

Parliament Monitoring Group  
Portfolio Committee  
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## Group Compliance



Your reference

Our Reference  
D Parsons

Date  
16 November 2007

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Dear Madam

### COMMENT ON THE NATIONAL ENVIRONMENTAL MANAGEMENT: WASTE BILL (B39 OF 2007)

#### 1. INTRODUCTION

- 1.1 The Standard Bank of South Africa Limited ("**the Bank**") would like to thank the Portfolio Committee for the opportunity to submit comments on the National Environmental Management: Waste Bill (B39 of 2007) ("**the Bill**"). Although the comments that follow are of importance to the Bank, we believe they are also of relevance to the financial services sector in South Africa as a whole, and we therefore trust that consideration will be given to them by the Committee.
  - 1.2 The Bank utilised the opportunity afforded to it to submit comments on an earlier version of the Bill, that gazetted on 12 January 2007 ("**earlier version**"), to the Department of Environmental Affairs and Tourism ("**the department**"). We annex as Annexure "A" our letter to the department, dated 16 May 2007.
  - 1.3 Whilst we appreciate that the current version of the Bill has been amended, for the reasons that follow, we remain concerned that the contaminated land provisions will have an unreasonable impact on banking practice in South Africa. We have therefore limited our comments to this aspect of the Bill.
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## 2. COMMENTS ON THE CHAPTER 4: PART 8: CONTAMINATED LAND

- 2.1 Annexure "A" sets out at Clauses 3 and 4 the areas of South African banking practice which will be affected by the contaminated land provisions contained in the earlier version of the Bill, and further sets out the potential adverse implications that will accrue as a result. Notwithstanding the amendments to Part 8 of Chapter 4 of the Bill, the implications we raised for banking practice contained in the current version of the Bill remain.
- 2.2 The comments contained in Annexure "A" have largely been ignored by the department. We therefore repeat the concerns expressed in our submission which may be summarised as follows:
- 2.2.1 Two key and fundamental banking practice areas will be adversely affected by the contaminated land provisions. Firstly foreclosure proceedings which are necessary for the bank to attach and sell fixed property over which it holds security, in order to recover unpaid loans, will be affected. Secondly, the provisions will prejudice banks when exercising their "step-in" or similar rights contained in lending agreements with customers, where the latter becomes insolvent, or otherwise fail to meet their loan repayment obligations. In these instances, the bank is often eligible to take control of the property and/or the business of its customer, either in an effort to sell the business or to continue trading it on behalf of its customer until such time as the outstanding loan obligations have been recovered by the bank.
- 2.2.2 The provisions of Part 8 of Chapter 4 of the Bill will restrict and potentially prevent the bank from perfecting its security in foreclosure proceedings through the sale of the property to a third party. This will severely prejudice banks and significantly diminish the value of the security it holds over fixed assets.
- 2.2.3 A second implication is that where it is necessary for the bank during foreclosure proceedings to take transfer of ownership of its customer's property, (even if such transfer will be for a short or temporary period whilst a third party buyer is sought), this will trigger the obligations firstly to report any contamination identified to the authorities as the owner of the land, and will secondly require the bank to take any remediation measures necessary in order to address the contamination. This we point out will become a strict liability obligation, notwithstanding that the bank would not have contributed to the contamination in any respect.

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- 2.2.4 A third implication is that Part 8 of Chapter 4 is retrospective (Section 35), and consequently the bank may already hold security over fixed assets which are contaminated, thus prejudicing the bank, and potentially severely diminishing the value of such security.
- 2.2.5 A fourth implication arises where the bank exercises its curatorship rights, and steps in or otherwise takes operational control of its customer's business, in which instances it will become liable, seemingly on a strict liability basis, to remediate contamination of the land in terms of any remediation order issued under Section 38(2).
- 2.3 The only concern raised in Annexure "A" which appears to have been accepted by the department is the concern that contaminated land could not be transferred without the permission of the Minister for Environmental Affairs and Tourism. The latest version of the Bill now stipulates that *"no person may transfer contaminated land ... without **notifying** the Minister or MEC and complying with any conditions that are specified by the Minister or MEC, as the case may be"* (Section 40(1)) (our emphasis).

However, a careful reading of the new section makes it clear that the amendment does not go far enough. By indicating that remediation sites can not be transferred without firstly complying with conditions specified by the Minister, this means that at a practical level, the permission of the Minister will still be required before contaminated land may be transferred, as the transfer will presumably be prevented if the conditions are not adhered to.

- 2.4 In addition, the amendments contained in the latest version of the Bill raise new concerns which, in our opinion, create unduly onerous obligations for the financial services sector. These are as follows:
- 2.4.1 The Bill has now introduced a positive obligation for owners of land and for persons who undertake activities which have caused the land to be significantly contaminated, to notify the Minister of such contamination when that person becomes aware, or ought to have become aware, of it (Section 36(5)).

Under the earlier version of the Bill, the onus to identify contaminated land rested with the national and provincial Ministers. The latest wording now places an obligation on the Bank where it is the owner of land or where it undertook activities on the land, to bring contamination to the attention of the Minister.

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The Bank owns or occupies numerous parcels of land throughout South Africa. Our concern with Section 36(5) is that the term "significantly contaminated" is not defined in the Bill. It is therefore unclear at what point contamination will be deemed to be "significant", and will be therefore require compliance with the reporting obligation.

Having clarity on this issue is critical, given the number of parcels of land owned or occupied by the bank throughout South Africa.

- 2.4.2 A subtle but potentially prejudicial amendment has been introduced to the latest version of the Bill with respect to the transfer of contaminated land (Section 40). In the earlier version of the Bill, land determined to be contaminated was then declared a remediation site. In the current version, it appears that contaminated land will no longer be declared a remediation site, but will merely be subjected to a remediation order (Section 38(2) and Section 39(1)). However, now not only can declared remediation sites not be transferred, but all contaminated land is subject to the limitation of transfer provisions.

As we understand it, this will therefore mean that land which is contaminated but does not require immediate or urgent remediation, (in those instances where the level of contamination or the risks associated with it are not deemed to be significant), will nevertheless still be subject to the limitation on transfer provisions.

Although we have a general concern with the implications for banking practices of the proposed limitation on the transfer of contaminated land, as expressed in Clause 2 above, we in particular find it unreasonable that land which is determined to pose no immediate threat or risk of harm, can not be transferred without firstly complying with ministerial specifications.

- 2.4.3 In a similar vein, the latest version of the Bill now stipulates that the contaminated land register (Section 41) must now contain details of "investigation areas" and not "remediation sites".

In our view, this is an unreasonable extension, as land which has as yet not been confirmed to be contaminated will be subject to the restrictions associated with it being listed in the contaminated land register. Once again, this will limit the Bank's ability to transfer land in foreclosure proceedings and other instances where it is necessary for the Bank to perfect its security over fixed assets.

- 2.5 In summary, whilst the Bank appreciates the need to address, manage and prevent contaminated land issues, the drafters of the Bill do not appear to have given any thought to the ramifications which the proposed contaminated land provisions will have for the financial services sector.

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Should these provisions be implemented as proposed the banks, who will in many instances have had nothing to do with contamination which may occur on land it wishes to exercise its rights over, will become the party responsible for addressing the issue. Depending on the nature and extent of the contamination, this liability could run into millions of rands in each instance. This would cause bank's to rethink their lending arrangements. Given that fixed assets are in many instances the only satisfactory form of security which banks can hold, this may result in a reduction in instances where banks will lend to clients, which will in turn have an adverse impact on the economy. We refer you to Clause 4.6 for our further submissions on the consequences of the provisions of Part 8 of Chapter 4 of the Bill.

We trust there is an appropriate compromise which will allow the department to satisfactorily regulate contaminated land, whilst at the same time affording financial institutions reasonable protection in appropriate circumstances, to continue traditional lending practices. In our view, such a compromise is possible as recommended in Annexure "A", and as reinforced below.

### **3. RECOMMENDED AMENDMENTS TO PART 8 OF CHAPTER 4 OF THE WASTE BILL**

- 3.1 We emphasise that the Bank is not proposing a blanket immunity for financial institutions with respect to the contaminated land provisions of the Bill. Nor are we suggesting that banks have no role in terms of ensuring that they or their customers adopt appropriate environmental management measures.
- 3.2 Where banks own and operate from land in the same manner as any other person or entity, and this results in contamination envisaged under this portion of the Bill, then it is acknowledged that the bank must be treated in the same manner as any other person, and would become bound to comply with the contaminated land provisions.
- 3.3 However, in those instances where the bank forecloses on land over which it holds security, alternatively takes control of the business of its customer, in all instances solely for the purposes of perfecting its security or otherwise securing its rights to recover loan amounts, then these are, we respectfully submit, essential instances where banks should be distinguished from other persons under the provisions of Part 8 of Chapter 4 of the Bill.

We highlighted in Clause 5 of Annexure "A" how several foreign jurisdictions have recognised the need to afford banks an appropriate level of protection from certain of the environmental statutory obligations for addressing contamination. We pointed out that in the United States, this step to ameliorate the responsibility of banks was only recognised retrospectively, and after their judicial system had held a number of their banks liable for addressing contamination caused by their

customers. We respectfully submit that South African banks will be left in precisely the same position as American banks found themselves in prior to the introduction in that country of the Asset Conservation, Lender Liability and Deposit Insurance Protection Act in 1996. It would be unfortunate if our legislature, with the benefit of hindsight of knowing the unreasonable consequences for banks in other jurisdictions as a result of similar contaminated land provisions, ignored the opportunity whilst it is finalising the Bill, to incorporate reasonable provisions which will provide protection to South African banks in appropriate circumstances. If banks in a modern economy such as that in the United States were severely affected through the American legislative system learning the hard way of the consequences of not affording banks a level of protection in these circumstances, then we respectfully submit that an emerging economy such as ours can ill afford to wait until our concerns have manifested, before any response is taken by government.

3.4 Recommended amendments to the current wording of Part 8 of Chapter 4 are set out in Clause 6.3 of Annexure "A". In light of the amendments made to the current version of the Bill, we recommend the following changes to our proposed wording:

3.4.1 By amending Section 40 with the insertion of a new Section 40(2), (and renumbering the current Section 40(2) as Section 40(3)):

*"Provided that the obligation to notify the Minister or MEC and complying with any conditions that are specified by the Minister or MEC, as the case may be, will not be applicable in those instances where a secured creditor seeks to transfer the contaminated land for the purposes of foreclosure proceedings: Provided such transfer takes place expeditiously, and solely for the purposes of recovering any outstanding loan amount".*

3.4.2 By amending Section 39 of the Bill by the insertion of a new Section 38(3), (and the renumbering of the current Sections 38(3), (4) and (5) accordingly):

*"Provided that a remediation order issued in terms of subsection (2) above, may not be issued to a secured creditor who has acquired ownership or control of the land solely for the purposes of foreclosure proceedings, but only where the transfer of the contaminated land from the secured creditor takes place expeditiously, and ownership or possession is held solely for the purposes of recovering any outstanding loan amounts, and provided further that the secured creditor has not contributed to, nor otherwise exacerbated the contamination whilst the contaminated land was in its possession or control".*

4. CONCLUSION

4.1 We thank you once again for the opportunity to make this submission. We trust you will recognise the seriousness of the concern we have raised, and kindly request that you assist the Bank by ensuring that appropriate steps are taken to mitigate the prejudicial situation which will arise should the Bill be promulgated in its current form.

Yours sincerely,

Dorea Parsons  
Senior Manager, Safety, Health and Environmental Risk  
Group Compliance

STANDARD BANK OF SOUTH AFRICA LIMITED

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16 May 2007

Dear Ms Mzusi

**COMMENT ON THE NATIONAL ENVIRONMENTAL MANAGEMENT: WASTE  
MANAGEMENT BILL (GG29497 OF 12 JANUARY 2007)**

**1. INTRODUCTION**

- 1.1 The Standard Bank of South Africa Limited ("**the bank**") would like to thank the Department of Environmental Affairs and Tourism ("**the department**") for the opportunity to submit comments on the National Environmental Management: Waste Management Bill ("**the Bill**")<sup>1</sup>. We believe our comments that follow are of importance not only to the bank, but to the financial services sector in South Africa as a whole, and we therefore trust that due consideration will be given to them before the Bill is finalised.

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The Standard Bank of South Africa Limited (Reg. No. 1962/00738/06) Authorised Financial Services Provider

Directors: DE Cooper (Chairman) JH Maree\* (Chief Executive) DDB Band E Bradley T Evans TS Gcabashe DA Hawton SE Jonath<sup>†</sup> Sir Paul Judge<sup>‡</sup> SJ Macozoma RP Menell Adv KD Moroka  
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Secretary: L Wulshohn \*Executive Directors <sup>†</sup>British <sup>‡</sup>Ghanaian 01/02/2007

<sup>1</sup> GNR1832, GG29487 of 12 January 2007.



1.2 We congratulate the department on this step it has taken to develop legislation which will play an important role in contributing to the protection of our environment for current and future generations.

1.3 Whilst the Bill will have relevance to bank's operations in a number of respects, we intend limiting our comment to one specific provision, given its potential ramifications for banking practice in South Africa.

## 2. **CHAPTER 3: PART 8: CONTAMINATED LAND**

2.1 Part 8 of Chapter 3 of the Bill intends regulating "contaminated land". The bank fully supports the need to prevent and address contamination of land in South Africa. However, the provisions of Part 8, as presently drafted, will have significant implications for the bank (and for the financial services sector generally), insofar as we hold fixed property as security for some of the lending transactions which we have entered into and may in future enter into with our customers.

## 3. **AREAS OF BANKING PRACTICE WHICH WILL BE AFFECTED BY THE CONTAMINATED LAND PROVISIONS**

3.1 It is commonly known that when banks enter into lending arrangements with customers, they frequently require security to be provided for the repayment of such loans. Very often this security will be provided in the form of a bond registered against the title deeds of fixed property which the borrower either holds or has access to. This elevates the status of the bank to that of a secured creditor. Where loans cannot be repaid by customers, and where no other option to recover an outstanding amount is available, banks will generally enter into foreclosure proceedings in terms of which they seek a court order to allow them to take control of, attach and sell the fixed property over which they hold security. Once a court order is granted, the property is either sold directly to a third party, alternatively the bank will acquire ownership of it itself, and thereafter sell it to a third party.

*contributing to, or otherwise enhancing the contamination once transfer has taken place".*

- 6.3.3 We further recommend that the term "expeditiously" be defined in Section 1 of the Bill as:

*"'Expeditiously' as referred to in Section 46(2) of the Act, means that transfer must take place from the secured creditor to a third party within twelve months from the date on which transfer to the secured creditor is completed".*

- 6.4 There are also several practical implications of this provision which need to be clarified either in the Bill itself or in regulations to it. These include:

6.4.1 Will the deeds office be required to endorse the title deeds for land declared to be contaminated, to the effect that the affected property cannot be transferred without DEAT's permission?

6.4.2 What will satisfy the Minister that a person wanting to take transfer of contaminated property will be able to undertake the remediation required? Will this include the provision of a financial guarantee?

**SIGNED AND DATED ON THIS 16th DAY OF MAY 2007**

Dorea Parsons  
Senior Manager, Safety, Health and Environmental Risk  
Group Compliance

**FOR AND ON BEHALF OF  
THE STANDARD BANK OF SOUTH AFRICA LIMITED**