TEMPLATE: Comments on Draft National Legislation			
Name of Department:	Department of Environmental Affairs and Development Planning, Western Cape		
Matter: *(Title of Legislation)*	MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL, 2013		
Contact Person:	Anique Rossouw	Due Date for comments:	
Email:	Anique.rossouw@westerncape.gov.za	Date of Submission	
Telephone:	021 483 2900	Legal Services Ref. No.:	
Submitted To:			

COMMENTS:

Clause *(Indicate clause/ regulation Number)*	**Comment** *(State why the clause/regulation or proposed amendment is not supported or what the problem is with the provision)*	**Suggestion** *(Suggested deletion/amendment/ addition)*
General comment	One of the objects of the Mineral and Petroleum Resources Development Amendment Act, 49 of 2008 is to make the Minister of Mineral Resources the competent authority for the implementing of environmental matters in terms of the National Environmental Management Act, 107 of 1998 (NEMA). The National Environmental Management Amendment Act 62 of 2008 provided a mechanism whereby any provision relating to prospecting, mining, exploration and production related activities would come into operation 18 months after the commencement of the Mineral and Petroleum Resources Development Amendment Act, 49 of 2008. After this initial 18 month period, the provisions allowed for the competency to issue environmental authorisations in respect of prospecting, mining, exploration and production related activities to vest with the Minister of Mineral Resources for a limited period of 18 months. The intention was that the Minister of Mineral Resources would only be a competent authority	

	in terms of NEMA as part of this transitional 18 month period and that the decision-making competency to issue environmental authorisations in respect of mining, prospecting, exploration and production related activities will ultimately shift back to, and remain, with the environmental authorities. The National Environmental Management Laws Amendment Bill, 2013 (published in Government Gazette No. 36765 Notice No. 854) however now seeks to ensure that the competency to grant environmental authorisations in respect of the so-called listed mining activities remains with the Minister of Mineral Resources and does not revert back to the environmental authorities, as was intended and agreed. This revoking of the third phase where the decision-making competency to issue environmental authorisations in respect of mining, prospecting, exploration and production related activities, should revert back to the environmental authorities is not supported for the following reasons - The definition of 'sustainable development' in the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA) currently reads "*means the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that mineral and petroleum resources development serves present and future generations*". The definition of 'sustainable development' in the National Environmental Management Act, 107 of 1998 (NEMA) currently reads "*means the integration of social, economic and environmental factors into planning,*	

	implementation and decision-making so as to ensure that development serves present and future generations". The NEMA calls for sustainable development, the Mineral Petroleum Resources Development Act, 2002 (MPRDA) calls for sustainable mineral development ("means the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that mineral and petroleum resources development serves present and future generations"). As such, the objects of the MPRDA, read with the definition of sustainable development contained in the MPRDA, the Minister will not be able to, in an unbiased and objective manner administer the NEMA, which calls for sustainable development (i.e. interpreted broader than in the MPRDA) encompassing the most sustainable option as opposed to the MPRDA's call for the most sustainable mining option. Fundamentally the function and mandate of Department of Mineral Resources differs substantially from that of Department of Environmental Affairs insofar as it relates to sustainability (which is based on the legal definition of sustainability/sustainable development as contained in the different statutes). It is not feasible that the Department of Mineral Resources, with their objective being to promote mining, should be the competent authority to grant authorisations in respect of environmental activities, when its principle objective is in itself destructive to the environment. The Western Cape firmly supports the requirement for improved coordination and integration regulatory processes, procedures and decision	

	making. However, a call for integration and coordination does not call for a transfer of mandates. We regard the transfer of environmental decision making mandates as an inappropriate abdication of a constitutional mandate.	
Clause 1(p) S1 Definition: "mine"	The definition of '**mine**' includes "*...any other place where a mineral resources is being extracted, including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or extraction or processing of such mineral resource...*" The use of "access roads" in the definition of "mine" is very wide. What about existing access roads that are also used by other users (for example main roads). This will have unintended consequences for other users. Certain roads would impact on many other users and sectors and the impacts and considerations would be wider than simply mining related matters, with other authorities also having to regulate the construction and use of such roads. The phrase "intended to be used" is also too wide. It is submitted that this should refer to "*intended to be used as per an approved mine plan*" and not all future possible (yet unknown) intended uses.	Access roads should be limited to access roads constructed specifically to access a mine. Amend "intended to be used" to include the words "as per an approved mine plan".
Clause 1(q) S1 Definition: "mining area"	The "**mining area**" is proposed to be defined as: "*(a) in relation to a mining right, <u>reclamation permit</u> or a mining permit, means the area **[on which the extraction of any mineral has been authorised and]** for which that right or permit is granted;* *(b) in relation to any environmental, health, social and labour matter and any residual, latent*	It is submitted that the proposed definition of 'mining area' is too wide. It is recommended that the definition be limited to include the area physically to be mined as well as infrastructure on or in that area which are

	or other impact thereto, ***[including]*** *includes—* *(i)* ***any [land or]*** *surface of land within, adjacent or non-adjacent to the area as contemplated in* ***[subsection (i)]*** *paragraph (a) but upon which related or incidental operations are being undertaken and impacting on the environment;* *(ii) any surface of land on which such* ***[road, railway line, power line, pipe line, cableway or conveyor belt]*** *mining infrastructure is located, under the control of the holder of such mining right, reclamation permit or mining permit and which such holder is entitled to use in connection with the operations performed or to be performed under such right or permit; and* *(iii) all buildings, structures, machinery, residue or other stockpiles, or objects situated on or in the area as contemplated in* ***[subsections (ii)(a) and (ii)(b)]*** *subparagraphs (i) and (ii).''*	exclusively used for the purpose of mining on the land in question.
Clause 11 Section 16(4)(a) and (b)	If a Regional Manager accepts an application such Regional Manager is obliged to advise an applicant to apply for an environmental authorisation in terms of Chapter 5 of NEMA and to consult with and include the results of the consultation with "*..the landowner, lawful occupier and* ***[any interested and]*** *an affected party..*" in the relevant environmental reports. The proposed deletion of "*any interested and*" is inconsistent with the principles of NEMA and limits the scope of public participation. The environmental authorisation process in terms of NEMA allows for all interested and affected parties to be consulted during an environmental authorisation process and the omission of such persons from this amendment is not supported.	

	Furthermore the exclusion of those interested parties may not withstand constitutional scrutiny as everyone has the right to the protection of the environment for all future generations and it is not only those affected by an activity that should be entitled to comment thereon.	
Clause 15(b) S20(3)	The proposed insertion of section 20(3) reads as follows: "*Any person who applies for permission to remove and dispose of minerals in terms of this section must obtain an environmental authorisation in terms of the National Environmental Management Act, 1998 if he has not done so in terms of section 16(4)(c) of this Act.*" Section 16(4)(c) reads: "*If the Regional Manager accepts the application, the Regional Manager must, within* ***[14 days]*** *the prescribed period from the date of acceptance, notify the applicant in writing –* *(c) to apply for a license for use of water in terms of applicable legislation*" The National Environmental Management Act, 1998 regulates the environmental authorisation process and the National Water Act, 36 of 1998 regulates the requirement and process for obtaining a water use license. The reference to section 16(4)(c) as used in section 20(3) therefore seems to be incorrect.	
Clause 17(a) S22(1)	The omission of the words "*must simultaneously apply for an environmental authorisation*" is not supported. The current section requires a person who intends to apply for a mining right to simultaneously apply for an environmental authorisation and not merely to require the Regional Manager to notify them to apply. The onus to apply for the required environmental	

	authorisation is on the applicant. An applicant applying for a right in terms of the MPRDA, must, if relevant, apply for environmental authorisation in terms of NEMA and not only when he is informed to do so. The motive for this deletion is not understood or supported.	
Clause 19(c) S24(3)	Section 24(3)(a) propose the following: "*terms and conditions of the mining right and is not in contravention of* ***[any relevant provision of]*** *this Act* ***[or any other law]***." The implications of the proposed amendments to Section 24(3) are that the Minister must grant the renewal of a mining right even if the operation is unlawful in terms of other statutes, for example the National Water Act, 36 of 1998, or Municipal Planning Legislation. The proposed deletion is fundamentally wrong and promotes unlawful activities. It is inconsistent with the principles of NEMA (section 37 of the MPRDA specifically confirms the application of the principles of NEMA) and contrary to the rule of law, a value on which the Constitution was founded, as well as the need for cooperative governance.	
Clause 28 S37	Section 37 (1) reads as follows: "***[The principles set out in section 2]*** *All environmental requirements provided for by this Act will be implemented in terms of the National Environmental Management Act, 1998 (Act No 107 of 1998)* ***[- (a) apply to all prospecting and mining operations, as the case may be, and any matter or activity relating to such operations; and (b) serve as guidelines for the interpretation, administration and implementation of the environmental requirements of this Act]*** The rational for the deletions in section 37(1) is not	

	clear. We believe that the NEMA principles apply to all mining, prospecting and related activities. This deletion is especially concerning when seen in conjunction with the consistent deletion of "*any other law*" throughout this amendment bill. In this regard, see comments on clause 19(c), 55 and 61.	
Clause 30(a) S43(1)	Consider including the underlined as part of the amendments to subsection 1 "*...the conditions of the environmental authorisation and the management and sustainable closure and rehabilitation thereof.*"	
Clause 30(c) S43(5)	Section 43(5) reads as follows: "*No closure certificate may be issued unless the Chief Inspector* ***[and each government department charged with the administration of any law which relates to any matter affecting the environment]*** *of Mines and the Department of Water and Environmental Affairs have confirmed in writing that the provisions pertaining to health and safety and management of pollution to water resources, the pumping and treatment of extraneous water and compliance to the conditions of the environmental authorisation have been addressed.*" The Department of Water and the Department of Environmental Affairs are two separate departments. Reference to these departments must therefore be changed to "*the Department of Water and the Department of Environmental Affairs.*" It is further recommended that the Department of Agriculture and the various municipalities (the responsible authority for air pollution and municipal planning) are included.	
Clause 30(f) S43(13)	The insertion of this clause is not supported as some environmental consequences will only become apparent over the long term (significant time-lag effect of environmental consequences).	

	Who will determine whether a holder *"has not conducted any invasive operations"*?	
Clause 33(b) Section 46	Section 46 (2) reads as follows: *"The measures contemplated in subsection (1) must be funded from financial provision made by the holder of the relevant right, permit, the previous holder of an old order right or the previous owner of works in terms of the National Environmental Management Act, 1998, where appropriate* ***[, or if there is no such provision or if it is inadequate, from money appropriated by Parliament for the purpose]***.". The proposed deletion from Section 46(2) is not supported as there is no other remedy provided for, should such provision be inadequate.	
Clause 34 Section 47	The proposed change is not supported. It is submitted that affording the Minister the discretion to provide the holder with *"a reasonable opportunity"* to show why the right, permit or permission should not be suspended is the preferred option rather than stipulating that the holder must be given *"30 days notice"*, as proposed in section 47(2)(c). There may be instances where it is not appropriate to provide the holder with *"30 days notice"*. It is also noted that this Bill seeks to remove the legislative timeframes in many of the sections of the Act. It is unclear why this section is different.	Consider retaining the discretion with regards to the timeframes.
Clause 34 Section 47(4)	It is not clear whether the 30 days referred to in section 47(4) Is in addition to the *"30 days notice"* in section 47(2)(c).	Consider retaining the discretion with regards to the timeframes.
Clause 36 Section 49	Section 49 (1) reads as follows: *"Subject to subsection (2), the Minister may* ***[after inviting representations from relevant stakeholders, from time to time]*** *after consulting a Minister of a relevant state department as and when the need arises by notice in the Gazette, having regard to*	

	the national interest,..." The deletion of *"after inviting representation from relevant stakeholders..."* is not supported. The inclusion of *"after consulting a Minister of a relevant state department as and when the need arises"* is not sufficient. There should at least be prior consultation with relevant organs of state. It is further unclear what is meant by a national interest and such term should be defined rather than having an overly broad undefined meaning.	
Clause 38 & 39 Section 51 & 52	The reason for the removal and replacement of all references to *"the Board"* with *"Regional Manager"* is not clear. The Board's composition allowed for broader input from various relevant stakeholders. This will be lost. It is recommended that the reference to the Board should be replaced with the Advisory Council.	
Clause 42 Section 56	The final deregistration must also be subject to the holder complying with any environmental responsibility related to the rehabilitation of the land.	
Clause 43 Section 56A	It is unclear who will be regarded as the *"three persons representing relevant state departments"*. Also, considering the number of relevant Departments (Water Affairs, Environmental Affairs, Agriculture, Energy, Science and Technology, Rural Development and Land Reform, etc), three representatives are not enough. In addition, local government must also be represented. NGO sectors, the same as the business sector and organised labour, should also be included.	
Clause 45 Section 69(2)(b)	See comments above regarding the problematic definition of *"mining area"*.	

	This now applies to "*production area*" too. For example, the current definition of mining area includes any "*adjacent land*", implying that when the first production right is granted (for shale gas), the whole Karoo could be regarded as a shale gas production area?	
Clause 48 Section 74(4)(b)	The "*prescribed period*" is undefined and it is not clear to which legislation this provision refers. It is proposed that following "*prescribed period*", "*as provided for in terms of the NEMA*" is inserted.	
Clause 49 Section 75	It is noted that section 75 proposes to amend the validity period from one to seven years. It is unclear why is such a long period is required when reconnaissance operations must be actively conducted within the first year of the permit being issued. (see section 75(5)(a))	
Cause 54 Section 80(3)	Change 'and' to an 'or' in section 80(3)(a).	
Clause 55 Section 81(3)(a)	The deletion of "*or any other law*" in section 81(3)(a) is not supported. In terms of co-operative governance the Minister of Mineral Resources should consult with other governmental agencies when it is known that other laws have not been complied with and the Minister should not be compelled to issue a right in cases of non-compliance with other laws.	
Clause 55 Section 81(3)(c)	Insert "*has complied with the terms and*" before "*conditions of the environmental authorisation*" in section 81(3)(c).	
Clause 60 Section 85	Section 85(2)(c) reads as follows: "(c) *be accompanied by a detailed report reflecting* ***[the extent of]*** *the right holder's compliance with requirements of the approved environmental* ***[management programme]***, *authorisation, the rehabilitation to be completed and the estimated costs thereof; and*" Compliance with the environmental authorisation as well as with the environmental management programme must be assessed. The section must therefore be amended to specifically include the	It is suggested that section 85(2)(c) be amended as follows: "(c) *be accompanied by a detailed report reflecting the extent of compliance with requirements of the approved environmental authorisation and environmental management programme, the rehabilitation to be completed and the estimated costs thereof; and*"

	approved environmental authorisation as well as the environmental management programme.	
Clause 61 S86(2)(c)	The deletion of the words *"any other law"* is not supported. See comments above in this regard.	
Clause 68 S96(1)(b)	In terms of section 96(1)(b) an appeal may be lodged with *"the Minister of Water and Environmental Affairs if the decision relates to environmental matters and issues incidental thereto."* Appeal provisions related to environmental authorisations must be dealt with in terms of NEMA and not in the MPRDA.	
Clause 69 S98	It is not clear why a contravention of section 5(4) was removed from the offences listed in section 98.	
Clause 70 Section 99	Whilst it is welcomed that fines for offences will be linked to the profits of a corporation, there should also be a monetary value attributed to the fine in order that those who do not reflect profits in their annual financial reports to still incur a penalty. Sections 99(1)(a), (c), and (e) must therefore be amended to include an appropriate amount as an alternative, if no profits are reflected in a holder's annual financial statements, as follows: *".....percent of the persons or right holder's annual turnover in the Republic and its exports from the Republic during the persons or right holder's preceding financial year as reflected in the last available annual financial statements or a million rand, whichever is the greater, or imprisonment..."*	
General comment	The Act does not require the mine owner or operator to make a full disclosure of the hazardous substances used during prospecting or mining. This should form part of the application for the mining license. This is especially problematic when water treatment or soil remediation is required.	
Clause 72(b)	The proposed amendment reads as follows: *"Any*	

S102(3)	*right holder mining...may while mining such material, also mine and* ***dispose*** *of any other mineral...".* It is suggested that the reference to 'dispose' be changed to "lawfully disposed".	
Clause 73 S106	It must be noted that the exemption provided in section 106 will in no way affect the requirement to obtain environmental authorisation, if relevant, in terms of the National Environmental Management Act, 107 of 1998.	
General comments	It is further motivated that the proposed amendments to the Minerals and Petroleum Resources Development Act enable the Minister to consider an applicant's eligibility as a *'fit and proper person'*, as contained in the National Environmental Management Air Quality Act before issuing any rights.	

Signature of manager responsible for comments

Date: 4/09/2013

Comments noted and supported.

(Head of Department)

Date: 05.09.2013

Comments noted and supported.