial, and the risks associated with it are the topic of much debate.
3. The Alliance takes the view that in circumstances where sufficient local scientific research concerning the environmental risks associated with shale gas exploration is not yet available, the South African government is obliged to proceed with caution when it considers authorising the activities associated with shale gas exploration and mining. This approach would be in line with the well-known 'precautionary principle'.
4. This means that, despite the publication in Government Gazette No 38855 and the coming into effect on 3 June 2015 of the final Regulations for Petroleum Exploration and Production ('the regulations'), shale gas exploration and mining

ought not to be proceeded with until the outcome of certain local research has come to hand.

5. The Alliance notes that, in the absence of any legislation, court order, moratorium or other prohibition barring the receipt of applications for licences or rights for the exploration and/or production of petroleum, consideration of applications for licences or rights for the exploration and/or production of petroleum or the issuing of licences or rights for the exploration and production of petroleum, there is nothing to prevent the making and granting of applications under the regulations. This is highly undesirable:
  - 5.1. In or about October 2014 the Department of Science and Technology commissioned the prestigious Academy of Science of South Africa ('ASSAF') to undertake a study to establish the technical readiness of South Africa to support the shale gas industry and produce a report thereon. The report ('the ASSAF report') is not yet to hand.
  - 5.2. In May 2015 the Minister of Environmental Affairs commissioned the Council for Scientific and Industrial Research ('CSIR') to undertake a Strategic Environmental Assessment ('SEA'), which is scheduled to take no less than two years.
  - 5.3. The outcome of these investigations and researches must inform the South African government's approach to shale gas mining generally, and fracking in particular.
6. The main purpose of this letter is to demand specific undertakings from the DMR to ensure that all decisions taken with regards to shale gas mining in South Africa are individually and collectively in line with the precautionary principle; and to provide a stern warning to government, more specifically the DMR, to refrain from taking any actions pertaining to shale gas mining in South Africa, that are undesirable, unreasonable, unlawful or irrational.

#### Summary of concerns

**The consideration of applications and/or issuing of exploration licence or rights by the DMR prior to the finalisation and release of the SEA and the ASSAF report is premature and irrational.**

#### 7. *The SEA*

- 7.1. The EIA essentially reacts to proposed developments and their environmental impacts. The SEA process, for its part, 'facilitates the earlier consideration of environmental impacts, the examination of a wider range of *potential alternatives*, the generation of standard mitigation measures and the opportunity to address a wider range of impacts ...' (Chris Wood , *Environmental Impact Assessment: A Comparative Review* (2nd ed 2003) (own emphasis).
- 7.2. The National Environmental Management Act, 107 of 1998 (NEMA) specifically endorses the notion of SEA in section 24(5)(bA)(ii).

- 7.3. The CSIR website %Strategic Environmental Assessment for Shale Gas Development+states among other things: %the SEA will be conducted as a science-based assessment to improve understanding of the risks and opportunities of shale gas development, and assist government in creating a framework and guiding principles that will inform responsible decision-making+(own emphasis) - ([www.seasgd.csir.co.za](http://www.seasgd.csir.co.za) accessed on 27 July 2015).
- 7.4. In light of these observations, and in the application of the precautionary principle, it would have been appropriate for the SEA to have informed the content of the regulations.
- 7.5. Not only that, but the SEA will also investigate some of the primary drivers for shale gas mining, namely the creation of jobs, the production of an additional purported cleaner source of energy at an affordable cost and the generation of considerable new amounts of revenue. The SEA, should therefore provide information to the applicants, government and interested and affected parties that could shape the respective courses of action they choose with regards to shale gas mining.
- 7.5.1. If the SEA indicates that neither exploration nor production is desirable, then the applicants need not appropriate any further resources thereto.
- 7.5.2. If the SEA indicates that it is desirable, but that there are a variety of additional considerations that need to receive attention, all applicants can make informed decisions whether they wish to continue on that basis or amend their applications or courses of action in any respects.

## 8. ASSAF report

- 8.1. The purpose of the ASSAF report is to determine whether South Africa is technically ready to undertake shale gas extraction in South Africa. It is our understanding that the report will indicate whether South Africa is technically prepared to undertake shale gas mining. The contents of this report will therefore also play an important role in informing the courses of action of all the parties.
- 8.2. If the ASSAF report indicates that South Africa is not technically ready to undertake shale gas extraction then the applicants need not appropriate any further resources thereto for the time being.

## **The failure of the DMR to adequately involve the public in the legislative process before passing the regulations**

9. The Constitution imposes an obligation on the legislature to facilitate public involvement in the legislative process. This obligation is also imposed on the Minister during the legislative process for the passing of regulations.
10. Despite various written attempts to encourage the DMR and other parties to involve the public in the legislative process, the only public involvement was the call for oral or written submissions on the regulations. No public hearings have been facilitated as yet, and the current efforts are not sufficient to meet the

required standard. The regulations could therefore be unconstitutional as a result of the lack of public involvement in the legislative process.

**Certain provisions in the regulations are vague, lacking in substance and likely to be very difficult to enforce.**

11. In the absence of reasonable certainty about the who, what, how, where and when, those upon whom the obligations have been imposed might not know with reasonable certainty what is required of them and neither will those who must monitor their activities and enforce legislation.
12. The proper determination of baseline data is in any event a matter that still requires attention, and which has not appropriately been dealt with.

**The Minister of Mineral Resources will have a conflict of interest if he adjudicates the application of Shell for a petroleum exploration licence or right.**

13. If the information at our disposal is correct, the Batho Batho Trust (herein after referred to as the trust), is a trust established by Nelson Mandela approximately 20 years ago and a trust that regularly donates to the African National Congress (ANC). The chairperson of the Trust, Mr. Kenny Fihla has been quoted in the Sunday Times as saying "We make no bones about the fact that we donate to the ANC . precisely because the trust was established by the president of the ANC at the time [Mandela]".
14. The main purpose of the trust is said to be to support the efforts of the historically disadvantaged in South Africa. According to the website of Thebe Investments the Batho Batho trust has however not provided any support to such projects to date. This is because all profits generated by Thebe have been reinvested into the group and its subsidiary companies, such that no dividends have been either declared or paid to Thebe's shareholders.
15. The trust holds approximately 47 percent equity in Thebe Investments.
16. Thebe Investments is alleged to be a local empowerment partner of Shell South Africa.
17. The information we have indicates that at least three of the trustees (the details of the other trustees was not available to us at the time of writing this letter) of the trust are also ANC members and two of them are currently deployed and hold office within the South African government. These are Dr. Sibongiseni Maxwell Dlhomo who holds office as the MEC for Health in Kwazulu Natal and Dr Molefe Samuel Tsele who is a South African ambassador and previous BEE advisor to the State President. The other known trustee, Mr Valli Moosa is to the best of our knowledge also a member of the ANC fundraising committee. The Minister of Mineral Resources is also a member of the National Executive Committee (NEC) of the ANC and has been deployed to this ministry by the ANC.
18. Rule 12 of the constitution of the ANC states the following "The National Executive Committee of the ANC is the highest organ of the ANC between national conferences with the authority to lead the organisation, subject to the provisions of this Constitution" [own emphasis].

19. The Minister of Mineral Resources is responsible for the granting or refusing of exploration and production rights and therefore also responsible for the granting or refusing of the application of Shell Exploration B.V for exploration and production rights.
20. In summary, the Minister, who is also a member of the ANC NEC, is responsible for adjudicating the application of Shell Exploration Company B.V for an exploration right. Shells local empowerment partner is part owned by the trust who is a self-admitted donor to the ANC, with trustees that hold office within the ANC and the South African Government simultaneously. One of the trustees is on the ANC fundraising committee and the public protector has found him to be in contravention of his duty to declare a conflict of interest and recusing himself from a decision making process.

**It is highly undesirable and possibly unlawful for any company either closely associated with or in whom an interest is held by any political party, either directly or indirectly, to be considered for or issued a petroleum exploration or production right or licence by the state.**

21. This concern is self-explanatory. We are of the opinion that the courts would share our sentiments and possibly extend this concern to the validity of agreements where political parties have interests in companies that do business with the state.

**The apparent lack of consideration or recognition of the contents of the “Canadian report” and “New York” report (herein after collectively referred to as the “CN reports”) by any organ of state.**

22. Both these reports were made available to your offices on previous occasions.
23. To the best of our knowledge, no mention has ever been made by the DMR or any other organ of state with regards to the consideration or recognition of these reports.
24. The task team report was finalized prior to the availability of the CN reports and could thus not have taken cognisance of the reports at the date of release.
25. It is safe to say the task team did not consider the CN reports prior to releasing the task team report.
26. The task team took notice of this possibility by stating this report and recommendations are not claimed to be fully comprehensive . new reports [own emphasis] and technical reports continue to emerge. Further work is required in a number of critical areas.
27. The CN reports are the product of years of extensive research into the risks associated with shale gas mining. Comparisons can be drawn between these reports and the current SEA that has been commissioned.
28. The findings and recommendations of the task team, which it would appear are being followed by the DMR, could quite possibly have been different, had the CN reports been available at the time the task team drafted their report.
29. The task team is not at fault, as the chronology of events did not allow them to consider the CN reports, however their recommendations should be followed

with much caution as very important information was not at their disposal at the time of the drafting of the report.

**The inability of the DMR, Department of Water and Sanitation and the Department of Environmental Affairs, amongst others, to adequately monitor and enforce legislation with regards to the exploration and production of petroleum.**

30. The ability to explore for shale gas and produce shale gas has been admitted by the task team to require specialised skills and knowledge, not necessarily available locally. The task team stated the following in their report %Although potential employment opportunities are recognised, most jobs (directly from shale gas exploration and production) are likely to require specialised skills and knowledge which may not be available locally+.
31. In addition to the assumption that most of the required skills and knowledge might not be available locally, as it stands, many of the agencies and departments do not have the best track records with regards to the monitoring of mining activities and enforcement of environmental legislation. So, for example,
  - 31.1. a large number of mines in South Africa have not been rehabilitated;
  - 31.2. a large number of mines operating without water use licences;
  - 31.3. there is a low number of successful prosecutions for environmental transgressions; and
  - 31.4. many municipalities are unable to monitor and enforce matters related to air quality.
32. In summary, there is a high probability that South Africa does not currently have the skills or knowledge locally to adequately monitor or enforce shale gas mining in South Africa at the moment. This is another reason to rather err on the side of caution.

General submissions

**The drivers of shale gas mining in South Africa**

33. There is much debate on the advantages for South Africa if shale gas mining were to commence, particularly when other methods of energy generation are considered and juxtaposed. It is appropriate to ask whether shale gas mining should be considered at all if another cleaner method of generation were proposed, that would create more jobs and generated more revenue.

**Permanent Peoples Tribunal**

34. On 23 July 2015, the Permanent Peoples Tribunal (PPT), an internationally recognized tribunal, announced that hearings will be held in 2017 to examine testimony to decide whether to indict certain nations on charges that they failed to uphold universal human rights by allowing unconventional oil and gas extraction. The evidence will include:

- 34.1. Personal witness statements
  - 34.2. Expert testimony on the practices and impacts of fracking
  - 34.3. Findings from preliminary hearings in other countries
  - 34.4. Peer-reviewed research
  - 34.5. Academic reports
  - 34.6. Human Rights Impact Assessments
35. The findings of the PPT will provide precious insights into shale gas mining and hydraulic fracturing, informing related decisions by government. These developments make it highly advisable for the South African government to await the findings of the PPT before authorizing any activities related to shale gas mining.

#### Request for undertakings

36. In light of the foregoing considerations, the following undertakings are sought.

#### **Undertaking 1**

37. That a moratorium will be reinstated within 30 calendar days from the date of receipt of this letter prohibiting the submission, consideration and issuing of exploration licences and rights prior to the finalisation of the SEA and ASSAF reports and that the Minister of Mineral Resources will give the writers hereof at least 14 (fourteen) calendar days written notice prior to the termination of the moratorium together with reasons therefore.

#### *alternatively*

38. That the consideration and issuing of exploration licences and rights will be halted pending the finalisation of the SEA and ASSAF reports.
39. We request this undertaking in writing and signed by the Minister of Mineral Resources within 15 (fifteen) calendar days from the date of receipt of this letter.

#### **Undertaking 2**

40. That the Minister of Mineral Resources will amend the regulations or publish a notice in the government gazette within 15 calendar days from the date of receipt of this letter, suspending the operation of the regulations until such time as the public has adequately been involved in the legislative process and the contents of the SEA have been considered, where after another notice can be published bringing the regulations into force again.

#### **Undertaking 3**

41. That the Minister of Mineral Resources remove all the indicated concerns regarding enforceability by appropriately amending the regulations at least 30 (thirty) calendar days before the notice, as per undertaking 2, is published by the Minister bringing the regulations into force again.

#### **Undertaking 4**

42. That the Minister of Mineral Resources will not accept, consider or issue any application for exploration or production licences or rights from Shell SA or any subsidiary as long as the Batho Batho trust has any interest in Shell SA, either directly or indirectly.
43. We request this undertaking in writing and signed by the Minister of Mineral Resources within 30 (thirty) calendar days from the date of receipt of this letter.

#### **Undertaking 5**

44. That the Minister will not issue any mineral prospecting or mining licence or right and petroleum exploration or production licence or right to any company wherein an interest is held by any political party, either directly or indirectly.
45. We request this undertaking in writing and signed by the Minister of Mineral Resources within 30 (thirty) calendar days from the date of receipt of this letter.

#### **Undertaking 6**

46. That the Minister of Mineral Resources will consider or cause to be considered the contents of the CN reports and provide the Alliance with a written proof of such consideration within two years from the date of receipt of this letter.
47. We request this undertaking in writing and signed by the Minister of Mineral Resources within 15 (fifteen) calendar days from the date of receipt of this letter.

#### **Undertaking 7**

48. That the Minister of Mineral Resources will not accept any applications for petroleum exploration or production licences or rights prior to the determination of the resources required to monitor petroleum exploration and production activities and enforce environmental and other legislation applicable thereto.
49. We request this undertaking in writing and signed by the Minister of Mineral Resources within 15 (fifteen) calendar days from the date of receipt of this letter.

#### **Conclusion**

50. We look forward to your response to this letter, and in particular to our request for undertakings, in respect of which we request that you indicate whether you are prepared to give all, or only some, of the undertakings, and the reasons for your decision in each instance where you refuse.

Regards

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