



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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By email: ashley.labuschagne@angloamerican.com

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Dear Mr Cutifani

OPEN LETTER - ANGLO AMERICAN'S PLANS TO SHED COAL ASSETS IN SOUTH AFRICA

The Centre for Environmental Rights (CER) is a non-profit organisation and law clinic that helps communities defend their right to a healthy environment. We do this by advocating and litigating for transparency, accountability and compliance with environmental laws.

1. In 2015, the CER conducted a baseline assessment of 20 listed South African companies with significant environmental impacts that have regularly appeared on the JSE's Socially Responsible Investment Index (SRI Index). The results of our assessment were published in September last year. Our report, entitled *Full Disclosure: The Truth about Corporate Environmental Compliance in South Africa*, revealed that over the period assessed (2008-2014), many of South Africa's biggest listed companies committed serious breaches of environmental laws and that the level of disclosure of these breaches to shareholders was in most cases extremely poor.
2. Anglo American was one of the companies which we assessed, and we raised the concern that Anglo American provides surprisingly little data on environmental non-compliances and incidents to its shareholders. We also noted that what little information is provided raises serious concerns, in particular in relation to unauthorised water discharges and other water contamination.
3. The CER notes the dramatic restructuring plans announced by Anglo American on Tuesday, 16 February 2016, in particular Anglo American's plans to sell off its coal and iron ore assets in South Africa and focus its efforts on its diamond, platinum and copper businesses.¹
4. There is a trend in South Africa of large mining companies selling their mines, usually with significant environmental liabilities, to smaller mining companies after most of the reserve has been exhausted. The trend sees these smaller companies going insolvent shortly after the sale - before any of the prescribed rehabilitation

¹ <http://www.angloamerican.com/~media/Files/A/Anglo-American-PLC-V2/press-release/releases/2016pr/strengthened-balance-sheet-160216.pdf>

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of environmental damage has taken place. Liability for pollution, ecological degradation, the pumping and treatment of extraneous water, and latent and residual impacts, as well as the obligation to apply for a closure certificate, vests in the last holder of the right.² The seller, who held and benefited from the mining right, avoids liability for rehabilitation on the grounds that it was not the last holder of the right.

5. Two disastrous cases serve as stark examples: Harmony Gold's sale of its operations in the North West to Pamodzi Gold Orkney (Pty) Ltd³ is still a matter of contention, despite there being a Supreme Court of Appeal judgment confirming that Harmony Gold could not legitimately walk away from historic pollution. Despite the Supreme Court of Appeal's ruling, and the Constitutional Court's refusal to entertain the matter further, Harmony Gold still denies liability for addressing the water pollution associated with these facilities on the basis that liability lies with the new owner (which was liquidated).⁴ This notwithstanding the fact that Harmony Gold enjoyed many years of profitable operations during which the significant and ongoing environmental damage was sustained. Similarly, the site of the abandoned Blyvooruitzicht mine outside Carletonville in western Gauteng remains unrehabilitated, with DRDGold denying liability following the sale of its shares to Village Main Reef.⁵ Again, DRDGold enjoyed years of profitable operations during which the environmental damage was sustained.
6. The transfer of a mining right requires consent from the Minister of Mineral Resources.⁶ Since the act of giving consent for such a transfer clearly constitutes administrative action, public participation is, as a matter of law, required to be undertaken in these transactions in accordance with the Promotion of Administrative Justice Act 3 of 2000 (PAJA). While this requirement already exists, historically it has not been implemented by transferring mining companies nor enforced by the Department of Mineral Resources. The CER holds the firm view that this non-compliance facilitates the kind of environmental disasters seen in the Pamodzi and Blyvooruitzicht cases.
7. Given this trend, the CER calls for transparency, as publicly committed to by Anglo American,⁷ and public participation in the transfer of any mining rights by Anglo American. We call specifically on the management of Anglo American to act responsibly, and in the interests of the environment and the South African public, as it readies itself to dispose of its coal and iron ore assets.
8. You will no doubt be aware of the litigation instituted by Conservation South Africa against the Department of Mineral Resources (DMR) which involved your subsidiary, De Beers Consolidated Mines Limited. This litigation was instituted following the DMR's refusal to make available key environmental records pertaining to the sale of Namaqualand Mines by De Beers to TransHex Limited. This sale involved a reduction of the financial provision funding for environmental rehabilitation at Namaqualand Mines, the details of which should have been publicly disclosed. De Beers opposed the release of this information and used a number of tactics to deliberately delay the matter, allowing the sale to be finalised without public scrutiny. While De Beers ultimately withdrew its opposition after the sale and tendered to pay Conservation South Africa's legal costs, and even though the High Court ordered the DMR to release the records, this cynical opposition to transparency is of immense concern to the CER, our partners and stakeholders, and the broader South African

² T Humby, *Facilitating dereliction? How the South African legal regulatory framework enables mining companies to circumvent closure duties*, available at:

http://www.academia.edu/8621292/Facilitating_dereliction_How_the_South_African_regulatory_framework_enables_mining_companies_to_circumvent_closure_duties.

³ <http://www.iol.co.za/business/companies/harmony-gold-ordered-to-pay-for-pollution-1617427>.

⁴ See, in this regard, the statements made by Harmony Gold denying its liability in its annual reports, as quoted in the CER's report, *Full Disclosure: The Truth about Corporate Environmental Compliance in South Africa* - <http://cer.org.za/full-disclosure/company/harmony-gold-mining-company-limited?disclosure>.

⁵ <http://mg.co.za/article/2013-11-14-defunct-mine-gets-up-towns-nose/>.

⁶ Section 11 of the Mineral and Petroleum Resources Development Act, 2002.

⁷ <http://www.miningmx.com/page/news/energy/1657200-Anglo-neutral-on-bidders-for-SA-coal-mines#.VtBMGfI97IV>.

community. It would be disappointing in the extreme to see Anglo American fail to allow public scrutiny of its divestment in South Africa.

9. Good corporate governance and the prescripts of PAJA require that Anglo American conducts public participation processes in respect of the sale of these assets. Necessarily, this includes public participation in respect of the transfer of its environmental liability. All documents relating to these sales and transfers (and/or amendments to the Environmental Management Programmes governing these mines) must be made publicly available.
10. With 6000 derelict and ownerless mines in South Africa - a legacy problem which is costing taxpayers millions annually - we also call for careful assessment and public scrutiny of the financial provision required to be made to enable the transfer of such mining rights and environmental liability.
11. We expect Anglo American to operate responsibly as it disposes of its coal and iron ore assets in South Africa, by ensuring that the environmental liabilities of these operations are not in due course added to the burden of the 6000 derelict and ownerless mines already borne by the South African public.
12. We therefore call on Anglo American to inform us of the company's plans for public participation in relation to the various sales forming part of its restructuring and divestment in South African coal and iron ore.
13. We furthermore call on Anglo American to undertake to publish, on its website, and to make available, for inspection and copying, to anyone on request:
 - 13.1 the mining rights which it intends to transfer as part of this restructuring process;
 - 13.2 the Environmental Management Programmes governing these operations;
 - 13.3 its assessments of its environmental liability in respect of each operation to be sold, including financial provision for rehabilitation;
 - 13.4 the full applications lodged with the DMR for approval of the transfer of the various mining rights;
 - 13.5 the full applications lodged with the DMR for approval of the transfer and/or amendment of the respective environmental management programmes, and/or environmental authorisations together with the proposed financial provision for rehabilitation and environmental liability.

We look forward to receiving your reply.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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