

# Resistance to marine phosphate mining in Namibia

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Namibia is facing the prospects of becoming the first country to allow marine phosphate mining. There is currently a request from Namibian Marine Phosphates (NMP), an 85-percent foreign-owned company (Omani investor) intent on mining for phosphates on the seabed, close to the major coastal fishing town of Walvis Bay, where it proposes to dump tonnes of waste on-land. Another applicant, Lev Leviev Namibia Phosphates, are hoping to also apply to set up a marine phosphate mining operation and a phosphoric acid plant at Luderitz.

NMP received an environmental clearance certificate from Namibia's Environmental Commissioner in 2017 despite many concerns raised by various activists and environmentalist over the years. However, their activism was mostly internet/email based. This approach was criticised by the proponents of phosphate mining as "faceless activism". Understandably, the activists were probably weary of intimidating lawsuits or other threatening tactics. At least one marine biologist came forward and explained why he could not publicly raise objections to marine phosphate mining as this would have threatened his livelihood and possibly even posed a risk to his life.

There was thus a need for public resistance to phosphate mining. The Economic and Social Justice Trust discussed and agreed on making this issue one of our current focus areas. One of our Trustees, Michael Gaweseb, went to the Environmental Commissioner's office to enquire about the state of affairs with the intention for the Trust to lodge an appeal against the proposed marine phosphate mining project. The officials basically presented a scenario that the appeal period as opened by the minister was running out and that Michael had to launch an appeal immediately to stay within the deadline. As he did not have a formal mandate from the Trust yet, he decided to launch the appeal in his personal capacity. Having had experience with the Walmart and the Namibia Competition Commission appeals processes some years back, Michael was aware that there may be risk of adverse lawsuits against him for simply lodging an appeal. He even received a "friendly warning" from a fishing sector activists who warned him that the company is well resourced and thus able to sue him in expensive litigation suits. The company being big and influential was part of Michael's reason for challenging them as resource utilisation in a democracy should not be subjected to corporate economic power or political influence. There were, however, many mountains to climb. First, Michael had to pay N\$/ZAR 1,000 to just launch the appeal. He was also required to read and understand the relevant law and regulations. There was no legal advice available at the time, but one requirement was that the appellant had to inform the proponents when lodging the appeal, providing them with reasons and even informing them when/where the appeal hearing would be held. This was difficult as it was in the hands of the Minister of Environment and Tourism to decide on such a hearing. In the haste to launch the appeal, Michael made a mistake to indicate that he would not need witnesses, which could have been a key weapon for an activist to use.

## **The court case**

After convening a hearing on Michael's appeal, the Minister of Environment and Tourism set aside the environmental clearance certificate. NMP decided to launch a legal challenge against the Minister's decision because it believed that it's right to be

heard was not respected. The court case was thus against the Minister of Environment and Tourism for setting aside the environmental clearance certificate and against Michael who had objected to the clearance certificate for the company. When Michael approached the Legal Assistance Centre (LAC) in Windhoek, they declined to be involved and advised him that he did not have standing to lodge the appeal. They also questioned why Michael got involved in the case as he did not have a “direct” interest.

Michael now faced a dilemma as he had no legal representation and faced possible financial ruin if he was sued by the company. He decided to proceed and was then given an ultimatum by the company’s lawyers. They said that they would merely cite him as an interested and affected party, but if he opposed the company’s legal action he would eventually have to pay if government lost the case. Michael then contacted the Law Society and asked for a lawyer to take up his case on a pro bono basis. This is very uncommon in Namibia but one lawyer, Uno Katjipuka, offered to represent him in court. Michael requested from his lawyer to ascertain from government if they would accept responsibility for the adverse legal fees in the event the case is lost. This is also another major consideration for an activist as the courts can be used to silence activist through the threat of financial ruin.

On [ DATE] the judge ruled that the Minister needed to give the company a fair hearing before taking a decision on the environmental clearance certificate and thus ordered that such a hearing be held. The judge also confirmed that Michael had indeed legal standing in the case and this is a ground-breaking contribution in terms of jurisprudence in relation to environmental matters. The judge thus disagreed with the Legal Assistance Centre’s view that Michael had no legal standing to lodge an appeal. The judge pointed out the ministers who are elected decide on these matters but that “any person” had the right to lodge a complaint as stated by law. This confirmed a previous ruling by the Judge President who found that where there is a specific law addressing an issue such as this it overrules the common law, thus the common law’s provision for direct and significant interest did not apply.

### **Ministerial hearings**

The Minister of Environment and Tourism then convened the second hearing in June 2018 and the environmental clearance certificate was halted once again. Even in that hearing, the company’s lawyers once again questioned Michael’s standing despite advice from the minister that this issue had been ruled on by the court. Michael was fully backed by the Economic and Social Justice trust as well as several other activists who provided moral and legal support and generated public interest in the case. The Minister’s decision to once again set the environmental clearance certificate aside to allow for further consultations is courageous and opens a window of opportunity to end the proposed marine phosphate project. Whether the politicians were attentive to the public opinion or guided by principal is another issue, but Namibians raised their voices against marine phosphate mining. Michael’s appeal was critical in helping Namibia to reverse a decision that would have led to irreversible ecological and economic damages as outlined below.

It is noteworthy to mention that some of Namibia’s most renowned environmental activists who proclaim to have been involved in the protection of the environment for over 30 years, have not only rendered support for the proposed marine phosphate

mining venture but they approved the project through the environmental impact assessment (EIA) study they conducted. This study was paid for by the company and produced exactly the kind of recommendations the company wanted to hear. The Environmental Commissioner then based his decision to grant the Environmental Clearance Certificate on the EIA. This seems a clear case of environmentalists succumbing to the economic power of transnational capital. It shows how easily some environmentalists are “persuaded” to use their credibility acquired over the years to endorse harmful practices.

The Minister’s ruling is merely a temporary victory and by mid-September 2018, objections against marine phosphate mining have to be submitted to Namibia’s Environmental Commissioner to ensure that this proposal is permanently cancelled.

### **What is at stake?**

Marine phosphate mining will have far-reaching and irreversible consequences which include the following:

#### ***HEALTH aspects***

- Marine phosphate mining is untested in the world and was turned down by respected fishing countries, e.g New Zealand
- Dredging of major quantities of marine phosphates will result in massive amounts of potentially harmful, radioactive solid and liquid waste, with no proper way proposed to dispose of it and prevent it blowing over nearby Walvis Bay and Luderitz.
- On broad global consensus, marine-origin phosphates have higher radio-activity content than land-based phosphates
- Leaks of radioactive material into seawater would impact on quality of fishery and marine products, affecting food-safety levels for human consumption. In Togo, waste produced from the phosphate mining has flowed into the sea, causing serious problems of contaminated seafood to coastal communities.
- Suspended heavy metals and other contaminants, nutrient imbalance, reduced oxygen, possibly release of methane and hydrogen sulphide reducing water quality from both mining (deep water) and processing (shallow water).
- Possibly unsafe radiation levels associated with the uranium content of marine phosphates, both at mining sites and from processing effluents.

#### ***ENVIRONMENTAL aspects:***

- Potential for marine ecosystem collapse from dredging is very real, based on scientific understanding of the sensitivity of deep sea marine ecosystems.
- 5.5 million tonnes of sediment per year would be removed from the seabed, causing significant alterations of the ecosystem in the immediate mining area
- Dredging physically removes seabed substrate and associated flora and fauna, with long-term, permanent and irreversible effect
- Material dredged is not replaced, so has a drastic impact on all communities, including altering species composition and effects on plankton and ichthyoplankton

- duration and intensity of suspended sediment generated by dredging would result in a permanent plume in the dredging area, with chronic effects ensuing after 3 days of exposure at a suspended sediment concentration of over 20mg/l, resulting in exposure of organisms to elevated TSS loads.
- Risk levels estimated for: fisheries 60%; for water column 54%; and for benthos 77%.
- The mine has admitted that, while it could try to accommodate the monk fishery, it is unable to propose any mitigation measures.
- Significant expected impact also on seabirds and mammals, in terms of altered behaviour and potential loss of prey and foraging habitat, of which:
  - *African Penguin* (occurring up to 100km from the coast) IUCN conservation status “Endangered” (revised 2010)
  - *Shy Albatross*: IUCN conservation status “Near Threatened” (revised 2010)
  - *Black-browed Albatross*: IUCN conservation status “Endangered” (revised 2010)
  - *Yellow-nosed Albatross*: IUCN conservation status “Endangered” (revised 2010)
- cumulative effects of more approaching phosphate mining activities cause further serious concern
- The global shift is away from relying on finite resources (especially those extracted from environmentally sensitive areas) to ensure world food security, towards sustainable and low impact production of food.

### ***FISHERIES aspects***

- Ecosystem change in microbial processes, bottom-living animals, food web and diet species of commercial fish.
- Suspended sediment cloud (plumes) potentially clogging of fish gills, poisoning, oxygen depletion and smothering of young fish in their breeding and nursery grounds.
- Major impact on fishing activities, as fishing grounds stretch across length of the coast.
- Effluent and waste from marine phosphate land based processing affecting all near-shore marine biota.
- Impacts likely to be on the entire marine ecosystem and fishing industry, namely on fish distribution, diversity and ecosystem interactions.
- Change in sea bottom habitat (as mining will be total removal of seabed to a sediment depth of 1-3 metres).
- Fish biodiversity likely to be severely impacted with potential loss of prey and foraging habitat in hake breeding areas in the immediate mining.
- Permanent destruction of specific breeding areas of major commercial fish species.
- Dredging would destroy monk fish breeding grounds over a long- term of 15 years.
- Impact of phosphate mining on pelagic spawning activity is unknown but of concern, while mining operations are likely to cause fish displacement and mortality.

## **LABOUR aspects**

- Phosphate mining will not contribute to ‘world food production’ but it is a purely commercial venture with insignificant potential benefits for the Namibian people.
- Marine phosphate mining would rely on massive dredgers, not people, to do most of the work, and many employees will require skills not currently available in Namibia.
- Fewer than 160 direct jobs for the people would be created.
- In contrast, the Namibian fishing industry *directly* employs some 16,800 people - many of them women, and nearly all are Namibians. *Indirect* jobs are around 60,000.
- The fishing industry earns some N\$7.03 billion per year in valuable foreign exchange for the country from seafood exports - few Namibians industry sectors can match these figures.
- International prices for mined minerals are widely known to be fluctuating and generally offer dubious investments, including the price for rock phosphate, which has only recently risen and then dropped back.
- If phosphate mining proves economically unfeasible, Namibia would be left with an ecologically unbalanced area which could not be restored.
- It would make no sense for a marine phosphate industry to be established with unproven prospects, threatening to replace the well-established fishing industry.

## **Legal Aspects**

Marine phosphate mining goes against the UN Goals for Sustainable Development, International Maritime Law and Namibia’s renowned Constitution and laws. It also goes against Namibia’s Vision 2030 which guides our future development as a nation. However, practical steps and monitoring mechanisms to guarantee this currently do not exist, pointing to the need to shelf or bury the prospect of phosphate mining in Namibia.

- Namibia has an internationally recognised commercial fishing industry, signatory to:
  - United Nations Convention on the Law of the Sea (UNCLOS) - obliges signatory countries to preserve and protect the marine environment;
  - Reykjavik Declaration - for an ecosystem- based fisheries management programme;
  - Southern African Development Community (SADC) Fisheries Protocol - accepted as customary international law
  - Food and Agriculture (FAO) Code of Conduct for Responsible Fisheries to follow the “Precautionary Approach.”
- International Guidelines for Marine Mining (adopted in 2001 and reviewed Sept 2011) obliges signatory countries to preserve and protect the marine environment. UNCLOS was promulgated through the MARPOL agreement, to which Namibia is a signatory.

**Local legislation** abounds with the need to preserve the fragile ecosystem of Namibia:

- The Constitution of Namibia, Article 95.1, requires government to actively promote the welfare of the people, stating that the Government of Namibia is obligated to: *“..maintain ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future.”*
- Namibia’s Environmental Act obliges use of the Precautionary Approach where insufficient data exists on biogeochemical properties and plume characteristics. It reads, *“In the case of newly proposed projects, in the absence of scientific certainty that no unjustifiable environmental harm will be caused, the proponent is to err on the side of caution”*, i.e. in favour of the environment.
- Namibia’s Marine Resources Act of 2000 states that
  - *Section 52(3)(e)* “Any person who discharges in or allows to enter or permits to be discharged in Namibian waters anything which is or may be injurious to marine resources or which may disturb or change the ecological balance in any area of the sea, or which may detrimentally affect the marketability of marine resources, or which may hinder their harvesting, shall be guilty of an offence and liable on conviction to a fine not exceeding N\$ 500 000.”
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  - *Section 52(3)(f)* “Any person who kills or disables any marine animal by means of any explosive, poison or noxious substance, or by means of a firearm except as may be prescribed, shall be guilty of an offence and liable on conviction to a fine not exceeding N\$ 500 000.”

### **The next steps**

The Economic and Social Justice Trust (ESJT) with other organisations and individuals has initiated an appeal to Namibians to object to marine phosphate mining and to make their views known to the Ministry of Environment and Tourism. Appeals to have the environmental clearance certificate for marine phosphate mining permanently set aside were launched with the Environmental Commissioner and the Minister of Environment and Tourism in September 2018. In addition, the ESJT also initiated a petition which was signed by hundreds of delegates at the SADC People’s Summit in Windhoek on 16-17 August 2018. The petition is presented below.

