Western Cape Government

MINISTRY OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

REFERENCE: 3/5/10 (2013/437)

Department of Environmental Affairs
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Attention: Mr Sibusiso Shabalala

Dear Sir

NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL, 2013

The call for comments on the above draft Bill published in Government Gazette No. 36765 of 16 August 2013 refers. Kindly find herewith the comments of the Western Cape Government on the draft Bill.

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	The National Environmental Management Amendment Act 62 of 2008 provided for a mechanism whereby any provision relating to prospecting, mining, exploration and production related activities would only come into operation 18 months after the commencement of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008, which Act has as one of its objects, to make the Minister of Mineral Resources, the competent authority for implementing	The decision-making competency to process environmental authorisations for mining activities must revert to the environmental authorities.

	environmental matters in terms of the National Environmental Management Act, 107 of 1998 (NEMA). The National Environmental Management Amendment Act 62 of 2008 further provided that after a period of 18 months from the commencement of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008, the competency to implement environmental matters in respect of prospecting, mining, exploration and production related activities, would revert to the environmental authorities. These provisions allowed for the competency to issue environmental authorisations in respect of prospecting, mining, exploration and production related activities to vest with the Minister for Mineral Resources for a limited period of 18 months, whereafter such function would revert to the environmental authorities. The National Environmental Management Laws Amendment Bill [B26-2013] (the Bill) however appears to ignore the above position by deleting the provisions allowing the competency to issue environmental authorisations in respect of prospecting, mining, exploration and production related activities (mining activities) to revert to the environmental authorities. The provisions allowing for the environmental authorities to ultimately have competency in respect of environmental authorisations for mining activities were in fact the result of careful planning and a long consultation process to ensure effective and cohesive environmental management within South Africa. It would be contrary to streamlining environmental management for environmental authorisations if processed by different departments, depending on the industry, as	

	opposed to the government departments, tasked with the management of environmental affairs for the country as a whole. The vision of the Department of Mineral Resources enables a "*globally competitive, sustainable and meaningfully transformed minerals and mining sector to ensure that all South Africans derive sustainable benefit from the country's mineral wealth*". The Department of Mineral Resources promotes and regulates both minerals and mining to achieve this vision. On the contrary, on the Department of Environmental Affairs' website their mandate is recorded as "*to ensure the protection and conservation of natural resources, balanced with sustainable development and equitable distribution of the benefits derived from natural resources.*" In order to achieve this aim the Department of Environmental Affairs formulates, coordinates and monitors the implementation of national environmental policies, programmes and legislation. Section 24 of the Constitution confers an onus on government to ensure the protection of the environment and confers a right to all citizens to an environment, which is not harmful to their health and wellbeing. The Constitution as well as several international conventions obliges government to hold the environment in trust, and ensure that it is protected, for the benefit of present and future generations. The principles as set out in section 2 of the NEMA provide, *inter alia,* that the pollution and degradation of the environment be avoided and where this is not possible that such be minimized and remedied. Furthermore, development is to be socially, environmentally and economically sustainable. Development, use and exploitation of renewable resources and the ecosystem of which it is a part, may not exceed a level beyond which their integrity is	

	jeopardised. In further efforts to ensure sustainable development the Constitution requires environmental protection which ensures ecologically sustainable development. The environmental impact of mining activities has grave consequences for the environment. Whilst it is accepted that South Africa relies heavily on the extraction of mineral resources to ensure an economic benefit for all, it would be bad governance and contrary to the principles set out above, if a department, such as the Department of Mineral Resources, whose primary function is to ensure the development and growth of the mining industry, is then tasked to assess mining activities which may lead to the environmental degradation and ecological unsustainability of an activity which in essence they are mandated to promote. In order to ensure that the requisite checks and balances are in place and the integrity of the environmental assessment process is not compromised, the Department of Environmental Affairs and Development Planning (the Department) remains of the view, and has expressed this throughout the various amendment processes currently tabled with Parliament to amend the NEMA and the Mineral and Petroleum Resources Development Amendment Bill, that the competent authority to issue an environmental authorisation should vest solely with the environmental authorities, and that includes the authority to authorise activities which relate to prospecting, mining, exploration, and production activities. The Bill, in its current form, may serve to regulate and ensure certainty in respect of the competent authority to grant environmental authorisations in respect of mining activities for the interim period of 18 months, as set out	

	above. The Department's main objection however relates to the proposed deletion of the provisions in the National Environmental Management Amendment Act 62 of 2008 which ensured that the competency to issue environmental authorisations for mining activities reverted to the environmental authorities, following the abovementioned 18 month period. The Department fundamentally disagrees with the Department of Mineral Resources retaining the decision-making competency to process environmental authorisations for mining activities. Accordingly, the comments which follow below are largely as a result of the deletion of sections 13 and 14 from the National Environmental Management Amendment Act 62 of 2008, as proposed by Clause 13 and 14 of the Bill and all comments below must be seen within this context. Ideally the Department would have a preferred that the competency to issue environmental authorisations at no time vests with the Department of Mineral Resources, but acknowledges that the three phased approach, as set out above, was agreed to and adopted after a lengthy consultation process. The Department however strongly objects to the now proposed deletion of the third phase, as proposed by Clause 13 of the Bill, which will mean that the competency to issue environmental authorisations for mining activities will remain with the Department of Mineral Resources permanently.	
Clause 1 Definition of "environmental management inspector"	Considering the 'General Comment' above, this proposal is not supported as such inspectors should only be designated by the Department of Environmental Affairs.	
Clause 1 Definition of	Considering the 'General Comment' above, the definition for environmental mineral	

"environmental mineral resource inspector"	resource inspector is not supported as the competency of such inspectorate vests with the environmental management inspectors.	
Clause 2 Amendment of section 24(5)(b)(vi)	Considering the 'General Comment' above, the Minister for Environmental Affairs should remain the Minister capable of making regulations for the management and control of residue stockpiles.	Section 24(5)(b) (vi) should not be deleted.
Clause 3 Amendment of section 24C of the NEMA	A "*mining area*" is defined very broadly in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 as well as in subsequent proposed amendments. Given the present proposed legislative regime, as set out under the 'General Comment' above, the Minister for Mineral Resources is expected to become the competent authority to grant environmental authorisations in respect of mining activities shortly. The proposed amendment to section 24C(2A) merely refers to "*in the area for which the right has been applied for*", which is equally as broad as the definition of mining area. This amendment is too broad and given the initial intention to limit the period that the Minister for Mineral Resources would be mandated to grant environmental authorisations, this amendment is not supported.	
Clause 4 Amendment of section 24O(3)	It is unclear why the time period change from 40 to 30 days is necessary and whether the increased administrative burden can be managed by the respective government agencies. The Promotion of Administrative Justice Act, 3 of 2000, provides for 30 days as a minimum period in which to consult. Commenting authorities are already experiencing challenges to meet the current 40 day commenting period. It is further important to note that with administrative processes included, the actual commenting period would in fact only allow for approximately 20 days. In addition, Regulation 6(4) of the Environmental	The commenting period of 40 days should be retained.

	Impact Assessment Regulations (GN 543 GG 33306), must also be considered. The proposed shortening of the commenting time period is unrealistic and inappropriate in terms of co-operative governance.	
Clause 5 Insertion of section 31BB in the NEMA	Considering the 'General Comment' above, the proposed amendment is opposed. Environmental enforcement and compliance should remain a function of those designated with such competence within the Department of Environmental Affairs. This ensures impartiality and cohesive enforcement of environmental compliance if one department is tasked with this function as opposed to fractured governance of this function.	
Clause 6 Section 31D of the NEMA	This provision serves its purpose in so far as it relates to the interim position for the competent authority to determine environmental authorisations in respect of mining activities. Considering the 'General Comment' above, if sections 13 and 14 of the National Environmental Management Amendment Act are however deleted as proposed, the proposed amendment of section 31D of the NEMA is opposed as it serves to confer powers on the Minister for Mineral Resources that should vest in the Minister of Environmental Affairs.	This provision should be deleted.
Clause 13 Section 13 of the National Environmental Management Amendment Act, 62 of 2008	The proposed amendment is strongly opposed as it would result in the Minister of Mineral Resources processing authorisations for prospecting and mining rights as well as mandating that same Minister to evaluate the environmental impacts in respect of the very activities for which he/she has issued a license. In this regard we reiterate our "General Comment" above. The repeal of Section 13 of the National Environmental Management Amendment Act, 62 of 2008, deletes the provisions allowing the competency to issue environmental authorisations in respect of prospecting, mining, exploration and	Section 13 of the National Environmental Management Act, 62 of 2008 must be retained and should not be repealed.

	production related activities (mining activities) to revert back to the environmental authorities. This will mean that the Department of Mineral Resources retains the decision-making authority to issue environmental authorisations for mining activities. This is a gross conflict of interests and it will almost certainly lead to numerous decisions being reviewed owing to the perception of bias, which such position creates. It is important to note that an application for environmental authorisation is not a hindrance to development or an obstruction to job creation but rather a means to ensure the constitutional duty to secure an ecologically sustainable future for all South Africans is fulfilled and the means to achieve this aim is to ensure that all appropriate checks and balances are met.	
Clause 14 Schedule to the National Environmental Management Amendment Act, 62 of 2008	The repeal of this schedule is opposed for the reasons as set out above in our objection to Clause 13 of the Bill.	The schedule must not be repealed and should be retained.

We trust that these comments will receive your favourable consideration.

A BREDELL

MINISTER

DATE: 16/9/2013