Centre *for* Environmental Rights

Advancing Environmental Rights in South Africa

The Honourable Johnny de Lange MP
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Our ref: CER/RH
Date: 13 September 2013

Dear Advocate de Lange

SUBMISSIONS ON THE NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL [B26-2013]

1. In this document, the Centre for Environmental Rights makes submissions on the National Environmental Management Laws Amendment Bill [B26-2013] ("NEMLAB3"). We only address those aspects of the Bill on which we have comments.

2. We read NEMLAB3 in the context of the Mineral and Petroleum Resources Development Amendment Act, 2008 (MPRDAA) to the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) which allow for environmental management and authorisation of mining[1] activities to be governed in terms of the National Environmental Management Act, 1998 (NEMA), as also read with NEMA itself (as amended by the National Environmental Management Amendment Act, 2008) and the Mineral and Petroleum Resources Development Amendment Bill [B15-2013] ("MPRDA Amendment Bill").

A. Introduction

3. The Centre received the documents presented to the joint sitting of the Portfolio Committees on Water & Environmental Affairs and Mining on Thursday, 12 September 2013, the day after these were presented to the joint sitting. Unfortunately we were not given notice of that meeting, and we regret not being able to attend.

4. These documents have, for the first time, provided the Centre and other civil society organisations with an idea of how the three departments envisage the implementation of the new legislative regime proposed by the various pieces of legislation and draft legislation currently before Parliament. We are still in the process of

[1] In this submission, "mining" should be read to refer to all prospecting, mining, reclamation, reconnaissance and exploration activities regulated by the MPRDA.

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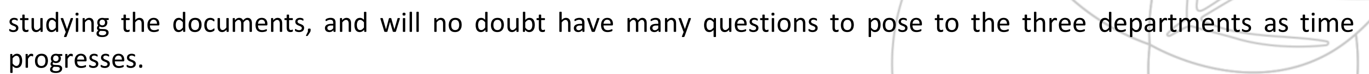


studying the documents, and will no doubt have many questions to pose to the three departments as time progresses.

5. What we would like to say at this juncture is that, despite serious reservations about the implementation of NEMA by the DMR (which we have communicated in detail to the Portfolio Committee on Mining, and will again mention in this submission), we would like to take the opportunity to congratulate the Ministers, the three departments and the two Portfolio Committees on what has been achieved. As civil society organisations, we have long called for the application of NEMA to mining activities, and so we regard this as a major improvement towards more appropriate regulation of the environmental impact of mining.

6. We also thank the Department of Environmental Affairs for the detailed Explanatory Memorandum accompanying NEMLAB3, which has been exceptionally useful in assisting our interpretation of NEMLAB3.

B. Implementation of NEMA by the DMR

7. As mentioned above, we have made our reservations about the DMR's capacity and incentive to implement NEMA clear to the Portfolio Committee on Mining in both written submissions and in oral submissions on 12 and 13 September 2013, and we do so again briefly below. These submissions[2] were made on behalf of Bench Marks Foundation, BirdLife South Africa, Centre for Environmental Rights, Conservation South Africa, Endangered Wildlife Trust, Federation for a Sustainable Environment, Greenpeace Africa, groundwork, Worldwide Fund for Nature South Africa and supported by Prof Tracy Humby, University of the Witwatersrand School of Law.

8. In our submissions, we welcomed the application of NEMA and particularly the fact that decisions about impacts on environment and water resources would now precede the issue of mining rights.[3] However, the question we pose is who is best placed to make these decisions, and what is the best way to spend public funds to achieve the sustainable development of mineral resources within the confines of NEMA? Ultimately we want to see streamlined, effective, adequately resourced, appropriately incentivised regulation of environmental impacts of mining. In our view, the Bill's proposal is not the optimal way to give effect to section 24 of the Constitution.

9. Below, we briefly provide six reasons why environmental authorities are better placed to fulfil this function.

<u>Reason 1: Capacity</u>

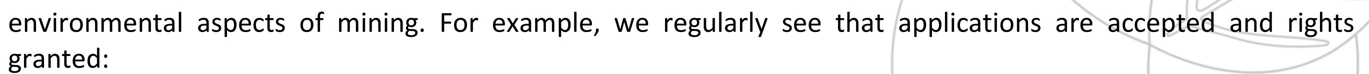
10. The DEA and provincial environment departments have significantly more existing capacity for EIA, compliance monitoring and enforcement than the DMR. We question whether the R65,9 million allocated to the DMR in the budget proposal presented to the two Committees on 10 September 2013 is sufficient, given that the DEA alone spent R70 million on this function in FY2012. We are also concerned about how long it will take the DMR to build this capacity – recruitment and training take a long time in government – and therefore about the environmental damage that will happen during this interim period.

<u>Reason 2: Track record</u>

11. The DMR has a poor track record when it comes to EIA, compliance and enforcement.

12. While the DEA and provinces have a significant track record in processing EIAs and efforts to streamline and make NEMA EIAs more effective, the DMR has a history of poor decision-making when it comes to the

[2] Copies of these submissions were provided to the Department of Environmental Affairs.
[3] We have a concern about whether it is sufficiently clear in the MPRDA Amendment Bill that a water use licence is a prerequisite for the issue of a right under the MPRDA. We will again draw this to the attention of the Portfolio Committee on Mining.



environmental aspects of mining. For example, we regularly see that applications are accepted and rights granted:

12.1. in sensitive or environmentally important areas;
12.2. in protected areas, which is unlawful; and
12.3. despite express opposition from environmental and water authorities.

13. The Environmental Management Inspectorate publishes its results in the annual National Environmental Compliance & Enforcement Report, and can show meaningful results. The DMR publishes no statistics and no reports. It appears to have no strategic compliance inspection schedule and no enforcement policy. It reports no criminal convictions, and there are no reported civil cases by the DMR to recover costs of rehabilitation from companies and directors. We also never see the DMR refusing to grant new rights to mining companies not in compliance with the law.

14. The Minister and DMR are always tight-lipped about the DMR's compliance monitoring and enforcement activities in relation to environmental violations by mines, and particularly in relation to any results of such monitoring and enforcement activities. Recent criminal cases against mining companies for violating environmental laws involved communities, civil society organisations, the DEA and the NPA, but not the DMR. What steps will the DMR take to ensure an effective criminal and administrative enforcement programme: will it hire enough and senior enough officials with the right qualifications? Will it develop an enforcement policy and strategy? Will it spend enough money on training and equipment? Will it even join the Environmental Management Inspectorate?[4]

<u>Reason 3: Inherent conflict</u>

15. The fundamental conflict between the obligation to promote mining and exploitation of mineral resources and the obligation to realise environmental rights is not unique to South Africa, and fundamentally undermines the realisation of environmental rights when it comes to mining. It is, we believe, the reason for the pitiful state of environmental compliance by mining industry. Not only does it lead to poor decision-making, but it also puts DMR officials in impossible situations of conflict. This is the reason why the current proposal for integration is inherently flawed.

<u>Reason 4: Unjustifiable special treatment</u>

16. Under the current proposal, the mining industry will continue to receive special treatment. The Department of Agriculture, Forestry and Fisheries does not issue environmental authorisations under NEMA to farmers, nor does the Department of Transport issue environmental authorisations under NEMA to the South African National Roads Agency. These departments not have the expertise to do this, and managing environmental impacts is not their core business. Treating the DMR and the mining sector differently is not justifiable, and will result in a regulatory regime that may be even more complicated than before.

<u>Reason 5: Constitutional difficulties</u>

17. We contend that the proposal undermines not only section 24 of the Constitution, but also violates the allocations of functional areas of competence by excluding provinces from decisions about "environment" listed in Schedule 4 Part A to the Constitution.

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[4] Even today, the DWA's so-called Blue Scorpions have resisted joining the Inspectorate despite being enabled to do so by the inclusion of the NWA in NEMA's definition of specific environmental management Acts, thereby holding back the effective compliance monitoring and enforcement of the NWA.

Reason 6: Inefficient use of public funds

18. It is hard to see how developing capacity within the DMR from scratch (and it is *significant* expansion and retraining that is required) when the same funds could be used to expand existing capacity in DEA and provinces is an efficient use of public funds.

Conclusion and plea

19. While we understand that current proposals and implementation plans are well underway, it is important to note that, as civil society organisations, we have consistently been making these arguments over a period of many years, and have repeatedly asked for opportunities to be heard on these proposals. There was no opportunity to do so before or during the development of these proposals, and it was only on 10 September 2013 that, for the first time, we received details of the implementation plans developed by the three departments.

20. We regard this law reform process as an opportunity to free the DMR from this responsibility and to strengthen our environmental authorities, as was envisaged by the 2008 agreement between the two Ministers. The continued reluctance to hand over this mandate to environmental authorities now results in an overly complicated, inherently flawed, unrealistically optimistic regulatory regime. As civil society organisations, we strongly believe that this is not the right way for the regulatory regime to go if the realisation of the right set out in section 24 of the Constitution is to be achieved.

21. As civil society organisations we have seen many reneged obligations from the DMR, and we have little reason to believe that this situation is any different in a Department whose main objective is to promote the exploitation of South Africa's mineral resources. If these proposals go ahead, our plea to both Portfolio Committees is to ensure adequate funding, and to do everything in their power to hold the Minister and the DMR to their commitments to implement.

22. We now turn to the details of NEMLAB3. In the first section, we deal with the clauses proposed in NEMLAB3. In the second section, we deal with clauses that we believe should be included in NEMLAB3 for various reasons, but which have not been included.

C. Detailed comments: Clauses proposed in NEMLAB3

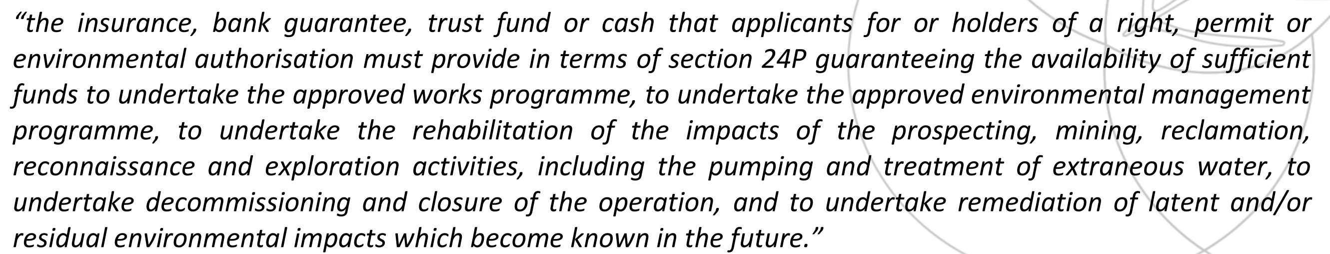
Clause 1: Definitions

23. The MPRDAA deleted from the MPRDA the definition of "financial provision". Notwithstanding the insertion in NEMA of section 24P (Financial Provision for the remediation of environmental damage) by Act 62 of 2008, NEMA does not contain a definition of "financial provision".

24. "Financial provision" was defined in the MPRDA as:

    "the insurance, bank guarantee, trust fund or cash that applicants for or holders of a right or permit must provide in terms of sections 41 and 89 guaranteeing the availability of sufficient funds to undertake the agreed work programmes and to rehabilitate the prospecting, mining, reconnaissance, exploration or production areas, as the case may be"

25. We would like to see an improved definition of "financial provision" in section 1 of NEMA (or potentially in regulations under NEMA), to the following effect:



"the insurance, bank guarantee, trust fund or cash that applicants for or holders of a right, permit or environmental authorisation must provide in terms of section 24P guaranteeing the availability of sufficient funds to undertake the approved works programme, to undertake the approved environmental management programme, to undertake the rehabilitation of the impacts of the prospecting, mining, reclamation, reconnaissance and exploration activities, including the pumping and treatment of extraneous water, to undertake decommissioning and closure of the operation, and to undertake remediation of latent and/or residual environmental impacts which become known in the future."

26. We draw the committee's attention to the fact that the MPRDA contained detailed regulations[5] on the methods of financial provision and the quantum of financial provision, in regulations 53 and 54. Similar regulations need to be inserted into the new Environmental Impact Assessment Regulations (EIA Regulations), subject to certain revisions. For example, an equivalent of regulation 54(1) needs to reflect the accurate itemisation and quantification of financial provision for the mining works programme, the environmental management programme and other specific costs associated with decommissioning, closure, rehabilitation and remediation of latent and/or residual environmental impacts which become known in the future.

27. We regard this is as a fairly urgent issue, since the only statutory provision currently governing financial provision for mining is the deleted section 43 of the MPRDA, which is being "kept alive" by the application of section 11 of the Interpretation Act, 1957.[6] This is not an ideal situation for legal certainty, particularly in the context of criminal liability.

<u>Clause 4: Amendment of section 24C</u>

28. The proposed amendment to this clause is a good illustration of the concerns that civil society organisations hold about the DMR's capacity and expertise to implement NEMA described above.

29. In the Explanatory Memorandum, it is explained that the DMR will now be considering the environmental impacts of powerlines "directly related to the mine"; this opens the door for the DMR to be responsible for authorising a vast number of listed activities in relation to which the DMR holds zero expertise, like underground fuel storage, roads and – potentially – a power station directly associated with a mine. These are listed activities the consideration of which requires specialised expertise. It is our submission that environmental authorities who have been considering these applications for more than a decade are better placed to continue doing so, rather than duplicating this capacity in the DMR – and that is assuming that the DMR is in fact able to develop this capacity in the first place.

<u>Clause 4: Reduction of time available for state departments to respond from 40 to 30 days</u>

30. The explanation provided for this proposed amendment in the Explanatory Memorandum – "to bring section 24O(3) in line with the provisions of the Promotion of Administrative Justice Act" is not persuasive. PAJA provides for a minimum period – that is clearly not a good reason to reduce all existing consultation periods in legislation. The length of consultation periods should be tailored to the subject matter of the consultation.

31. The Department will be well aware that state departments already have great difficulty meeting the 40 day consultation deadline. Smaller agencies that hold invaluable biodiversity information, like the provincial parks agencies, are flooded with development applications, including applications for prospecting and mining, and already struggle to provide meaningful comment within the 40 day period with existing human and other resources.

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[5] Mineral and Petroleum Resources Development Regulations GN R 527 under Government Gazette No. 26275 published on 23 April 2004, Regulations 53 and 54.

[6] The Centre has closely investigated the legal implications of the commencement of the MPRDAA, including seeking advice from senior counsel, and can provide more information to the Committee should it require.

32. For these reasons, and in the interest of proper administration of applications for environmental authorisations, we oppose this amendment.

Clauses 5 and 6: Enforcement

33. We have set out above our reservations about handing the functions of compliance monitoring and enforcement to the DMR.

34. Having said that, on the basis that this proposal will proceed, we encourage and support the full integration of compliance and enforcement officials in both the DMR and the Department of Water Affairs (DWA) into the Environmental Management Inspectorate. We believe that much can be gained by these two departments from the extensive work undertaken and experience gained by the Inspectorate, which will directly contribute to greater realisation of environmental rights. We call on the Portfolio Committee to continue asserting pressure on the DMR and DWA for such integration, starting with the publication of an integrated National Environmental Compliance and Enforcement Report.

35. With regard to the particular amendment in clause 6, we are concerned about the phrase "which are implemented by the Minister of Mineral Resources" in the proposed section 31D(2A) – we would prefer "in respect of which powers are conferred on the Minister of Mineral Resources". In other words, those provisions must link to the statutory mandate rather than the factual question of whether provisions have been implemented by the Minister of Mineral Resources (or the DMR).

36. Finally, while this is not currently proposed, we also want to make it clear that there should be no statutory bar to non-DMR EMIs exercising their mandate under NEMA in relation to mining areas. This is important for two reasons :

    36.1. In many cases, mining, water and other environmental violations are closely connected, and it is not in the interest of integrated environmental management to tie the hands of an EMI who is pursuing a violator because an investigation has broadened to cover illegal activities on a mining area. Cooperation and conflicts can be managed through agreements between the departments.
    36.2. EMIs can provide invaluable additional support to Environmental Mineral Resources Inspectors, particularly in the early period of implementation, and so cooperation should be encouraged by the legislature.

Clause 7: Appeals

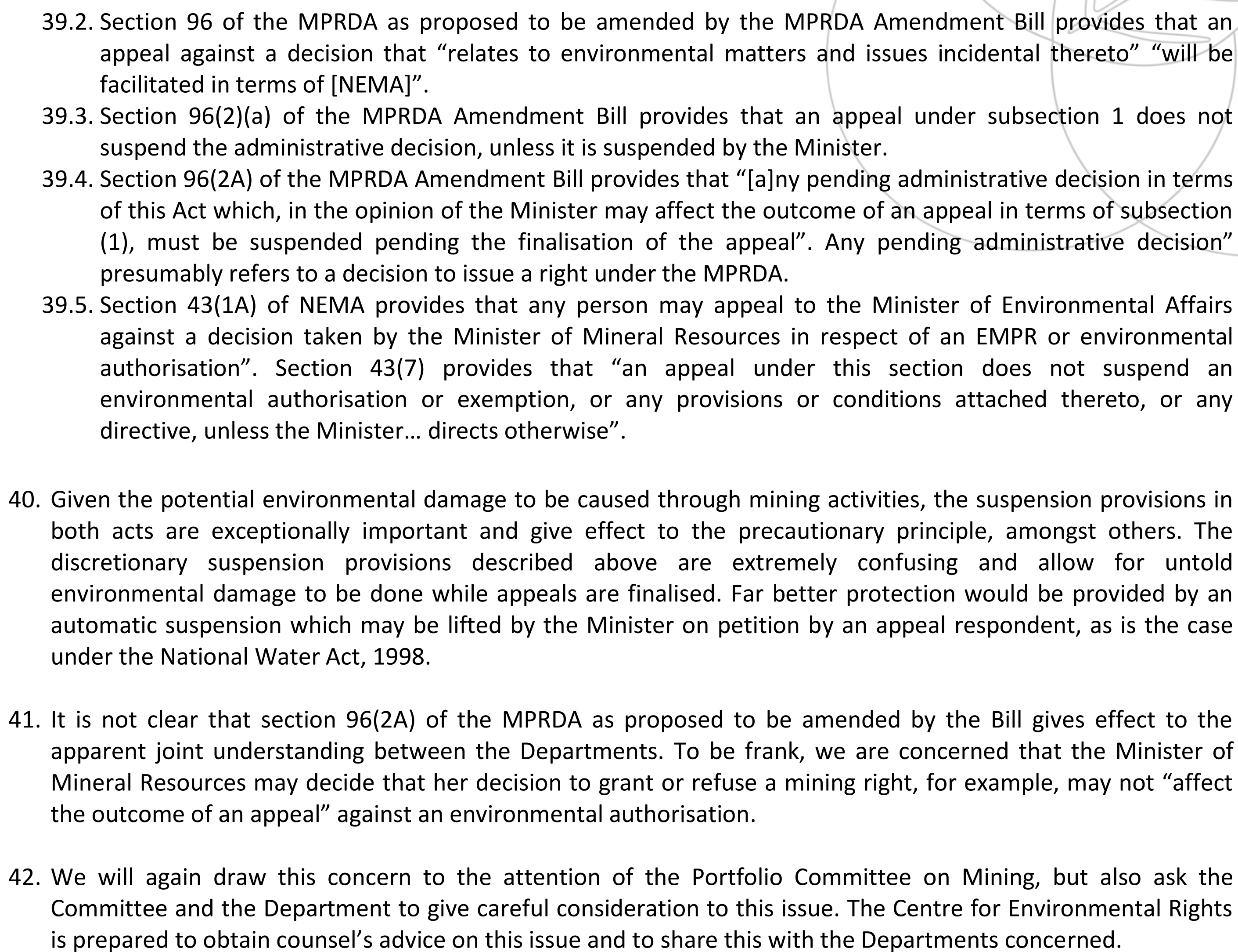
37. We support this amendment to section 43.

38. We use this opportunity to raise two concerns with the Department and the Committee regarding appeals against environmental authorisations issued by the Minister of Mineral Resources or her delegate.

Environmental authorisations appeals finalised before rights issued under MPRDA

39. The presentation to the joint sitting of the Portfolio Committees on 11 September 2013 contains two flowcharts indicating the integrated timeframes for the different licence applications applicable to mining. In that timetable, it suggests that appeals against environmental authorisations must be finalised before the associated prospecting or mining right may be issued - it describes the appeal on an environmental authorisation decision as a "prerequisite". We are concerned that this is not clearly reflected in the draft legislation.

    39.1. Section 38A(2) of the MPRDAA provides that "an environmental authorisation issued by the Minister [of Mineral Resources] shall be a condition prior to the issuing of a permit or the granting of a right in terms of [the MPRDA]".



39.2. Section 96 of the MPRDA as proposed to be amended by the MPRDA Amendment Bill provides that an appeal against a decision that “relates to environmental matters and issues incidental thereto” “will be facilitated in terms of [NEMA]”.

39.3. Section 96(2)(a) of the MPRDA Amendment Bill provides that an appeal under subsection 1 does not suspend the administrative decision, unless it is suspended by the Minister.

39.4. Section 96(2A) of the MPRDA Amendment Bill provides that “[a]ny pending administrative decision in terms of this Act which, in the opinion of the Minister may affect the outcome of an appeal in terms of subsection (1), must be suspended pending the finalisation of the appeal”. Any pending administrative decision” presumably refers to a decision to issue a right under the MPRDA.

39.5. Section 43(1A) of NEMA provides that any person may appeal to the Minister of Environmental Affairs against a decision taken by the Minister of Mineral Resources in respect of an EMPR or environmental authorisation”. Section 43(7) provides that “an appeal under this section does not suspend an environmental authorisation or exemption, or any provisions or conditions attached thereto, or any directive, unless the Minister… directs otherwise”.

40. Given the potential environmental damage to be caused through mining activities, the suspension provisions in both acts are exceptionally important and give effect to the precautionary principle, amongst others. The discretionary suspension provisions described above are extremely confusing and allow for untold environmental damage to be done while appeals are finalised. Far better protection would be provided by an automatic suspension which may be lifted by the Minister on petition by an appeal respondent, as is the case under the National Water Act, 1998.

41. It is not clear that section 96(2A) of the MPRDA as proposed to be amended by the Bill gives effect to the apparent joint understanding between the Departments. To be frank, we are concerned that the Minister of Mineral Resources may decide that her decision to grant or refuse a mining right, for example, may not “affect the outcome of an appeal” against an environmental authorisation.

42. We will again draw this concern to the attention of the Portfolio Committee on Mining, but also ask the Committee and the Department to give careful consideration to this issue. The Centre for Environmental Rights is prepared to obtain counsel’s advice on this issue and to share this with the Departments concerned.

Time period for lodging notice of intention to appeal

43. The Draft National Appeal Regulations presented to the Portfolio Committees on 11 September 2013 requires notice of intention to appeal to be lodged within 5 days “that the decision has been issued” [*sic*] (draft regulation 5(1)). This notice must even include “a short summary of the issues that will be raised during the appeal process”, and “new information that will be raised in the appeal submission, which must be attached to this document”.

44. With respect, meeting these extremely short timeframes is only possible if (a) the affected party knows about the decision, and (b) has the resources or access to resources, and in many instances access to legal advice, required to do this. Even the appeal provision in the MPRDA Amendment Bill (clause 68) refers to appeal within the prescribed period “of becoming aware of such administrative decision”; the MPRDA Regulations refer to “30 days after he or she has become aware of or should reasonably have become awareof the administrative decision concerned”.[7]

45. Although these draft regulations are not before the Committee (as far as we are aware), we record that such proposed regulations – and the potential refusal to accept an appeal that does not meet these requirements – fall foul of the requirements of administrative justice.

[7] Mineral and Petroleum Resources Development Regulations GN R 527 under Government Gazette No. 26275 published on 23 April 2004, Regulation 74(1).

Clauses 8, 10 and 11: Amendment of National Environmental Management: Waste Act, 2008 (NEMWA)

46. We support the inclusion of residue deposits and stockpiles under NEMWA.

47. For all the reasons described above, we are not in favour of conferring powers under NEMWA to the Minister of Mineral Resources (and the DMR). The DMR does not have the incentive to exercise this mandate, nor does it have the required expertise for and experience in waste matters or adequate capacity or skills for monitoring compliance and enforcing compliance with NEMWA. The millions of hectares of unmanaged tailings dams and mine dumps in and around Gauteng, from which toxic dust blows and polluted water flows, should be enough evidence to support our opposition.

48. Moreover, given the size of residue deposits and stockpiles, this impacts on:

    48.1. provincial planning matters, a functional area of exclusive provincial legislative competence (Constitution Schedule 5, Part A); and
    48.2. solid waste disposal, a functional area of exclusive provincial legislative competence in respect of which municipalities have the executive authority and the right to administer (Constitution s. 156(1) as read with Schedule 5 Part B).

49. Conferring these powers on the Minister of Mineral Resources may therefore fall foul of the Constitution.

50. Having said that, on the basis that this proposal will proceed, we support the proposed clause 11 which empowers the Minister of Environmental Affairs to issue regulations on the "management and control of residue stock piles and deposits…". We hope that these regulations will improve and tighten the existing regulation 73 of the MPRDA Regulations.[8]

D. Detailed comments: Clauses to be considered for inclusion in NEMLAB3

Loss of sections 38, 39 and 41

51. While many aspects of the MPRDAA were welcome, the deletion of these sections in the MPRDA has impoverished the legislative regime applicable to mining. We refer, in particular, to
    51.1. Section 38 (Integrated environmental management and responsibility to remedy);
    51.2. Section 39 (Environmental management programme and environmental management plan);
    51.3. Section 40 (Consultation with State departments);
    51.4. Section 41 (Financial Provision for the remediation of environmental damage); and
    51.5. Section 42 (Management of residue stockpiles and residue deposits) of the MPRDA,

    all repealed by the MPRDAA.

52. We believe that some key aspects of the provisions should have been transferred to NEMA, and included in NEMLAB 3. Importantly, these provisions should not only apply to mining, but to all activity regulated under NEMA. These are the following:

    52.1. Section 38(1) of the MPRDA stipulated that environmental management must constitute an integral and ongoing part of the mining activities. Importantly, section 38(1)(e) stipulated that a right holder is responsible for any environmental damage, pollution or ecological degradation whether it occurs inside or outside the area to which the licence relates. As section 37 has been amended such that the NEMA principles no longer explicitly govern all prospecting and mining operations, and to the extent that this is

[8] Mineral and Petroleum Resources Development Regulations GN R 527 under Government Gazette No. 26275 published on 23 April 2004

not covered by section 28(1), the requirement that environmental management must be integral to mining activities should be inserted.

52.2. Section 38(2) stated that, notwithstanding the Companies Act, 1973 (Act 61 of 1973) or the Close Corporations Act, 1984 (Act 69 of 1984), the directors of a company or members of a close corporation are jointly and severally liable for non-compliance with obligations under the environmental management programme regardless of whether it was inadvertently or advertently caused. No such equivalent provision exists in NEMA - or indeed in company law - and the removal of this provision from the MPRDA radically alters the ability of the competent Minister to enforce the obligations of mining companies in terms of both their mining licences and their environmental authorisations.

52.3. The provisions of section 39(4)(b)(i) of the MPRDA are reflected in section 24N(4) of NEMA, requiring the Minister of Mineral Resources expressly to consider any recommendations of the Regional Mining Development and Environmental Committee (RMDEC). However, the provisions of section 39(4)(b)(ii) of the MPRDA, now repealed from that Act, have not been inserted in section 24N of NEMA. Section 39(4)(b)(ii) required the Minister of Mineral Resources to consider "the comments of any State department charged with the administration of any law which relates to matters affecting the environment." A similar provision should be inserted in section 24O(2) of NEMA.

Section 24P: Financial provision for remediation of environmental damage

53. As mentioned above, section 41 of the MPRDA, providing for Financial Provision for the remediation of environmental damage, has been repealed. Section 24P of NEMA is now the applicable section making provision for this. However, section 24P requires review in a number of respects.

54. As a general comment, there seems to be no reason why the power to require financial provision for the remediation of environmental damage should be limited to "prospecting, mining, exploration, production or related activities on a prospecting, mining, exploration or production area". We submit that this provision should be available to all competent authorities in relation to all listed activities.

55. As mentioned above, NEMA itself does not yet define "financial provision", nor is a definition proposed by NEMLAB 3. We have proposed a definition above. As per that proposed definition, we propose that section 24P(1) is amended to provide that the obligation to make financial provision exists in relation to the approved works programme, the approved environmental management programme, the rehabilitation of the impacts of the prospecting, mining, reclamation, reconnaissance and exploration activities, including the pumping and treatment of extraneous water, the decommissioning and closure of the operation, and the remediation of latent and/or residual environmental impacts which become known in the future, and not merely in relation to the environmental authorisation.

56. In addition, clarity on the nature and timing of financial provision is required. We assume that this will be provided in regulations to be issued under NEMA to replace regulations 53 and 54 in the MPRDA Regulations.[9]

57. Liability for rehabilitation of known environmental impacts, and (unknown) latent and residual safety, health or environmental impact and pollution, ecological degradation, the pumping and treatment of extraneous water, must be assessed for purposes of decommissioning/closure, and the necessary financial provision made at that stage also. To facilitate this, it is imperative to list decommissioning/closure as a listed activity that requires an environmental authorisation. This will not only facilitate adequate assessment of financial provision at closure, but also specify the obligations of the holder of the authorisation going forward.

[9] Mineral and Petroleum Resources Development Regulations GN R 527 under Government Gazette No. 26275 published on 23 April 2004

58. It is trite that environmental impacts of mining may only become known many years after cessation of the operations. In accordance with the principle grounded in section 24 of the Constitution and prescribed in section 28 of NEMA, the holder of the right or permit remains responsible for those impacts notwithstanding the issuing of a closure certificate by the Minister of Mineral Resources. Section 19 of the NWA is aligned with section 28 of NEMA in this respect, as is section 43(1) of the MPRDA, as amended by the Mineral and Petroleum Resources Development Amendment Bill, 2013. Section 24P(5) is not aligned with section 24 of the Constitution or the MPRDA or NWA, nor with section 28 of NEMA itself. It therefore requires amendment. We propose that section 24P(5) reads as follows:

    "(5) The requirement to maintain and retain the financial provision contemplated in this section remains in force notwithstanding the issuing of a closure certificate by the Minister of Mineral Resources in terms of the MPRDA to the holder or owner concerned, but the Minister of Mineral Resources may retain such portion of the financial provision as may be required to rehabilitate the closed mining or prospecting operation in respect of latent or residual environmental impacts."

Amendment to Section 24N(6): Amendment of EMPRs

59. Section 24N(6) provides that the relevant Minister, MEC or identified competent authority may at any time after he or she has approved an application for an environmental authorisation, approve an amended environmental management programme.

60. Since section 24N(1) provides that the relevant Minister, MEC or identified competent authority may require the submission of an environmental management programme before considering an application for an environmental authorisation, and since section 24N(1A) provides that "where environmental impact assessment has been identified as the environmental instrument to be utilised in informing an application for environmental authorisation, or where such application relates to prospecting, mining, exploration, production and related activities on a prospecting, mining, exploration or production area, the Minister of Mineral Resources, a MEC or identified competent authority must require the submission of an environmental management programme before considering an application for an environmental authorisation," it is submitted that section 24N(6) requires revision to be consistent with these two subsections.

Section 24R: Mine closure on environmental authorisation

61. For the reasons indicated in paragraph 58 above, section 24R(1) is similarly not aligned with section 24 of the Constitution, section 43(1) of the MPRDA as proposed to be amended by the MPRDA Amendment Bill, section 19 of the NWA and section 28 of NEMA itself. It therefore requires similar amendment to provide that:

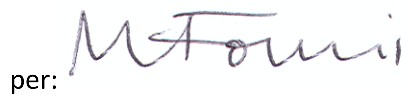
    "(1) Every holder, holder of an old order right and owner of works remains responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of extraneous water, the management and sustainable closure thereof notwithstanding the issuing of a closure certificate by the Minister of Mineral Resources in terms of the MPRDA to the holder or owner concerned."

62. Notwithstanding the title of this section, the section does not stipulate that an application for an environmental authorisation should be made when any holder, holder of an old order right and owner of works makes application for a closure certificate. As argued above, it is imperative to list decommissioning/closure as a listed activity that requires an environmental authorisation.

63. We appreciate the opportunity to make submissions on the Bill. Please let us know should you require more information in relation to any of the submissions.

64. We also request an opportunity to make oral submissions when this legislation is discussed in the Portfolio Committee.

Yours sincerely
CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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