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Heritage Representative
 Gamtkwa Khoisan Council
 PO Box 196
 Hankey
 6350

Tshwane

Lynnwood Corporate Park
 Block A, 1st Floor, East Wing
 36 Alkantrant Road
 Lynnwood 0081
 PO Box 35007
 Menlo Park 0102

Tel: +27 12 348 5880
 Fax: +27 12 348 5878
 Web: www.gibb.co.za

Dear Mr Reichert

RE: ESKOM EIA CONCERNS FOR THE PROPOSED NUCLEAR POWER STATION AND ASSOCIATED INFRASTRUCTURE (DEA Ref. No: 12/12/20/944)

Comment A:

SITE SPECIFIC COMMENTS WITH REGARD TO THE HERITAGE IMPACT ASSESSMENT AND THE EIA PROCESS WITH REGARD TO THYSPUNT. THE GAMTKWA KHOISAN COUNCIL IS A MEMBER OF THE THYSPUNT ALLIANCE.

We have studied the Heritage Impact Assessment, the Revised Draft EIR, the minutes of a previous Key Stakeholder meeting held with us, the responses received from GIBB dated 21 December 2011 on our written submission as well as the minutes of the Public Meeting held in St. Francis Bay after the release of the revised second draft. Following is our original objections, the responses received from GIBB and our further objections:

1. REGIONAL HERITAGE CONTEXT

Our comment (1)

The regional heritage synopsis for Thyspunt is poorly described with regard to the colonial period heritage of the KhoiSan people. The fact that an effort was made to describe the Khoikhoi people and their history in the vicinity of Duynefontein and Bantamsklip, but not at Thyspunt shows that this area did not receive the necessary attention to provide an accurate picture of the cultural landscape. The Gamkwa (sic) tribe is briefly mentioned in the report by referring to the fact that they:

- “are particularly concerned about the future of their heritage”,
- “ must be informed and consulted when human remains are uncovered”, and
- have expressed concern with respect to the future of archaeological material which they see as the heritage of their people

The last statement is of particular concern, because it appears that the author’s opinion differs from what we regard to be our heritage. If this is the case we would like clarification on this point with specific reference by the author on who should be regarded as the lawful claimants of the heritage linked to the Khoikhoi “occupation” of the area, and if it is us, why consultation should be restricted to human remains alone?

The tribe's name is even spelled incorrectly despite the fact that our information appears on the I&AP list. It shows a clear lack of respect for our traditional structure, and the consultant's lack of cultural sensitivity is further illustrated by the fact that no attempt was made to consult with us with regard to the findings, or to obtain further information that could have been used to enhance the report.

Initial Response (1)

The miss-spelling of name of the Gamtkwa Tribe is a mistake for which an apology is offered and will be rectified in the revised Heritage Impact Assessment Report. The background to the presence of the Khoikhoi people in South Africa is described on a number of occasions throughout the report. Since the section on Thyspunt was the last site discussed in the Heritage Impact Assessment, and the Khoisan had already been discussed under the 1st two sites, it was felt that the topic had been sufficiently covered and did not need to be repeated. Published and verifiable information on the proto-historic period in the Thyspunt area is scarce. However, your comments and any available information which the specialist has not yet considered will be considered and included into the Revised Draft EIR.

FURTHER OBJECTION

We do not agree with the above statements that the discussion of the KhoiSan under the first two sites gives enough information to provide an acceptable regional heritage context of the KhoiSan people in the Eastern Cape. We did not request a general discussion of Khoikhoi peoples heritage in South Africa but that proper research be done to provide an accurate picture of the KhoiSan people's presence in the Eastern Cape. Published and verifiable information on the proto-historic period in the Thyspunt area may be scarce but no attempt has been made to source the available information by the specialist. We maintain that the regional heritage context is lacking in the HIA and we request that a historian be appointed to provide the correct information. The best opportunity to consider information that is available to the Gamtkwa KhoiSan Council is a Key Focus Group meeting. At the first meeting some informal information was shared with the consultants during the break. This information was not included in your report, and no formal attempt was made during the meeting to obtain this information from us. We have requested through the Thyspunt Alliance that a further Key Focus Group meeting must be held before the end of this comment period. The request has not yet been approved, and we wish to formally repeat this request.

Response A:

Your comment is noted. There is more than one group in the Eastern Cape that has contrasting claims to represent the KhoiSan people, of which the Gamtkwa KhoiSan Council is one. None of these claims regarding representation of the KhoiSan or Gamtkwa people can be verified, since these claims are based largely on oral history and none of these bodies have recognition in terms of South Africa's official traditional leadership structures.

Nevertheless a Focus Group Meeting with a group of the Chiefs of the First Nations was conducted on 20 November 2015 at the Gamtoos Hotel and Caravan Park. It was noted that you wished not to attend the meeting and requested that a separate meeting be scheduled the group you represent.

Comment B:

Our comment (3)

It is also not clear why we need to be consulted when human remains are uncovered if no information about our historical connection to the area is provided. We therefore insist that:

- further research must be done to describe the presence of the Gamtobakwa people (Gamtkwa is an abbreviation of the original tribal name), or the so called “Gamtousch nation” (as described by early travelers such as Ensign August Beutler in 1752) within the regional heritage context.
- further information must be supplied on what causes ended the long “occupation” of the area by Khoikhoi people and what factors led to their eventual presence at Missionary Stations in Bethelsdorp, Hankey, and Clarkson. The statements that “European farmers (Trekboere) were the vanguard of formal colonization and accelerated granting of land by the British Colonial Government”, and “Land which was viewed as a shared resource by the Khoekhoen was no longer available to them” are simplistic and do not provide the full reasons why our original cultural structures disintegrated and why we lost access to our ancestral land.
- the living heritage associated with the KhoiSan people with specific reference to medicinal and other useful plants that occur within the study area be investigated further. If the “intangible heritage” associated with the St. Andrews shack has been investigated, surely we should be afforded the same consideration.

Initial Response (3)

Should additional information become available, it will be considered and included in the Revised Draft EIR. No particular groups of people were identified during the course of the study as the archaeology of the study area is of overall massive antiquity and therefore national heritage, and in some aspects, international heritage. Furthermore the limited amount of detailed study that has taken place to date does not provide secure enough evidence to equate the archaeological material to any particular grouping of people, other than to state that the presence of ceramics on some sites indicated that they developed during the last 2000 years, which coincides with the broad time period that the Khoikhoi were present in the area. Archaeological sites characteristic of this period are to be found throughout much of the Eastern Cape, Northern Cape and Western Cape, hence in broad terms, all three of these provinces are ancestral land, however defining the boundaries of ancestral land for the various groups is a highly complex task that needs acknowledgment of the detailed dynamics of the movement of groups over space and time. Mostly this history, apart from small glimpses of it in historic records, has been lost.

As regards consultation requirements in respect of any human remains that might be found, the requirements of section 36 of the National Heritage Resources Act, 25 of 1999 require public participation with respect to the exhumation, treatment and disposal of human remains that fall within the ambit of that statute, and accordingly this issue was identified during this environmental assessment process, in the expectation that there could be human remains from the historic period on the site.

The site of the St Andrews cottage was identified as it is in active use. The broader area is owned by Eskom and is access controlled. The land that comprises the Thyspunt property is not actively used for the collection of medicine.

FURTHER OBJECTION

The above response does not provide an answer to the first two issues raised by us. We requested that accurate information about the proto – historic period of their presence in the general area should be provided. The fact is that you are unable to provide us with the information and this is the real reason why you are not able to: **to equate the archaeological material to any particular grouping of people.** If proper historical research was done by a historian you would have been able to provide us with the requested answers. It is also interesting to note that although archaeological material cannot be linked to any particular group of people that you still recommend that: **“At Thyspunt, for example, the Gamtkwa community who are listed as I&APs must be informed and consulted when human remains are uncovered, and if necessary the reburial of any human remains should be facilitated.”**

We also do not agree that consultation should be conducted with regard to human remains alone. If this was the case why did the consultants agree to a Key Focus Group meeting with the specialist where the HIA was discussed? We maintain that consultation with regard to human remains and archaeological material should be discussed with the affected community since section 38(3)(a) of the National Heritage Resources Act, 25 of 1999 requires that the results of consultations with an affected community should be included in the report. In our view this should have been extended to your permit application for test excavations. The fact that this was not done further illustrates your lack of respect for our traditional structure and that you as scientists claim the sole right to make decisions about the heritage of our people.

The fact that the Thyspunt site is not actively used for the collection of medicine is due to the fact that there has been access control to the site for a number of years. This does not mean that medicinal and other useful plants are not present on the site. The fact that an ethno-botanist did not provide a report as part of the HIA makes the report incomplete and creates the risk that these plants will be destroyed if this project was allowed to continue. An assessment of intangible heritage also does not have active use as a pre-requisite and is also not limited to the collection of medicinal plants alone.

Response B:

The scale and significance of the human tragedy associated with the loss of ancestral land and livelihood by the KhoiSan across South Africa, which was not confined to the project area or indeed to the Eastern Cape, and the disintegration of their traditional culture is fully acknowledged. However, in the context of the Nuclear-1 EIA process, it is questioned what responsibility Eskom (as the applicant) or GIBB (as the Environmental Assessment Practitioner) have to historical issues like the reasons why KhoiSan people ended up at missionary stations. It is well known that land was regarded as a shared resource by KhoiSan cultures but that land tenure imposed by white settlers was based on private land ownership and that KhoiSan communities were therefore dispossessed. However, the focus of an EIA process is to assess the potential impacts of the proposed development i.e. to determine how the proposed development will alter the prevalent environmental conditions and not to resolve the reasons for historical conflicts, as tragic as the outcomes of such conflicts may be. Although the proposed on-site curation facility for archaeological artefacts that must be established as part of the heritage mitigation strategy should include a full history of the peoples that produced these artefacts, it is not the function of this EIA process to provide this interpretation.

One of the outcomes of the post-Apartheid political settlement was a decision, codified in South African law, that only land claims originating after the 1913 Land Act would be considered for restitution. Whilst the tragedy of land dispossession of KhoiSan people cannot be downplayed, it is not the function an EIA process to resolve issues related to dispossession of ancestral land.

Owing to the scarcity of accurate written records of the history of the KhoiSan people, in general but also particularly for the Eastern Cape region and for this site, it is questioned what additional value further research would contribute. Given this scarcity, is it further questioned how any tenable and verifiable link could be established between the KhoiSan people who occupied the site during the last several thousand years and any particular grouping of people today. As indicated in Response 1, the Gamtkwa KhoiSan Council is only one of the bodies that claim to represent the Gamtkwa people in the Eastern Cape. As such, the Environmental Assessment Practitioners cannot be expected to involve this council as the sole representative of the KhoiSan people with respect to the heritage resources on the Thyspunt site.

Section 38(3)(a) of the NHRA requires “the identification and mapping of all heritage resources in the area affected” and we therefore presume that you refer instead to Section 38(3)(e) with respect to consultation, since this latter section requires “the results of consultation with communities

affected by the proposed development and other interested parties regarding the impact of the development on heritage resources” should be recorded. It is to be noted that in terms of Section 38(8) of the NHRA, Section 38 of the NHRA does not apply if an environmental impact assessment is required under the prevailing EIA legislation (i.e. the National Environmental Management Act, 1998). Considering that the Nuclear-1 EIA process is being undertaken in terms of the EIA regulations, the public participation requirements of these regulations and the NEMA are applicable instead. The results of the consultations undertaken in terms of the EIA are available in the Environmental Impact Report.

Subsection 35(4) of the NHRA states that no archaeological material may be excavated without a permit issued by the responsible heritage authority. Test permit excavations for the Thyspunt site were obtained from SAHRA in terms of this portion of the NHRA. The NHRA does not specify any consultation requirements with respect to an application for such permit. In any event, the purpose of the test excavations was not to disinter human remains or to remove any material from the site, but simply to determine what is present so that a better understanding could be obtained about the distribution and quality of the heritage sites at Thyspunt, so that the impact confidence in the prediction of the impact of the proposed power station could be more improved.

Additional input from the Heritage Specialist Dr Tim Hart: The purpose of the trial excavations was not to excavate archaeological material but to check a hypothesis with respect to the apparent absence of archaeological sites in certain areas. The application itself was submitted as a precaution in case archaeological material was encountered. However retrospectively no permit application was required as no archaeological material was found in the trial excavation areas. The permit application required the position of the landowner to do the work,

The study area has been in private ownership since the first title deeds were issued in the early part of the 19th century, and off-limit as a nature reserve for the 21st century, There is no indication that legal use of plant resources has been used unless by the property owners or their staff. For most of the 20th century the site was in shocking condition and effectively over-run by alien vegetation. This has been cleared by Eskom staff to some extent and indigenous vegetation has retained a foothold. The significance of this has been appraised by the project botanist. Eskom should be approached with respect the future propagation and exploitation of medicinal herbs and plant foods on site, Since no traditional activities have been permitted on site in the past, an ethno botanical study is not deemed necessary as part of an impact assessment. A future study may be worthwhile if Eskom agrees to exploitation of plants.

The general environmental sensitivity of the Thyspunt site is well known and this is why the recommended position of the power station is in the vegetated dunes, within the area of lowest environmental sensitivity (including heritage). It is one of the recommendations of the Botanical Assessment (Appendix E11 of the Revised Draft EIR) that search and rescue operations need to be conducted on rare and/or sensitive plant species prior to the start of construction.

Comment C:

Our comment (5)

The following statement was issued on 8 August 2005 in Pretoria by the Special Rapporteur of the UN on the Human Rights and Fundamental Freedoms of Indigenous People:

“... All indigenous peoples of South Africa were brutally oppressed by the colonial system and the apartheid regime up to 1994. The Khoi-San were dispossessed of their lands and territories and their communities and cultures were destroyed. The tragic consequences of apartheid cannot be overcome in a few years and the Special Rapporteur is fully conscious of the tremendous efforts that have been made by the democratic government of South Africa to redress the many injustices inherited from the old regime. Through his conversations with Government authorities and Khoi-San

people, he is also aware of the challenges faced by these communities and their longstanding demands for land rights, official statutory recognition, respect of their cultural identities and full and equal access to social services.

The Special Rapporteur is encouraged by the government's declared commitment to meet the demands of the indigenous groups in the country and by the ongoing efforts to formulate and implement appropriate legislation and policies to address issues such as land restitution, multilingual and multicultural education, the representation of traditional authorities in public life and the delivery of health and other service

Without the above information the regional heritage synopsis is incomplete and misleading. The KhoiSan people did not just "occupy" the area for thousands of years and then disappear from the face of the earth. They lost their land by force and through conflict, and the current government recognizes the genocide that took place in colonial times. We, the descendants of these people are very much alive today and represented by various organizations, a fact that should be recognized in the HIA.

Initial Response (5)

Agreed and comment noted. The Draft Environmental Impact Report (EIR) and the associated Heritage Impact Assessment report acknowledge that the heritage of the area is the "heritage of many South Africans who are alive today". The heritage section of the EIR report is of a general nature and tries to be impartial in view of the fact that the heritage of the study area is part of "the National Estate". The study has truthfully informed the public of the presence of a wide variety of archaeological sites but cannot ascribe those sites to particular groups of people apart from in the broadest of terms. The archaeological studies proposed prior to and during construction can include this aspect in the scope of work.

FURTHER OBJECTION

The archaeological studies proposed prior to and during construction of an activity that will destroy a cultural landscape will serve no purpose whatsoever. This information should have formed part of your HIA and the fact that it was not done is due to the fact that proper historical research was not conducted and the fact that recent developments with regard to the recognition of KhoiSan structures were ignored. The inputs of the Department of Provincial and Local Government in this regard should have been obtained and this may have solved several uncertainties that you have at this stage with regard to the rights of indigenous people and would have provided the Government's official position in this regard to the decision maker in this application. Your failure to link the site to any particular group (Please see our further objection to your response 6(3)) apart from the broadest terms cannot serve as an excuse to strip people of their rights, and your failure to place to correct information before the decision maker may have severe consequences for your client.

Response C:

Our above initial response remains valid.

Please provide details regarding the "recent developments with regards to recognition of KhoiSan structures". We re-iterate that the Gamtkwa KhoiSan Council is only one of the organisations claiming to represent the KhoiSan in the Eastern Cape and that there is no formal recognition of KhoiSan structures in official traditional leadership structures in South Africa. Although the Traditional Affairs Bill provides for recognition of KhoiSan leadership structures, it is well-known that the passage of the bill through parliament has been fraught with difficulties and constitutional challenges. We would welcome the opportunity to engage with the officially recognised structures but at this point in time there are, as mentioned above, different structures that claim to represent

the KhoiSan people. GIBB has met with these structures in the Eastern Cape but cannot be expected to recognise one or another of these structures as the only valid representative.

As indicated in Response 2 above, the archaeological sites on the Thyspunt site cannot be linked to any specific present-day group, apart from a generic link to the KhoiSan people who are known to have occupied not only this area but many areas in South Africa during the past several thousand years.

Comment D:

2. PRE-COLONIAL HERITAGE/MITIGATION

The information provided about the archaeology of the area is accurate, and substantiates the fact that the KhoiSan community does have a vested interest and rights with regard to the majority of the cultural heritage situated within the study area. We do not regard mitigation as a viable option for an area with the unique non – renewable resources as specified in the HIA.

Mitigation will have no benefits for the cultural group affected by the "rescue operation", especially if the majority of the archaeological sites will be destroyed as a result. The Khoikhoi and San heritage of this area will only have benefits for the research community if it is removed, and in our view it should be preserved in context for future generations as part of a National Cultural Heritage Site. Our view is supported by the HIA results and the author confirms that:

"Mitigation can be achieved through scientific recording, sampling or excavation - however these are also destructive processes. In general, full rectification of heritage impacts is not normally possible in the case of archaeology unless the archaeological sites can be conserved in their entirety."

We agree with the statement that:

"However, given the broader picture, the procurement of power (in particular non-greenhouse gas producing alternatives) is critical for the future well-being of the nation, which is currently suffering from a deepening energy shortage."

We disagree however that this can be presented as a motivation for the destruction of the cultural heritage of indigenous people, especially if other alternatives are available but were either not investigated or scoped out of the process due to financial or other implications. The specialist concludes that the cost to the National Estate is going to be high, unless properly mitigated (In the case of Thyspunt all indications are that there are severe constraints for proper mitigation).

The author states that further that:

"The sites that have been selected for the proposed activity are primarily based on their geological and engineering suitability to the task (a primary consideration in nuclear engineering). It would appear that other disciplines were either not considered or viewed as sacrificial under the primary concerns of safety and engineering suitability. The result of this legacy is that the sites of Duynefontein, Bantamsklip and Thyspunt, despite their exceptional heritage qualities, have been identified for the proposed NPS"

This supports the general view of various I&AP's that the planning for Thyspunt is out-dated.

The construction of facilities to house heritage material removed from the site will cost millions. The cost for excavation work by a team of specialist over a prolonged period in an area that will be difficult to mitigate will be equally high. The total budget for the destruction of our heritage should in our view rather be used to purchase a more appropriate site with less impact on the environment and on heritage resources.

The consultants have indicated that even mitigation is destructive, and since Thyspunt is regarded as the most sensitive of the sites it should have been scoped out of the process on its cultural heritage value alone. The fact that it has not been done shows that they do not understand that the issues that should be considered are far more complex than merely providing power to the country.

Initial Response 7

Your comments are noted. The heritage specialist indicated to the Applicant (Eskom) and the South African Heritage Resources Agency (SAHRA) that the work required is potentially very demanding on both hard-pressed archaeological expertise resources and existing state capacity. At Thyspunt the final site location has a critical bearing on how much archaeology will be affected. The heritage specialist agrees with the notion expressed that archaeological sites are best preserved in-situ for future generations and conservation minded archaeologists will always strive to achieve this goal. Mitigation by excavation is always a second best and should be avoided, where possible. However it is important to remember that the comparative assessment of the three alternative sites was based on the following:

- Results of the specialist studies: specialists have indicated the relative significance of potential impacts with mitigation at each of the three alternative sites;
- An integration workshop, involving all specialists, on 24 and 25 November 2009, where potential impacts and ranking of the alternative sites was discussed;
- Costs; and
- Transmission integration requirements.

Although there are obvious differences between the significance of the potential impacts of the three alternative sites, all specialists agreed that there are no fatal flaws at any of the sites (provided appropriate mitigation is implemented). The specialists further collectively agreed that all three alternative sites are suitable for development of a nuclear power station in time, given sufficient mitigation of impacts. The power station has been positioned on the site to avoid the highest concentration of archaeological sites. This concentration occurs in a thin strip along the coastline west of the proposed position of the power station on the Thyspunt site. The position of the power station has been set back by at least 200 m from the high water mark in order to avoid this particularly rich concentration of archaeological sites.

FURTHER OBJECTION

SAHRA has already indicated that they do not approve of this development at Thyspunt. The test excavations that have been carried out will not change this decision and served no purpose at all. It is not a matter of where the power station is positioned but what the affect will be on the cultural landscape. Please see your own response at the Key Focus Group meeting in this regard as well in the post meeting notes by SAHRA.

The entire area is a cultural landscape in term of the UNESCO definition, and the concentration of the archaeological material is not limited to a thin strip along the coastline. How can you make a statement like this if your own report indicates that these sites only constitutes a small percentage of what may be present at the Thyspunt site?

From the above it is clear that the integration workshop ignored clearly established cultural issues in favour of cost and transmission requirements. The fact that the Thyspunt site can be regarded as a cultural landscape does constitute a fatal flaw at the site and the SAHRA decision not to allow this development further substantiates this fact. We do not accept that the weighting given to Thyspunt was accurate in the light of the availability of alternative sites

Response D:

Your opinion regarding the mitigation of archaeological impacts not being viable is noted.

It is not correct to state that the majority of the archaeological sites will be destroyed. The test excavations conducted in 2011 established that the central portion of the site within the vegetated dunes (which includes the recommended position of the power station) has very few archaeological sites and that the most significant archaeological sites, both in number and in quality, occur along the western coastline of the Thyspunt site. Therefore, the revised Heritage Impact Assessment (which will be provided to all I&APs for comment) concludes that *“it is possible to position the proposed nuclear power station in such a way that physical impacts to heritage sites of an archaeological nature can be minimised. Mitigation of any heritage material through sampling by controlled excavation, or creation of local exclusion areas is considered feasible with resources currently available.”* Some on-site storage (a small museum) may be necessary. Your opinion regarding the test excavations serving no purpose is noted. However, this is a conclusion better left to SAHRA itself based on the findings of the test excavations.

Your comment regarding the consideration of alternative sites is noted. Consideration of additional alternative sites is not feasible or reasonable in this instance, since the five sites initially identified in the scoping phase of the Nuclear-1 EIA process are the only sites confirmed to be technically suitable for a nuclear power station. Due to the long lead times required for development of a nuclear power station (it is generally accepted that the entire lifetime of such a power station from planning to decommissioning is 100 years), the sites were acquired by Eskom decades ago. Should the identification of suitable sites have to be started from scratch, it would result in a delay of at least 5 to 10 years, since the critical task of determining a site’s seismic suitability takes at least 5 years.

It is well known that South Africa is a water-stressed country and does not have sufficient inland water resources to provide cooling for a nuclear power station. A coastal site is therefore the only feasible option for a nuclear power station. Thus it is a foregone conclusion that a nuclear power station would have to be constructed on a coastal site. Without detracting for the significance of the heritage resources found at the Thyspunt site, it is known that generally speaking the highest concentrations of KhoiSan heritage are found along the coast, particularly in the Western Cape and Eastern Cape. Some impact of KhoiSan heritage virtually anywhere along the coastline is therefore probable. The concentration of KhoiSan heritage sites on the Bantamsklip site is an indication of the richness of heritage sites in other coastal areas. An alternative (coastal) site would therefore not be guaranteed to have less significant or fewer KhoiSan heritage sites than either the Bantamsklip or Thyspunt sites.

The direct financial cost of heritage mitigation will be tiny compared to the cost of finding an alternative site and the economic impact of delays in supplying sufficient baseload power to the South African economy and the potential impact of load shedding. The test excavations have found that there are far fewer heritage sites in the recommended footprint of the power station than originally anticipated and the cost of heritage mitigation will therefore be manageable. As indicated above, the heritage specialist has concluded that heritage mitigation will be achievable with currently available resources. Prior to the test excavations it was suspected that significant resources would have to be imported into South Africa to make the mitigation possible.

The issues of a UNESCO cultural landscape and the concentration of archaeological sites refer. As indicated above, the test excavations found very few archaeological sites within the vegetated dune environment in the central portion of the Thyspunt site. The concentrations of KhoiSan archaeological sites correlates closely with the availability of fresh water i.e. they are concentrated primarily along the coast (where there are coastal seeps), further inland (e.g. close to wetlands) and in the mobile dunes (where there are inter-dune wetlands). There are no sources of fresh water in the vegetated dunes and hence there are very few archaeological sites in this area.

Your opinion regarding the weighting of decision factors is noted. GIBB (as the environmental assessment practitioner) stands by the decision on weighting, which was taken in consultation with the entire specialist team, including the Heritage Impact Assessment team.

Comment E:

3. LEGISLATION / INDIGENOUS PEOPLES RIGHTS

Our comment (6)

It appears that Eskom is under the impression that by meeting South African legal criteria there is no obligation on them to act in terms of the UN's declaration of indigenous peoples rights (of which the South – African Government is a co-signatory), the UNESCO or ICOMOS: Burra Charter guidelines, and the Kari-Ocha and Kimberley declarations. These declarations and guidelines all require "informed consent" before any development can take place on indigenous peoples land.

The response we received from Eskom on the above statement in the Revised PoS was:

"Eskom is the current owner of the Thyspunt site. As indicated above all due process has been followed with respect to the archaeological sensitivities on site, which Eskom considered to be serious."

This type of response is indicative that Eskom does not have any understanding of current developments with regard to indigenous people's rights in South – Africa, or they are ill-advised by their consultants.

The fact that they under the impression that due process has been followed to date is also incorrect. In the Revised PoS we objected against drilling operations that took place without any archaeological supervision, and we indicated that : "We have been informed that little damage was done to some of the sites, but this is still an offence in terms of section 35 (4)(a) of the South-African Heritage Resources Act, no. 25 of 1999."

Eskom responded as follows:

"It should be noted that all drilling sites were inspected by the EIA Archaeologist who indicated that no damage to any sites of significant archaeological importance had occurred. In addition Eskom has a drilling EMP that requires that should any archaeological site be identified all work must stop until such time that an archaeologist has inspected the site. Eskom has been in communication with SAHRA who have indicated their satisfaction with the current process."

With regard to the above statement:

- Firstly, The Act does not distinguish between "significant" and "insignificant" archaeological sites. The disturbance of any archaeological site without a permit is a transgression of the Act.
- Secondly, The EIA archaeologist noted the following in the "Inventory of Observations" at 6 drilling sites : "*Buried midden deposit turned up by borehole drilling*"
- Thirdly, We followed the matter up with SAHRA and this was their response to the claim that SAHRA has indicated their satisfaction with the current process:

"Dear Mr. Reichert

SAHRA is obviously very concerned about the NPS development and what impact it will have on the heritage resources of the Thyspunt area. To my knowledge SAHRA did not convey to Eskom

that we were happy with the process or that drilling etc. can start without the relevant studies being completed and the APM Unit have commented on these. The APM Unit had expressed its concern regarding the proposed project and the enormity of the task at hand. However, no permission was given that destructive work may continue (if this is the case) without the input from the SAHRA.

Yours sincerely

Phillip Hine
 APM Impact Assessor
 South African Heritage Resources Agency
 111 Harrington Street
 PO Box 4637, Cape Town 8000,
 South Africa
 E-mail: phine@sahra.org.za
 Phone : +27 (0)21 462 4502
 Fax : +27 (0)21 462 4509
 Web : www.sahra.org.za

In view of the above it is not only a case of a lack of understanding of indigenous rights issues from Eskom's side, but also a deliberate attempt to hide actions that cannot be justified. It is of no use to play with words in your responses to serious issues. If this can serve as an example, it becomes apparent that Eskom cannot be trusted to manage any aspect with regard to our heritage in a project of this size.

Eskom must be held accountable for their actions since they allowed drilling operations to proceed being fully aware of the archaeological sensitivity of the site. (Please see previous reports by Dr. Binneman commissioned by Eskom and the desktop study that formed part of the Scoping Phase for this EIA.). Possible damage to archaeological material due to the recent construction of gravel roads should also be investigated.

Initial Response 9:

In terms of the Environmental Impact Assessment process, the Heritage Assessment is conducted under the auspices of the national environmental legislation and SAHRA is a commenting authority and not the competent authority in terms of granting the environmental authorisation (see sections 38(8) and 38(10) of the National Heritage Resources Act, 1999). As such, the EIA practitioners have consulted with SAHRA regarding this matter and all evidence and records of the consultation will be included in the Revised Draft EIR as well as the Final EIR, for the attention of the competent authority as part of the decision-making process.

Secondly please note that the National Heritage Resources Act (NHRA) does consider significance in that the Act requires that Heritage Resources be graded.

Lastly, an environmental authorisation was not required for the drilling operations and an HIA for this activity was not triggered and an HIA for the drilling did not take place. The identifications of transgressions of the NHRA is a SAHRA function. The matter was discussed telephonically with Dr Jerardino (who has since left SAHRA).

FURTHER OBJECTION

Section 38 (8) of the National Heritage Resources Act, 1999 states that: The provisions of this section do not apply to a development as described in subsection (1) if an evaluation of the impact of such development on heritage resources is required in terms of the Environment Conservation Act, 1989 (Act No. 73 of 1989), or the integrated environmental management guidelines issued by the Department of Environment Affairs and Tourism, or the Minerals Act, 1991 (Act No. 50 of 1991), or any other legislation: **Provided that the consenting authority must ensure that the**

evaluation fulfils the requirements of the relevant heritage resources authority in terms of subsection (3), and any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account prior to the granting of the consent.

We submit that the evaluation did not fulfill the requirements of SAHRA and that a positive Record of Decision cannot be issued for Thyspunt if the SAHRA comments have been taken into account.

Response D:

The Section of the National Heritage Resources Act (NHRA) from which you quote is designed to ensure co-operative governance and provides for the integration of a Heritage Impact Assessment in an Environmental Impact Report in instances where an EIA would in any event be required by the National Environmental Management Act. The relevant portion of the NHRA further requires the decision-making authority in terms of the NEMA (the “consenting authority”) to consult with the relevant heritage resources authority prior to making a decision.

Your assertion in the last paragraph that the HIA did not fulfil the requirements of the SAHRA requires substantiation. Furthermore the Department of Environmental Affairs (DEA - the “consenting authority” in this instance) has not yet been provided with a final Environmental Impact Report for decision-making and it is, therefore, not yet in a position to request official comments from SAHRA to be taken into account in decision-making by the DEA. Your opinion in this regard is therefore premature, since SAHRA has not yet had an opportunity to provide its official comments on the final Environmental Impact Report and the Heritage Impact Assessment (Appendix E20 of the Revised Draft EIR) to the DEA.

Comment E:

FURTHER OBJECTION

Your response does not answer the statement that the Act does not distinguish between “significant” and “insignificant” archaeological sites. The statement does not refer to the grading of Heritage Resources, but to the application of section 35(4)(a) of the South-African Heritage Resources Act, no. 25 of 1999 which provides general protection to archaeological sites. Archaeological sites were impacted upon and disturbed by drilling operations while your client was fully aware of the archaeological sensitivity of the site

Response E:

Section 35(4)(a) of the NHRA does indeed provide general protection to archaeological sites. However, as indicated by the facts in the initial response, the site disturbed in this instance was a buried midden. The borehole drilling team could not reasonably have been aware of the presence of the midden prior to the start of drilling, by virtue of the fact that the midden was buried.

Please note that subsection 38(3)(b) of the NHRA, with respect to the contents of Heritage Impact Assessment reports, requires “an assessment of the **significance** of such resources¹ in terms of the heritage assessment criteria set out in section 6(2) or prescribed under section 7. Section 7 of the NHRA in turn is concerned with heritage assessment criteria and grading. Clearly, therefore, irrespective of the general prohibition on disturbance of archaeological sites, an assessment of the significance of the affected heritage resources is required.

¹ Our emphasis

Section 38 of the NHRA list a number of activities for which a Heritage Impact Assessment (HIA) is required prior to undertaking the activity. None of these activities include the drilling of boreholes and Eskom was therefore under no obligation to apply for authorisation to perform drilling operations. Had it known ahead of time of the presence of the (buried) midden, it would have moved the borehole position accordingly or would have accordingly performed an initial investigation to determine the significance of this particular midden.

Nevertheless, as indicated in the initial response, Eskom has an EMP that governs measures to be taken during drilling operations to prevent damage to the environment, including archaeological sites. Furthermore the drilling sites were inspected by an archaeologist to confirm the significance of the damage to the midden and Ms Gerardino of SAHRA was informed of the damage.

Had SAHRA considered the damage to the midden to be serious enough, there are several remedies available to it under Section 35(5) of the NHRA to force the landowner to cease the potentially damaging activity or to apply mitigation measures. Furthermore SAHRA has a right, under section 25(6) of the NHRA to serve a notice of the landowner to stop any activities and to prevent any activities within a specified distance of a heritage site. Although Eskom cannot speak for SAHRA, it would stand to reason that if SAHRA considered the damage to the midden to have been significant enough, it could have used its substantial powers under Sections 35(5) and 35(6) of the NHRA to take appropriate action against Eskom. However, no such punitive action was applied.

Comment F

Initial Response 6 (3)

Lastly, an environmental authorisation was not required for the drilling operations and an HIA for this activity was not triggered and an HIA for the drilling did not take place. The identifications of transgressions of the NHRA is a SAHRA function. The matter was discussed telephonically with Dr Jerardino (who has since left SAHRA).

FURTHER OBJECTION

It doesn't matter if a ROD or a HIA was required for the activity or not. The disturbance of an archaeological site is a criminal offence in terms of the Act and your continued justification for the actions of the contractors is unacceptable.

Response F:

Please refer to Response 6.

Comment G:

Initial Response 6 (4):

We take note of your comments regarding the various international declarations on rights of indigenous peoples. In the South African context, the applicable legal processes for indigenous peoples to regain access to land and resources of which they had been dispossessed has been put in place by the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994). Had the Gamt kwa Khoisan Council or the broader representatives of Khoisan believed that it had rights to the land, this is the mechanism that should have been followed to confirm these groups' rights to the land. To our knowledge, no such claims have been registered with respect to the Thyspunt site.

FURTHER OBJECTION

We disagree with the statement that: the applicable legal processes for indigenous peoples to regain access to land and resources of which they had been dispossessed has been put in place by the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994). Indigenous people of this country lost their land and resources long before the cut-off date of 1913 for Land Claims as you are fully aware of. The Act therefore does not provide for claims before that date. The Act can therefore not be regarded as an applicable process for indigenous people to regain access to land and resources. This is the reason why the Gamtkwa KhoiSan Council was unable to follow this mechanism. This does not change the fact that the Gamtkwa people regard Thyspunt as part of their ancestral land and we are therefore claiming our rights to the archaeological sites linked to the Khoikhoi culture that are present on the site. In this regard we are objecting against this project due to the fact that the development will destroy a cultural landscape where the Khoikhoi artefacts and sites constitute the majority of the archaeological sites described to date.

Response G:

Your comments are noted and it is not disputed that KhoiSan people lost rights to their land before 1913. However, in the South African context, the cut-off date for valid land claims is 1913, as stipulated in the Restitution of Land Rights Act. This date was agreed between all political parties during constitutional negotiations prior to the 1st democratic elections. The Restitution of Land Rights Act is therefore the only recognised legal instrument in South Africa for people to regain access to ancestral land. If this is not the applicable process for the Gamtkwa KhoiSan Council to follow, please advise what is the applicable process that the Council wants to follow?

Eskom as the applicant and GIBB as the environmental assessment practitioner must work within the confines of the law and have no mandate to challenge the provisions of the law or the democratically determined cut-off date for land claims with respect to a specific claimant such as the Gamtkwa KhoiSan Council.

Comment H:

Initial Response 6 (5):

In terms of “informed consent” - the notion of “informed consent” as stipulated by international conventions and/or declarations must be read against the backdrop of the more specific public participation and information requirements set out in the NEMA EIA legislative regime. The Nuclear 1 EIA is continuing in terms of the provisions of the 2006 NEMA EIA regime and the only requirement regarding consent (which consent requirement has been removed from the 2010 NEMA EIA Regulations) relates to obtaining the written consent “of the landowner...” in a situation where the applicant is not the owner of the land on which the activities are to be undertaken. In the circumstances, the notion of “informed consent” as provided for in the international legal milieu does not create a binding obligation that exceeds that imposed by the NEMA EIA Regulations.

FURTHER OBJECTION

We disagree with the above statement. The term “informed consent” in terms of international conventions and declarations cannot be read against the backdrop of NEMA since it clearly has two different meanings. We refer to informed consent for developments on ancestral land and we submit that NEMA EIA Regulations cannot over-ride the UN Declaration on Indigenous Peoples Rights when there is a binding obligation on the South African Government to ensure that it is implemented.

Response H:

As indicated in responses above, there is a specific mechanism created in the South African legal framework for restitution of land rights. Your opinion that the UN Declaration of Indigenous People's rights overrules the NEMA EIA regulations is noted. However, neither GIBB nor Eskom can operate outside the provisions of South African law.

Comment I:

Initial Response 6 (6):

Despite the Restitution of Land Rights Act being the only legal mechanisms for indigenous people enforce their land rights, Eskom is sensitive to the intangible connection that the descendents of the KhoiSan people have to the heritage resources at the site and to the intent of the applicable international declarations. The "*informed consent*" provisions of the UN Declaration relate to the following:

- Relocation of indigenous peoples (not applicable in this instance);
- Redress related to cultural, intellectual, religious and spiritual property that has been taken without the free, prior and informed consent of indigenous people or in violation of their laws, traditions and customs (not applicable in this instance);
- The adoption and implementation by UN Member States of legislative or administrative measures that may affect indigenous people (not applicable in this instance, as the obligation is on the government to enact legislative or administrative measures); and
- That UN Member States must take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. There is no specific measure in South African law to give effect to the intent of this article of the UN Declaration.

Whilst Eskom respects these provisions, and has taken all reasonable measures to minimise the impacts on heritage resources at Thyspunt, the Gamt kwa Khoisan Council has not established any proven legal claim to the land in terms of the relevant legal mechanisms established for this purpose by the South African government.

FURTHER OBJECTION

We do not agree that Eskom is sensitive to the intangible connection that the descendents of the KhoiSan people have to the heritage resources at the site. If this was the case your specialists would have investigated this "intangible connection" as part of the HIA. They however found this unnecessary due to the fact that there was no active use of the site. Please see your response 6 (3) as well as our further objection. The following statements further illustrate your lack of sensitivity for our concerns:

The "*informed consent*" provisions of the UN Declaration relate to the following:

- Relocation of indigenous peoples (not applicable in this instance);

- Redress related to cultural, intellectual, religious and spiritual property that has been taken without the free, prior and informed consent of indigenous people or in violation of their laws, traditions and customs (not applicable in this instance)

We submit that if a proper historical assessment was done about the KhoiSan people of this region that the above statements will be proven to be false. Indigenous people of this region were relocated and lost their cultural and spiritual property without their free, prior and informed consent and in violation of their laws. To state that this not applicable is an insult and shows a clear disregard for our history and is misleading to the extreme. We insist that the person who made this statement will attend a Key Focus Group meeting with us to personally explain on what basis these statements were made. We have requested that the author/s of your responses should be identified. This request was ignored by GIBB despite a request by e-mail and at the St Francis Public meeting. We once again request that we be provided with this information since this was done in other specialist responses to other I&AP's. There can be no reason why the identity of the author should not be disclosed.

Response I:

Your opinions are noted. As stated above, the tracing of origin of the heritage sites on the Thyspunt site to KhoiSan people in general who lived on the site during the past several thousand years is not disputed. The dispossession of the KhoiSan people is an unfortunate and tragic reality. However, "informed consent" with respect to relocation of indigenous people relates to current actions, not to historical actions. No "informed consent" is possible with respect to the dispossession that has taken place in previous centuries. Therefore informed consent is not applicable in this instance.

Responses are written by a team of environmental assessment practitioners in GIBB and where necessary, the relevant specialists are consulted.

Comment J:

We also refer to the following statements:

- The adoption and implementation by UN Member States of legislative or administrative measures that may affect indigenous people (not applicable in this instance, as the obligation is on the government to enact legislative or administrative measures); and
- That UN Member States must take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. There is no specific measure in South African law to give effect to the intent of this article of the UN Declaration.

We submit that these provisions are indeed applicable and that it places a binding obligation on the Government to enact legislative and administrative measures to address the above issues. The fact that there are not specific measures in place at present does not mean that it will NOT be in place in future. To lose sight of this fact as well as the current process of recognition of KhoiSan structures through the DPLG constitutes a fatal flaw in the EIA process since the obligation on the state to act in terms of the UN Declaration will have far reaching effects for the proposed NPS.

Response J:

Your opinion is noted. GIBB, as the environmental assessment practitioner, can only act within the provisions of the law in place at the time of the EIA process and cannot anticipate the content of laws may be in place at some future date.

Comment K:

As far as your statement is concerned that the Gamtkwa people has not established any legal claim to the property please refer to our further objection to your response 6 (4). If you are of the opinion that we have established no legal claim to the heritage resources linked to our culture and to developments proposed on the site, please provide us with a detailed explanation why your heritage specialists recommended in the HIA that: "At Thyspunt, for example, the Gamtkwa community who are listed as I&APs must be informed and consulted when human remains are uncovered, and if necessary the reburial of any human remains should be facilitated." Does this mean that our legal rights are limited to human remains alone, and that human remains should therefore be seen in a separate context to the archaeological material associated with those remains?

Response K:

Your quote from our initial response above refers: "*Despite the Restitution of Land Rights Act being the only legal mechanisms for indigenous people enforce their land rights, Eskom is sensitive to the intangible connection that the descendants of the KhoiSan people have to the heritage resources at the site and to the intent of the applicable international declarations*". This response remains valid.

Comment L:

Our Comment (7)

Although the HIA includes various examples of damage caused to archaeological material prior to and during the Scoping Phase, the fact that legislation was transgressed appears nowhere in the report. This shows a lack of objectivity on the part of the consultants by not disclosing the correct facts.

The following articles of the United Nations Declaration on the Rights of Indigenous Peoples are applicable:

Article 11

Indigenous Peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

Article 25

Indigenous Peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources, and to uphold their responsibilities to future generations in this regard.

Article 29

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in lands and territories of indigenous peoples without their free, prior and informed consent.

Article 32

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain free and informed consent prior to the approval of any project affecting their lands or territories or other resources ...

Several other articles are also applicable, and although many of these articles bind the state it does not mean that it does not have implications for Eskom. To ignore the principles contained in this declaration will have far reaching effects in future. The Government is already in the process of implementing these principles and the White Paper on the recognition of Khoi and San structures has already been published. This will provide our communities with far stronger rights in future than provided for in current legislation.

The Khoi and San people regard all archaeological material and sites linked to their culture as of spiritual significance and sacred. These heritage resources are equally deserving of protection similar to the protection offered to other religious minorities in the country (See the Supreme Court of Appeal decision in: Oudekraal Estates (Pty) Ltd v. City of Cape Town and others)

We therefore want to place on record that we are opposed to the proposed project and that neither Eskom nor the Government have approached us to date to obtain free and informed consent to develop a Nuclear Station on our ancestral land.

Response L:

Your statement that the HIA provides various examples of damage caused to archaeological material prior to and during the scoping phase is not substantiated. There are two instances of damage to buried middens recorded in Appendix 1 of the Heritage Impact Assessment. If such damage occurred due to the negligence of the landowner or due to wilful action, then the relevant heritage authorities have the right to take appropriate action against the landowner. If damage occurred prior to the scoping phase, this is clearly outside the scope of the Scoping and EIA process and such damage cannot be resolved through this process.

Regarding the damage to one shell midden during borehole drilling, please refer to Further Response 6.

Your opposition to the project is duly noted.

Comment M:

Initial Response (7)

Your comment is noted however more facts are required, on the assertions made in the first unnumbered paragraph to which this response relates, and where the assertion is made that there is a "lack of objectivity on the part of the consultants by not disclosing the correct facts." Without those facts it is not possible properly to formulate a response to those assertions. What are the "various? examples of damage" referred to in the circumstances? In terms of "free and informed consent" please refer to response 6.

FURTHER OBJECTION

We do not need to provide you with further facts. Please read the Thyspunt inventory of observations that forms part of the HIA. Please note the comments: “**Deposit turned up in borehole drilling upcast. Proves existence of buried deposit**” and other similar comments. Also see our further objection to your response 6 (3).

Response M:

Of the 234 points recorded in the inventory of observations for Thyspunt (Appendix 1 of the Heritage Impact Assessment), there are two points (14 and 42) where archaeological deposits were discovered from borehole upcasts. Two such instances of discovery of buried archaeological material can hardly be described as “various instances of damage”. Furthermore, it is questioned how providing information on these finds in publicly available documents could be construed as a failure to disclose the facts.

Comment N:

4. CONSULTATION

Our comment (8)

We have indicated that we find the public participation process lacking with regard to local KhoiSan community. It is of even bigger concern that National KhoiSan structures were not consulted as part of this process.

The Department of Provincial and Local Government is in the process of negotiations with the National Khoisan Council (N.K.C) and the National Khoi-San Conference Facilitating Agency (N.K.C.F.A) about various First Nation matters. These two structures are however unaware of this EIA process.

The N.K.C represents all the major Khoi and San groupings in South – Africa, while N.K.C.F.A has a membership of more than 70 indigenous organizations.

The HIA results show that a project of this nature will not only have an impact on the resources of a local KhoiSan community, but that the cost to the national estate may be high. It is therefore also a national issue, requiring consultations with national Khoi and San structures as specified above. The fact that this has not been done to date constitutes a serious flaw in the public participation process.

Initial Response (8) (1)

Your comments are noted. The importance of the N.K.C and N.K.C.F.A is not disputed and as such consultation has taken place as part of the formal EIA process.

FURTHER OBJECTION

The consultation process with N.K.C and N.K.C.F.A only started after the Key Stakeholder meeting with us at a very late stage of the EIA process. We provided you with their contact details after the said meeting. Please provide us with the correspondence and the minutes of Key Stakeholder meetings held with these organizations.

Response N:

Your request is noted. A Focus Group Meeting with the Chiefs of the First Nations is still planned as part of the Nuclear-1 Public Participation process but has to date not taken place. The minutes of any meetings conducted will however be made available for public review.

Comment O:

Initial Response (8)(2)

According to ACER records, information on the project has continuously been sent to Mr. Kobus Reichert of Gamtkwa Khoisan Council since June 2007, i.e. from the early stages of Nuclear-1 EIA and/or project announcement.

There are various levels of consultation that take place in an EIA process. The Public Participation Process creates various channels through which stakeholders can participate. During the EIA process, I&APs could contribute issues either in writing by completing and returning comment sheets, or by attending meetings (public meetings/focus group meetings/stakeholder meetings), or submission of information at any stage of the process.

Mr. Reichert has represented and submitted comments on behalf of the Khoisan Community during the Scoping Phase as well as during the EIA Phase. In addition, various project correspondence has been sent to Mr. Reichert as per table below.

ID Description

L02E Acknowledgement of Comments Received June 07
 L04E Letter 04E Scoping Extension 26 July 07
 L05E DSR Availability Letter - 28 Jan 08
 L08E DSR Comment period extension - 14 Mar 08
 L11E Final Scoping Report Availability - 4 Aug 08
 L12E Project Update Letter 22 Jan 09
 L13E Letter 13 Revised POS for EIA 18 May 09
 L14E Draft EIAR Availability 3 Mar 10
 L15E Invitation to Key Stakeholder Feedback Meeting, 03 Mar 10
 L17E DEIAR Comment Period Extension 6 May 10
 L23E DEIAR Further Comment Period Extension 27 May 10

The EIA Team would however very much like to meet with the Khoisan Council to discuss the comments submitted on the Draft EIR and as such a Key Focus Group meeting was held with the Gamtkwa Khoisan Council in Hankey on 27 August 2010.

FURTHER OBJECTION

Comments were submitted by the Gamtkwa Khoisan Council and not on behalf of the entire KhoiSan community in South Africa whose heritage will be affected by this project. We are well aware of your list of project correspondence but this is only applicable to the Gamtkwa KhoiSan Council and no other group or organization.

Response O:

It is virtually impossible for an environmental assessment practitioner to be aware of all directly and indirectly affected interested and affected parties at the commencement of an EIA process. The EIA regulations therefore require a combination of targeted stakeholder participation to those I&APs that are known (e.g. surrounding landowners, municipalities, councillors and organs of state) as well as

broad-spectrum participation (through press advertisements, and site notices) to try to ensure that all relevant stakeholders are identified. Throughout the EIA process since 2007, there have been numerous regional, local and national press advertisements to inform potentially affected parties of their right to participate in the EIA process.

As you indicate above, there is currently no official recognition of the KhoiSan community's representative structures in South Africa and these structures are therefore not generally known. Since Mr Reichert has been kept informed of the Nuclear-1 EIA process since 2007, he was in a position to provide GIBB with the details of these structures since this time. Consultation with these structures commenced as soon as Mr Reichert provided the EIA team with the contact details for these structures.

Comment P:

5. CONCLUSION

Our comment (9)

The HIA report mentions that:

Johan Binneman of Albany Museum, Grahamstown, has conducted by far the most detailed archaeological work in the area. He has completed surveys of the Cape St. Francis Dunefield, visited and sampled sites at Thyspunt on a number of occasions since the early 1980's as well as completed a preliminary survey commissioned by Eskom. Binneman (1996) has identified a suite of sites in the area that contain artefactual material characteristic of the full range of archaeological sites that are known to have occurred over the last 7 000 -10 000 years.

The report also indicates that he has been consulted as part of this HIA. His opinion with regard to the suitability of a Nuclear Station at this particular site as a specialist who "has conducted by far the most detailed archaeological work in the area" has however not been provided.

We have therefore approached him for his input in this regard and it will be attached to the comments by the Thyspunt Alliance.

Response P:

Your comment is noted and we welcome Dr Binneman's comments. Please disclose, as required by the EIA regulations, what Dr Binneman's direct personal, financial, business or other interest is in the matter, as we note that Dr Reichert and Dr Binneman have jointly established a heritage consultancy.

Comment Q:

Response (9)

Dr Binneman spent an evening with the heritage specialist team at Thyspunt. He provided useful information to the Heritage Impact Assessment practitioner and it was jointly agreed that the proposed Thyspunt site was highly sensitive, a finding that has been reflected in the HIA Report. Dr Lineman was the author of the first report prepared for Eskom (1987), which has been reviewed by the HIA practitioner. Dr Binneman concluded that the area was rich with archaeology and that extensive mitigation would be required if the proposed activity was to take place. The HIA specialist has used all information available to him as background to his study as well as to his site assessments.

FURTHER OBJECTION

Please see Dr Binneman's response to the above statement in annexure A of this submission. He has not formally been consulted as part of the HIA. Important information has therefore been excluded from both reports. The "valuable" information he shared with you at an informal social gathering cannot be regarded as formal consultation for the purpose of a project of this magnitude. His opinion as a specialist who: **has conducted by far the most detailed archaeological work in the area** about the suitability of this project at the Thyspunt site is as follows:

From an archaeological heritage perspective I can only state that the coastline from Oyster Bay to Cape St Francis and the adjacent dune pass system is a rich and unique archaeological and palaeontological landscape - only one of its kind in South Africa and therefore the entire area should be declared/protected as an Archaeological and Palaeontological Cultural Landscape. Archaeological resources are non-renewable and any large scale development will no doubt have a devastating effect on the archaeological and palaeontological resources. No matter what monitoring, precautions and mitigation processes, hundreds of sites will be damaged and destroyed and an important part of the KhoiSan pre-colonial history will be lost forever. It should be a no-go zone for development.

Response Q:

Dr Binneman has published widely on the result of his research and his published information is referenced in several places in the Heritage Impact Assessment (HIA). Additionally, as indicated in the, the Nuclear-1 HIA team consulted directly with Dr Binneman.

We thank you for Dr Binneman's comments.

Comment R:

6. MINUTES OF KEY STAKEHOLDER MEETINGS

We have indicated on several occasions that the minutes of the Key Stakeholder Meeting with us are incorrect and should be amended. We also requested that the minutes on your website titled: Final Minutes should be removed and replaced by the amended minutes. The request was ignored and the incorrect version remained on your website for a number of months. The Final Minutes included in your Revised Draft EIAR is still incorrect. We request that you consult the recording and have it amended. If you are of the opinion that your version is more accurate than the changes we requested, please provide us with a copy of the recording to enable us to prove the contrary.

Response R:

Your comments are noted and your correspondence regarding the content of the minutes were received and reviewed by GIBB. GIBB made changes to the minutes were it considered them to be appropriate and factually correct.

Comment S:

7. MITIGATION REPORT

At the St Francis Bay Public Meeting we received the following response when the validity of the Mitigation Report was questioned:

JMB responded that GIBB was not involved in the open day and mitigation workshop at UCT; it was not part of the EIA. Dr. Tim Hart arranged the workshop on his own accord, and therefore GIBB cannot comment on the proceeding of the workshop, but can say that we have discussed the curation of artefacts, should authorization be given. The SAHRA, Eskom, Dr. Hart and GIBB are well aware of the capacity of Albany Museum. Eskom has undertaken that should mitigation need to take place, Eskom would consider a facility to curate and store these artefacts.

We will appreciate it if you can indicate why the report was included in the EIA if it was not part of this process. The so called Mitigation Report starts off by providing all the reasons why development could not take place at the Thyspunt site but then concludes that mitigation will be possible despite all the constraints. We wish to place on record that we do not accept this report due to the following reasons:

- No consultations were conducted with the KhoiSan community or other I&AP's in the Eastern Cape about the proposed measures included in the report
- The Albany Museum is recognized as the Provincial Archaeological Data Resource Center but was not invited to the workshop to discuss the mitigation measures.
- Academics and students from the rest of the country were invited to contribute towards the report while key stakeholders in the province were ignored.

We will also appreciate it if you can indicate how you can be well aware of the **current** position of the Albany Museum if no consultation with them took place during the course of this process.

Response S:

The response with regards to the Albany Museum was to indicate that the EIA team is aware that the Albany Museum has no capacity to curate further heritage artefacts. This is one of the reasons (besides keeping the material as context-specific as possible after mitigation) why an on-site curation facility and museum is proposed for the Thyspunt site.

Further the previous director of the Albany Museum is a member of the ACO (Heritage Specialist) project team and is very familiar with the situation with respect to storage. The specialist has had conversations with the current museum archaeologist who has indicated the situation continues to be difficult and also discussed with her issues with respect to storage should mitigation be required.

Comment T:

8. CONCLUSION (REVISED DRAFT EIAR)

It is clear that the Heritage Issues have not received the necessary attention as part of the Revised Draft EIAR. SAHRA's decision not to allow the development is not even mentioned in the Executive Summary of the report. Instead a concerted effort has been made to create the impression that the SAHRA decision may change as a result of the test excavations and that certain mitigation issues must be resolved. This is not correct. The results of the test excavations will have no affect on the SAHRA decision and GIBB is well aware of this fact. The mitigation issues have also not been resolved as part in the Draft EIAR. We fully support SAHRA's decision and we continue to object against this project since the majority of our concerns have not been addressed.

The Thyspunt site is a cultural landscape in terms of the UNESCO definition and should be preserved for future generations. Nobody denies the power needs of the country, but this cannot be used as an argument when alternative sites are available. The site selection process was flawed and Thyspunt should not even have been considered further than the Scoping Phase. The fact that

ESKOM still regard Thyspunt as their preferred site is an insult to the KhoiSan people and a repeat of all the injustices we have suffered during the course of the history of this country.

Response T:

Your opinion with regards to SAHRA's decision is noted. The test excavations on the Thyspunt site do in fact substantially change the prediction of direct impacts for the Thyspunt site. This information will be provided to SAHRA for consideration. GIBB cannot respond to your opinion that new information from the test excavations will not affect the SAHRA decision.

All SAHRA correspondence, including letters in which it expresses opposition to the Thyspunt site, are included in Appendix B3 of the Revised Draft EIR Version 1. The executive summary cannot provide information on the comments of all statutory bodies.

As indicated in the Revised Draft EIR, a number of key decision factors were considered in the selection of a recommended site for Nuclear-1. Given the fact that the largest concentration of archaeological sites falls outside the recommended power station footprint, and the fact that the impact on the directly affected sites can be mitigated with available resources, the recommendation of Thyspunt as the preferred site for Nuclear-1 is still supported.

Comment U:

Annexure "A"

Comments on the archaeological heritage of the Thyspunt area

20 July 2010

Gamtkwa KhoiSan Council (Member of the Thyspunt Alliance)
P.O. Box 196
Hankey
6350

Dear Mr Reichert

Here are the comments on the following issues as requested by the Gamtkwa KhoiSan Council:

1. What is your experience of the Thyspunt area?
2. Provide a brief summary of the archaeology of the Thyspunt area.
3. To what extent were you consulted by the HIA specialist team?
4. In your opinion how suitable is the Thyspunt site for the development of a nuclear power station?

1. What is your experience of the Thyspunt area?

I visited the Thyspunt area for the first time during December 1981. Access to the dunes was open and easy from the gravel road east of Oyster Bay, and vehicles entered the dunes with ease and caused damage to sites. The first few hundred meters into the dunes were littered by archaeological remains – Middle and Later Stone Age stone tools and fossil bone. By 1992, when we recorded sites in the dune field, large areas and sites previously exposed were already covered by dune and alien vegetation. A few years later in 1996 these sites were also covered by vegetation. It is estimated that now in 2010 the dune system is half the size it has been in 1981 and one can only imagine how many sites have been covered since then.

Many visits followed between 1982 and 1996 and eventually the observations from the region comprised an important part of my D.Phil. These observations included large numbers of Later Stone Age shell middens, stone features and stone wall fish traps along the coast, Earlier, Middle and Later Stone Age lithic and fossil bone sites in the adjacent dune bypass system. The exceptional aspect of this region is the richness and diversity of archaeological and palaeontological sites. This large number and variety of sites provide excellent information to 'reconstruct' the early pre-colonial history of the Cape St Francis region and further afield. The information collected from the Thyspunt area provided valuable background for the identifying and classifying of a 'new' stone tool industry for the south-eastern Cape coast during the past 4 500 years.

Response U:

Your comment is noted.

Comment V:

2. Brief summary of the archaeology of the Thyspunt area

The Cape St Francis region, especially the Thyspunt and adjacent shifting dune bypass system, is among the richest and most exciting archaeological and palaeontological landscapes in the Eastern Cape and South Africa. Little is known about the first inhabitants of the region, but the large Earlier Stone Age handaxes found in the Thysbaai dune field indicate that people were already living in the area at least 1,4 million years ago. Not much information about the people who made the handaxes is available because no other associated remains have survived. The large Acheulian stone tools were replaced by smaller stone tools called the Middle Stone Age (MSA) flake and blades industries. MSA stone tools occur throughout the region and may date between 250 000 and 30 000 years old. There are some exceptionally large concentrations of MSA stone tools in the dunes east of Thyspunt.

The Thysbaai area is situated less than 20 km east from the world famous Middle Stone Age Klasies River Caves. The earliest skeletal remains of anatomically modern people (*Homo sapiens sapiens*) in the world were found there and date to approximately 110 000 years old. Well-preserved fossil bone of extinct mammals, are found throughout the shifting dune system, which indicate that it is highly possible that similar remains of anatomically modern people may be present in the region. Although humans were already anatomically modern by 110 000 years ago, they were not yet exhibiting 'modern behaviour' (symbolic expression) and only developed into culturally modern behaving humans between 80 000 and 70 000 years ago. This occurred during cultural phases known as the Still Bay and Howieson's Poort time periods/stone tool traditions/industries. The Howieson's Poort Industry is well represented at the Klasies River Caves and also in the dunes, a few hundred meters inland from Thyspunt. This site yielded well-preserved faunal remains and numerous hyaena coprolites. Among the faunal remains identified from this remarkable site were extinct giant buffalo, elephant, Cape buffalo, hippopotamus, eland, black wildebeest and Cape fur seal. The faunal remains and pollen extracted from the hyaena coprolites indicate that the environment during the Howieson's Poort time period was very different from the modern-day one and composed of open grasslands, large water bodies in the proximity of the site and dense close habitats in the river valleys.

Some 30/25 000 years ago the MSA gave way to the Later Stone Age (LSA) a time period marked by large scale technological changes. The period between 20 000 and 14 000 years ago experienced extremely cold climatic conditions (Last Glacial Maximum - the last ice age). The cold temperatures created favourable conditions for grassland expansion, which in turn gave rise to large herds of grazing animals. The mammal remains from archaeological sites in the wider region indicate that there were several large grazing animal species living on the grassland, for example giant buffalo, giant hartebeest and the Cape horse. After 14 000 years ago the climate started to

warm up again and caused the previously exposed grassland to disappear, causing the extinction of many grassland species including the giant buffalo, hartebeest and the Cape horse.

Shell middens are by far the most numerous archaeological features associated with the Later Stone Age (LSA). The majority of the middens are concentrated along the immediate coastline, but may be found as far as 5 km inland. Shell middens represent the living sites of prehistoric groups (San, KhoiKhoi, and KhoiSan people) who lived along the coast, either seasonally or permanently, and exploited the marine resources. Each midden contains its own unique composition of food and cultural remains. In general they are short-term occupation sites (a few days to a few weeks), or put differently, 'rubbish heaps' of food waste (mainly marine shell, some mammal, fish and reptile bone), mixed with cultural material (stone and bone tools, pottery and ornaments) and occasionally human remains. Several human burials were recorded from the coast and dune field.

The oldest open-air middens in the wider Thyspunt area date to approximately 6000 years old. These middens contain microlithic silcrete and quartz stone tools similar to those found in caves and rock shelters in the adjacent Cape mountains. The nearest source of silcrete and quartz is in the Cape mountains and it can therefore be speculated that these middens were the camp sites of small hunter-gatherer groups who visited the coast sporadically in search for food. Approximately 4500 years ago, a 'new' stone tool industry was introduced along the coast. This industry, called the Kabeljous Industry, was manufactured of local quartzite cobbles and 'replaced' the microlithic stone tools industries in caves and rock shelters by 3000 years ago. However, open-air middens with both industries are found side by side along the coast until 1800 years ago. This would indicate that inland groups still, or were allowed by the coastal inhabitants, to visit the coast. As the Kabeljous Industry contained no silcrete or quartz stone tools may indicate that the people who made these stone tools did not move beyond the coastal foreland and settled permanently along the coast.

Approximately 1800 years ago KhoiKhoi pastoralists occupied the Eastern Cape coast and introduced pottery and domesticated animals, such as sheep, goat and cattle to the region. One of the richest pastoralist sites (number of sheep remains) in South Africa and dating to 1 250 years old is situated in the dunes field east of Thyspunt. The KhoiKhoi sites can be divided into two types; those which contain pottery and domesticated animal remains (true pastoralists) and those which only contain pottery. Although these sites are scattered throughout the area, it would appear that sites with large numbers of sheep remains, or true pastoralist sites, are situated in the dune fields rather than along the immediate coastline. A few hundred years later the first Europeans rounded the Cape and altered the 'prehistoric' socio-economic landscape forever.

Response V:

Your comments are acknowledged with thanks and will be incorporated, where relevant, into the revised Heritage Impact Assessment.

Comment W:

3. To which extent were you consulted?

There was no 'formal' consultation, but there were some 'informal' comments made during one or two telephone conversations. I did pay a courtesy/social visit to the survey team in Oyster Bay on the evening of 8 July 2008 before their return to Cape Town, but little conversation regarding the survey took place.

Response W:

The comment is noted. This statement by Dr Binneman is not in dispute.

Comment X:

4. In your opinion how suitable is the Thyspunt site for development of a nuclear power station?

From an archaeological heritage perspective I can only state that the coastline from Oyster Bay to Cape St Francis and the adjacent dune pass system is a rich and unique archaeological and palaeontological landscape - only one of its kind in South Africa and therefore the entire area should be declared/protected as an Archaeological and Palaeontological Cultural Landscape. Archaeological resources are non-renewable and any large scale development will no doubt have a devastating effect on the archaeological and palaeontological resources. No matter what monitoring, precautions and mitigation processes, hundreds of sites will be damaged and destroyed and an important part of the KhoiSan pre-colonial history will be lost forever. It should be a no-go zone for development.

Dr Johan Binneman
Department of Archaeology
Albany Museum
Grahamstown

Response X:

Your opinion in this regard is noted.

The ACO team (Heritage Specialist) has seen in this area some of the finest archaeological sites it has ever recorded in 24 years of operation based on the quality of preservation, the cohesive set of landscape qualities and diversity over space and time. If one considers the place to be a cohesive cultural landscape, mitigation cannot be achieved. The law however only protects individual archaeological sites and does not apply to broad landscapes, although it does require landscape qualities to be assessed in an EIA. For a landscape to be protected as an entity in its own right, it has to be declared at either provincial or national level by the heritage authority. Therefore the law acts on individual archaeological sites as things stand at present. Given this situation the proposed activity could break the law if it damages archaeological sites, but will not be breaking the law if it changes the landscape. Enough is now known about the area to engage in the proposed activity in an area where archaeological sites do not exist, and permanently protect those that do exist. In terms of the landscape, which we consider to be very significant, this is lamentable but is the status-quo until such time a heritage authority defines the landscape and declares it. SAHRA has not indicated that it will do this as yet.

Yours faithfully
for GIBB (Pty) Ltd



The Nuclear-1 EIA Team