MEJCON-SA

Mining and Environmental Justice Community Network of South Africa

Ms F C Bikani, MP
Acting Chairperson of the Portfolio Committee on Mineral Resources
Parliament
Cape Town
By email: aboss@parliament.gov.za

6 September 2013

Dear Ms Bikani

Submissions by the Mining and Environmental Justice Community Network of South Africa to the National Assembly Portfolio Community on Mineral Resources on the Mineral and Petroleum Resources Development Amendment Bill, [B15-2013]

1. The Mining and Environmental Justice Community Network of South Africa (**MEJCON-SA**) is a network of communities, community based organisations and community members whose environmental and human rights are affected, directly or indirectly, by mining and mining-related activities.

2. MEJCON-SA's objectives are to:

    a. Promote and defend the environmental and human rights of communities both directly and indirectly affected by mining; and to ensure the sustainable use of mineral resources;
    b. Train, develop and capacitate community members;
    c. Access information including information about mining, law, rights, processes and impacts and to share and distribute that information amongst affected communities;
    d. Support and assist community champions, community organisations and the members of both directly and indirectly affected communities; and
    e. Engage all relevant roleplayers including government at local, provincial and national level, industry, civil society organisations, non-governmental organisations, traditional authorities and the institutions created in terms of chapter 9 of the Constitution of the Republic of South Africa, 108 of 1996.

3. MEJCON-SA was constituted on 17 October 2012 and despite its short period of existence, already has a membership of more than 60. Members of MEJCON-SA include representatives of the following organisations:

    a. Empowering Riverlea Community Projects (Soweto)
    b. Centre for Transformation and Development (Soweto)
    c. Madadeni Mining Committee (Eastern Mpumalanga)
    d. Hondeklip Empowerment and Livelihood Projects (Namaqualand, Northern Cape)

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e. Mokopane Interested and Affected Communities Committee (Limpopo)
f. Earthlife Africa Johannesburg Branch
g. Boboshanti Royal Hub (Gauteng)
h. Bench Marks Foundation
i. Batlhabine Foundation (Tzaneen, Limpopo)
j. Davidsonville Community Working Group (Soweto)
k. Mahatammogo Agricultural Forum (Gauteng)
l. Masiyeni Emasimini (KwaZulu-Natal)
m. Sikhwahlane Mining Committee (Mpumalanga)
n. National Alliance for the Development of Community Advice Officers

4. We submitted our comments on the Mineral and Petroleum Resources Development Amendment Draft Bill, 2012 [B36037-2012] (**the draft bill**) to the Department of Mineral Resources (**DMR**) on 8 February 2013. Only one of our many comments was incorporated into the Mineral and Petroleum Resources Development Amendment Bill, 2013 [B15-2013] (**the Bill**). These submissions are therefore a reiteration of the points raised in our comments to the DMR on the draft bill as supplemented and amended. These submissions are in addition supplemented by narrative examples of the egregious hardships that mining affected communities are suffering as a result of mining since the commencement of the Mineral and Petroleum Resources Development Act, 2002 (**the Act**), and will continue to suffer if the Bill is passed by National Assembly in its present form.

5. **MEJCON-SA would welcome the opportunity to make oral submissions to the National Assembly's Portfolio Committee on Mineral Resources along with its members who are community representatives from around the country. Whereas parliamentary hearings will take place on the 11th, 12th, 13th and 18th of September 2013, MEJCON-SA respectfully requests that it be allocated a slot for oral submissions on Wednesday the 18th of September 2013. MEJCON-SA members come from poor rural communities all over the country and arranging transport to and from and accommodation in Cape Town is not a simple matter. We also appeal to Parliament to make available funds to secure the presence of at least 2 MEJCON-SA steering committee members at the parliamentary hearings.**

6. Mining affected communities are amongst the most marginalised in South Africa. Despite many promises and even legislative requirements that mineral resources in South Africa be used for social upliftment, very few of the benefits of mining ever reach these communities. We respectfully submit that it is of enormous importance that Parliament hears our voices on the proposed changes to the law governing mining.

7. In section A, we raise a number of concerns relating to specific provisions of the Bill, and these provisions are duly identified. In addition, in section B, we raise a number of general concerns and issues in regard to mineral governance that we believe are not adequately addressed in the Bill. In section C we raise procedural concerns in regard to the Bill and questions in regard to broader consultation on the Bill with affected communities, particularly rural communities.

A. COMMENTS IN RESPECT OF PROVISIONS OF THE BILL:

Clause 1: Amendment of section 1 (Definitions)

8. Clause 1 of the Bill proposes to remove the proviso introduced by the Mineral and Petroleum Resources Development Amendment Act, 2008 ("**the Amendment Act**") to the definition of "community" ("Provided that, where as a consequence of the provisions of this act, consultations with the community is required, the community shall include the members or part of the community directly affect[ed] by mining on land occupied by such members or part of the community"). We welcome the deletion of this proviso as it is inappropriate for the Act, which does not provide for consultation with communities in their own right.

9. However, by deleting the proviso, the legislature may well be interpreted as having explicitly excluded the possibility that the duty to consult with communities in their own right can be read into the Act (as amended by the Bill). MEJCON-SA therefore proposes that explicit provision is made for consultation with communities in their own right, as opposed to the perceived representatives of communities such as traditional authorities (see our submissions on this point in paragraph 21 below).

Clause 2 of the Bill: Amendment of section 2(d) of the Act

10. Section 2(d) of the Act currently states that the objective of the Act includes substantially and meaningfully expanding opportunities for historically disadvantaged persons, *including women*. The Amendment Act amended this section by adding "and communities" after women. The Bill removes both the words "women" and "communities" from this section.

11. It is unclear why the Bill seeks to remove the emphasis on women and communities in this provision as both of these groups remain vulnerable to the impacts of mining but still receive little benefit from the extraction of mineral resources.

12. The conditions of women and communities have, if anything, deteriorated in the years since the Amendment Act was published. Mining companies have been known to enter into private deals with traditional authorities, not only denying communities their rights to be consulted, but ignoring customary law and creating devastating social rifts in rural communities. A number of mining companies have been found to be operating illegally, without water use licences and in non-compliance with their social and labour plans. Large mining companies increasingly are selling old mines to smaller, less well-resourced mining companies that have, in a number of instances, gone into liquidation leaving unrehabilitated mines, devastating environmental damage and workers and communities with no solutions to these problems. The legacy of acid mine drainage and other environmental impacts of mining are felt most keenly by the most marginalised communities who rely directly on natural resources to survive. Communities living next to mining suffer ill health effects and lose access to agricultural land and sites of customary significance. These communities, moreover, do not enjoy or share in the wealth generated by the mining.

13. Women remain inadequately represented amongst the ranks of owners and senior managers in the mining sector.

Jobs and skills development associated with mining are predominantly available to men. Women employees, who do work in the mines, report being harassed and abused and little is done to secure their safety. Women in rural communities – who depend on food gardens and take water directly from rivers and streams – risk exposing themselves and their children to the pollution and waste that mining produces. Mining industrialises rural landscapes, and women are at the greatest risk from the impact of mining activities on the environment. It is presumably for these reasons that the Act originally identified the need to create opportunities for women in particular as an objective. Given that the circumstances of women, particularly rural women, have not improved since 2002, the removal of the words "including women" proposed in the Bill is inexplicable.

14. It is submitted that the objectives of the Act should still emphasise the need to secure opportunities and benefits for those whose lives are most radically affected by mining, namely women and communities. It is accordingly submitted that the words "women" and "communities" must remain in the Act.

Insert 1: Disadvantaged position of mining affected communities and women

Mtubatuba

Several MEJCON-SA members reside in Mtubatuba, a mining affected village in KwaZulu-Natal. The Mtubatuba community stands to benefit from a community trust set up in accordance with an agreed BEE structure. The community, however, has seen very little of the money set aside to empower or benefit them and therefore remains poor and vulnerable to the environmental and social impact of mining.

The mining company furthermore forced some community members to relocate from their homes in order for the mining operations to expand. Indigent single women-headed households were paid a pittance in compensation for their forced removal.

Hondeklipbaai

The Hondeklip Empowerment and Livelihoods Project (HELP) represents the community resident in Hondeklipbaai, a Namaqualand town affected by diamond mining by De Beers. This community sees no economic benefit from the mining operation. The mine sources contractors from places other than Hondeklipbaai to conduct rehabilitation despite HELP having advised the mine that there are companies set up by the local community capable of performing this function.

Mokopane

A group of villages situated near Mokopane are affected by platinum mining in the area. The communities in these villages suffer the impacts of mining and enjoy no benefit. They have now set up a juristic body, the Mokopane Interested and Affected Communities Committee (MIACC), in order to enforce their rights against the mining company. The mining company, however, refuses to divulge information about its BEE structure and its plans to empower the local communities.

Clause 6: Insertion of Sections 10(2)(b) and (3) into the principal Act

15. In terms of section 10 of the Act, the Regional Manager must call on interested and affected parties ("**I&APs**") to submit their comments regarding the application within 30 days from the date of the notice.

16. The Bill now additionally requires the applicant to call on I&APs but does not stipulate how such a call should be issued. Section 3(2) of the Mineral and Petroleum Resources Development Regulations, No. 26275, GG R. 527 2009 ("**the Regulations**") requires the Regional Manager or a designated agency to make known an application by publication in the Provincial Gazette OR notice in the Magistrates' Court OR by advertisement in a local or national newspaper. In addition, when an application is granted, a notice must be placed on a notice board at the office of the Regional Manager. Notices, pinned up in regional offices and Magistrates' Courts are inaccessible and rarely seen by affected parties, particularly rural communities. Written notices posted in English in obscure locations are ineffectual and, it is submitted, not in compliance with the right to just administrative action.

17. Section 10 must be appropriately amended to ensure that notice is given to the affected community in a manner and form that is accessible to affected communities. Importantly, section 10 must stipulate that, where appropriate, notice must be given orally (through the radio and announcements on loudspeakers) and in a language that will be understood by the affected community.

18. The 30 days provided for in section 10 is a completely inadequate timeframe to enable communities to obtain all the necessary information, to consult with other structures and members of the community, and to prepare comment. Adequate time must be available for communities to get copies of the necessary documents, to read and understand those documents and, where necessary, to seek expert comment on those documents. We propose a period of at least 90 days for comment. In addition, provision must be made for communities to give comment in writing, orally over the phone or in person, by sms or other easily accessible and cheap medium and in the language of their choice.

19. Section 10(2)(b) is amended by the Bill to provide that an objection may be referred to the applicant "…to consult with the person objecting." Should the consultation lead to an agreement between the parties, such agreement must be reduced to writing and be submitted to the Regional Manager for noting and subsequently to the Regional Mining Development and Environmental Committee ("**RMDEC**"). While the introduction of this mechanism may, in some instances, be beneficial to communities, it is of concern that the procedure provided for is open to abuse. There is an inherent disparity of power between the bargaining parties: applicants generally have funds and access to legal and other resources, whereas rural community members are generally under-resourced and without access to critical information relating to the proposed mining. Provision must be made for an independent party to mediate in such negotiations.

20. Where land occupation or ownership is governed by customary law, the consultation procedures and accountability mechanisms inherent to customary law must be respected and followed. This would entail, for one, that no individual, whether a recognised leader or merely a community member, may enter into an agreement that will have implications for the larger community without the consent of the larger community sought in terms

of customary law. This requirement is stipulated in the Interim Protection of Land Rights Act 31 of 1996, but given the interim nature of this Act and the fact that no regulations were ever promulgated, the MPRDA must be amended to reflect these requirements specifically.

21. Moreover, the legislature cannot turn a blind eye to the many problems emanating from the Traditional Leadership and Governance Framework Act 41 of 2003 ("**the Framework Act**"): in the province of Limpopo alone, more than 600 disputes have been declared concerning community boundaries and the legitimacy of certain chiefs. The prevalence of these issues was acknowledged by the legislature during the discussions in parliament that led to the lapsing of the Traditional Courts Bill at the end of 2012. This is of significant concern for mineral regulation given the fact that a significant amount of our mineral resources are situated on land governed in terms of the Framework Act. It is submitted that the Bill must amend the Act to ensure proper accountability and consultation of communities in their own right and not rely on the problematic structures developed in other frameworks. At the very least, the confusion around and manipulation of the term 'community' that often leads to illegitimate and unlawful representation of communities during consultations, should be eradicated by clearly providing for community consultations to include the broad community.

22. The Bill does not specify what happens in the event of the parties not reaching an agreement after the consultation or what will happen where multiple parties submit objections in relation to different or overlapping areas of concern. This must be clarified.

Insert 2: Consultation with communities

Tlhabine

A clay mining company in Tlhabine, a village near Tzaneen in Limpopo Province, consulted only with the traditional leader for the area, who the community later discovered was also a director of the relevant mining company, during the application process for a mining right. The community was not consulted. Engagement by the community with the traditional leader was led by the Batlhabine Foundation.

The lack of consultation has been disastrous for the community. Deep dongas have resulted from excessive erosion on unfenced unrehabilitated mining areas, where ponds of water have collected. Children and cattle have drowned in these ponds and the cattle have died as a result of drinking polluted water from these ponds. In addition, the community has lost valuable agricultural land and land of cultural importance.

Mtubatuba

In Mtubatuba, a village in KwaZulu-Natal, a coal mining company consulted solely with a traditional authority who claimed to be consulting on the community's behalf without the latter even having been notified of the proposed mining operation in its village. Some community members challenged the authority of the traditional leader to act on the community's behalf in its dealings with the mine, and were threatened with prosecution for defaming a dignitary.

As a result of the negotiations between the mining company and the traditional leader, a community trust was set up to benefit the community. This money, however, was not used to empower or benefit the community. The trustees are also not willing to account to the community about the use of the funds.

Once again, the consequences for the community of not having been consulted were dire. The mine destroyed areas of agricultural, cultural and spiritual importance to the community during the course of mining; cattle died as a result of consuming water polluted by mining; the homes of some community members were damaged by mining; and some community members were forced by the mining company to relocate in order for the latter to expand its operations, often to areas already occupied by other community members.

Madadeni

In Madadeni, a village close to Komatipoort in Mpumalanga, a mining company consulted only with a traditional authority allegedly representing a community that would be affected by the environmental impacts of mining. It was not even disclosed to the community that mining operations would be conducted in its village. The Madadeni Mining Committee, a committee constituted by community members concerned about the environmental and social impacts of mining in their immediate vicinity, made enquiries from and later discovered that the traditional leader was given R186 000.00 in accordance with a memorandum of understanding between her and the mining company. This money was not shared with the community.

In the course of mining, the mining company destroyed wetlands, diverted the natural flow of water courses and built fences around areas of agricultural and cultural importance to the community.

Clause 7 of the Bill: Amendment of section 10C of the principle Act

23. The Bill prescribes the composition of RMDEC. The newly inserted section 10C(1) provides that the members of RMDEC must have expertise in mineral and mining development, mine environmental management, petroleum, exploration and production." Section 10C(2) provides that the maximum membership of a RMDEC is 14 members and that membership must include the Regional Manager as Chairperson, the Principal Inspector of mines for that region and representatives of relevant State departments (within the national, provincial and local sphere of government or organs of State within each sphere). These members will have voting rights. The non-voting members, who may be appointed by the Minister for that committee, may include a representative from a State Owned Entity or a consultant.

24. Notably, community concerns, interests and issues arising in relation to customary law are areas of expertise not represented on RMDEC. Given the high number of applications received to mine or prospect on communally managed land and land governed by customary law, this is a worrying gap in the RMDEC composition. We

accordingly submit that community representatives must be included in the composition of RMDEC.

Clause 17(f) of the Bill: Amendment of Section 22(4) of the principal Act - Social and labour plans

25. Clause 17(f) of the Bill aims to amend section 22 by the insertion of a provision that requires the Minister to notify a person who had been granted a mining right, within the prescribed period, to, *inter alia*, "consult with the community and relevant structures regarding the prescribed social and labour plan within 180 days of the notice and submit a social and labour plan in the prescribed manner" and "to apply for a licence for use of water in terms of applicable legislation." This amendment is welcomed.

26. To ensure that social and labour plans ("**SLPs**") are effective in ensuring that benefits are shared with affected communities and that the impacts of mining on those communities are mitigated, investment in skills development, training and education on relevant environmental and social issues for community representatives should be compulsory. Such training should meaningfully seek to empower communities to participate in consultation processes and in decisions taken that affect the community.

Clause 19 of the Bill: Amendment of section 24 of the principle Act

27. Section 24 of the Act sets out the procedure for renewing mining rights. It requires a right holder to submit an application to the Minister together with a report reflecting the extent of the right holder's compliance with the conditions contained in the environmental authorisation as well as a detailed mining programme for the renewal period. This section must be amended to require consultation with communities and I&APs in respect of any renewal application and before the renewal application is processed by the Minister.

28. We believe that this can be addressed by making appropriate provision for a consultation process with affected communities, and allowing communities to make submissions, in writing or orally and in a language of their choice. Such submissions must be considered by the Minister prior to any decision being taken in regard to a licence renewal application.

29. The section should be further amended to require an independent third party to draft the reports, and not the right holder.

Clause 20 of the Bill: Amendment of Section 25 of the principal Act

30. Clause 20(d) of the Bill seeks to amend Section 25(2)(f) by requiring the right holder to "implement the approved social and labour plan which shall be reviewed every five years for the duration of the mining right" (Clause 20(d) of the Bill) instead of merely requiring the right holder to "comply with the requirements of the prescribed social and labour plan" (section 25(2)(d) of the principal Act). The introduction of the requirement to review a SLP is welcomed, but given the changing circumstances in which communities find themselves as a result of the mining operation, and in light of the fact that some mining operations are only operational for short periods, it is submitted that the social and labour plan must be reviewed more frequently (every three years at most).

31. The review process must include consultation with the affected community to assess the changing circumstances

of the community and to ensure that the SLP is achieving the objectives set out in the Act.

32. Poor monitoring of compliance with SLPs and limited enforcement has meant that many communities do not see the benefits promised in those plans. Mines report on their own compliance and communities, who are denied copies of the plan, cannot be sure what the mining company's obligations are. The Department needs to significantly increase its compliance monitoring capacity. In addition, communities must be provided with the necessary information to enable them to assist the Department in monitoring compliance and to engage with the mining company, as necessary, in regard to their obligations in the SLP.

33. We also propose that section 30 of the Act "disclosure of information" be amended to provide for the mandatory disclosure of the S&L plan in all its draft forms to all interested and affected parties, to put an end to the practice the mining companies, with the tacit approval of the DMR, maintaining that these documents are commercially confidential.

Insert 3: Social and Labour Plans

Hondeklipbaai

De Beers is in the process of transferring mining rights in respect of diamond mines in Hondeklipbaai, in the Namaqualand, Northern Cape, to Trans Hex. The Hondeklipbaai community has not been consulted on the companies' social and labour plans. These plans are consequently inappropriate for the community living in this area. The plans, for example, do not address the high levels of unemployment in Hondeklipbaai, despite proposals from HELP that jobs are created in the rehabilitation phase of the mines.

Mtubatuba

In Mtubatuba, a village in KwaZulu-Natal, some of the community members' houses were damaged as a result of coal mining in close proximity to the community. The social and labour plans make provision for compensation for such damage, but the compensation was unequally distributed in accordance with this plan, with pensioners and single women-headed households receiving R5000.00 whereas those with a stable income received R33 000.00 in compensation. The social and labour plan also makes provision for creating infrastructure for the supply of electricity to the community, and although this was implemented, it was implemented inequitably.

Clause 41 of the Bill: Amendment of section 54 of the principal Act

34. Clause 41 of the Bill fails to address the open-endedness of Section 54 of the principal Act. Section 54(1)(b) provides that a right or permit holder must notify the Regional Manager if he or she cannot commence mining, prospecting, reconnaissance because the owner or lawful occupier of the land in question "…(b) places unreasonable demands in return for access to the land…"

35. We are of the opinion that the word "unreasonable" is too open-ended as the Act provides no test for what is "reasonable" under the circumstances. What will determine reasonableness is a particularly difficult question where the mining will have an impact on natural resources that communities rely on directly or where land is owned, used and managed by different parties. Reasonableness should also take into account the nature and extent of consultation with affected communities and the ways in which objections were addressed. It is submitted that the Bill should introduce a dispute resolution mechanism that would bind the right / permit / permission holder.

Clause 63(c) of the Bill: Amendment of Section 88(2) of the principal Act :

36. Section 88(2) of the principal Act prescribes that "subject to the Promotion of Access to Information Act 2002," (**PAIA**) all "information, data, reports and interpretations thereof submitted to the designated agency" be kept confidential by the designated agency for a period of at least 4 years from the date of acquisition. Clause 63(c) of the Bill, which aims to amend Section 88(2) of the principal Act, fails to address the lack of information and data that is provided to communities regarding mining operations on their land and the accessibility of such information and data.

37. We submit that this provision is very problematic and must be amended. The fact that the provision is subject to PAIA does not assist communities. To date the DMR has taken a very limited view of the information that communities are entitled to in terms of PAIA and has been known to deny land owners and occupiers copies of licences and social and labour plans in conflict with the DMR's PAIA Manual. Communities are not in a position to take matters to court to determine whether or not PAIA entitles them to access basic information about their own land. Accordingly, the Bill should make "information, data, reports and interpretations thereof" publicly available to I&APs. Such a provision would be in line with South Africa's Constitutional Democracy based on open and transparent governance.

Insert 4: Access to information

Mokopane

The Kgobudi community in Mokopane are affected by platinum mining in its immediate surroundings. It has requested information from the mining company, including the identity of the directors and the social and labour plan, but has not been provided with any information. This community, along with other communities affected by these platinum mines formed MIACC, an organisation which seeks to enforce the communities' rights. MIACC, however, finds it difficult to establish what the communities' rights are without access to information held by the mining company.

Tlhabine

The Batlhabine Foundation requested information from both the mining company and the DMR by means of a request in terms of PAIA. The community received the documents requested approximately 2 years after the initial request was made. The documents revealed that the mining company had been operating in areas not authorised by its mining right and that it was operating without a water use licence. Significant environmental harm was done by the mining company in those two years.

B. GENERAL CONCERNS RELATING TO ENVIRONMENTAL AND MINERAL GOVERNANCE NOT ADEQUATELY ADDRESSED IN THE BILL

Consent by community landowners and lawful occupiers

38. While we have raised a number of concerns regarding the manner and process in which communities are consulted on mining, we submit that consultation should not be the standard applied in determining whether to license mining activities over land owned or lawfully occupied by customary communities in South Africa. In regard to the mining of communally owned and/or occupied land, it is submitted that community consent must be the determinative standard and it is only when a community consents to mining on its land should such mining be licensed. Such consent must be free, prior and informed consent.

Community benefits and benefit sharing

39. While the Act identifies the creation of opportunities and the sharing in the benefits of the nation's mineral wealth as its goals, its primary mechanisms for achieving this is through taxation, social and labour plans and beneficiation. Taxation and beneficiation produce few direct benefits for communities directly affected by mining activities.

40. Social and labour plans, when they are complied with, confer limited benefits on communities and do so in a problematic manner. Social and labour plans are not based on proper assessments of community needs or circumstances and, on the whole, are focused on the life of the mine rather than sustainable and long-term community upliftment and empowerment. These plans are designed around mining company profit projections and the amount companies are willing to invest in community upliftment. They do not reflect the impact of the mining on communities or the cost of mining for those communities.

41. It is accordingly submitted that where mining takes place on communally owned or occupied land (which it is argued should only happen with the consent of the community), the community should be entitled to participate in the benefits of mining and the decisions taken in regard to the mining as shareholders. Community shareholding in companies engaging in mining on communally owned or occupied land should be a compulsory requirement for a company to be awarded a mining licence. The extent of such shareholding should be determined taking into account the nature and extent of the operations, and through negotiations between the community and the applicant.

42. Alternatively or in addition to the submission made in paragraph 41 above, the Bill should provide that a certain percentage of the royalties collected by the State from companies mining on land owned or occupied by a community is ear-marked for the upliftment and benefit of the relevant affected community. The funds so ear-marked should be reinvested in the community by payment into a trust fund, which is administered by community representatives and has the object of benefiting the relevant affected community.

Land Claims and Mining Rights

43. The Bill fails to address the problematic interaction between the MPRDA and the Restitution of Land Rights Act, 22 of 1994 and it is submitted that this must be rectified. While a significant number of land claims remain unresolved, mining licences are issued without regard for the contested nature of the land ownership and without adequately consulting all interested and affected communities and claimants.

44. It is accordingly submitted that land claims must be resolved, either through the processes set out in the Restitution of Land Rights Act or through agreement between all the parties and the applicants before any mining can commence.

INSERT 5: LAND CLAIMS AND MINING

Hondeklipbaai

The Hondeklipbaai community has a land claim pending in respect of land over which De Beers has a mining right. De Beers is currently in negotiation with Trans Hex for the transfer of the mining rights in respect of this land. The community has not been afforded an opportunity to give its input into the terms of this transfer. This will result in the community not being consulted over issues, such as environmental authorisations and social and labour plans, that will impact on its environmental, property and socio-economic rights in the event of their land claim being successful.

The role of the Minister

45. The Bill fails to address the multiple and sometimes conflicting roles of the Minister afforded to her by the Act. Clause 68 of the Bill aggravates the situation by amending Section 96 of the principal Act. Section 96 of the principal Act currently provides that the Director-General hears appeals in regard to administrative decisions taken by the Regional Manager and that the Minister will hear appeals regarding administrative action taken by the Director-General. Clause 68 of the Bill now provides that the Minister hears appeals on all decisions taken by any administrative official, bar decisions relating to environmental matters and issues incidental thereto (these appeals will now be heard by the Minister of Environmental Affairs).

46. The multiple and sometimes conflicting roles of the Minister (and the Director-General and Regional Managers to whom a number of the Minister's powers are delegated) is a matter of significant concern. Currently, appeals take many months or years to be considered and decided by the Minister, if they are decided at all. This results in uncertainty in the sector and, as an appeal does not automatically suspend the operation of the licence, allows untold damage to be inflicted on the environment and aggrieved communities pending its outcome.

47. We accordingly submit that provision must be made for an appeal immediately to suspend a mining licence and for an independent tribunal or body to be established to hear appeals in respect of licensing decisions taken by the Minister.

Environmental authorisations

48. The Bill proposes a system under which the DMR will process environmental authorisation applications in accordance with the National Environmental Management Act, 107 of 1998 (**NEMA**) and the NEMA regulations. We submit that the Department of Environmental Affairs should process environmental authorisation applications and not the DMR.

49. It is submitted that the DMR staff lack the necessary resources, experience and technical know-how to properly consider and assess applications submitted in terms of NEMA. It is also submitted that requiring the DMR to make difficult decisions about the environmental impacts of mining represents an inherent conflict of interest.

INSERT 6: MONITORING AND COMPLIANCE ENFORCEMENT BY THE DMR

Soweto

A number of communities in Soweto are affected by unrehabilitated gold mine dumps, such as those living in Snake Park, Meadowlands and Davidsonville. The DMR has the power and the duty to enforce rehabilitation of these mine dumps and to conduct rehabilitation itself. This notwithstanding, no action has been taken by the DMR to date, despite vociferous demands therefor by Earthlife Africa Johannesburg Branch, Davidsonville Community Working Group and others.

The dust and polluted water emanating from the unrehabilitated mine dumps cause the members of the community to suffer from respiratory diseases and other illnesses.

Mokopane

The DMR issued directives to a mining company mining near the Kgobudi community in the greater Mokopane region for non-compliance with its environmental duties under the Act. The directives have not been heeded by the mining company. Despite repeated calls from the MIACC for the DMR to take remedial action, nothing has been done.

Tlhabine

The DMR issued compliance notices to the recalcitrant mining company operating in the area, but has not done anything to enforce such notices. The community was therefore forced to look to criminal remedies. The Batlhabine Foundation laid charges against the mining company, which, together with its directors, is now being prosecuted by the National Prosecuting Authority for its non-compliance with mining, environmental and water laws.

Madadeni

The Madadeni Mining Committee complained to the Department of Environmental Affairs and Department of Water Affairs about unlawful activities of the mining company operating in Madadeni. These Departments issued directives and laid criminal charges against the company for numerous contraventions of environmental and water legislation. The company pleaded guilty to the criminal charges and has been forced to bring its operations in line with environmental regulatory requirements.

The DMR did not take action despite having received complaints from the community about the mining company's environmental transgressions under the Act.

Documents and notices

50. Under the current Act, notices to communities, I&APs and landowners are often given in highly technical language, in writing and (more often than not) in English. The notification that a mining licence has been granted that the Regional Manager is obligated to give I&APs in terms of Section 10(1)(a) of the Act; the notification that an applicant for a prospecting right must give to the land owners in terms of Section 16(4)(b) of the Act; and the peremptory notification that an applicant for a mining right must give I&APs in terms of Section 22(4)(b) of the Act are examples of such notices.

51. If communities are to be properly engaged in public participation and consultation, documents and notices will have to be more accessible. MEJCON-SA proposes that the Bill be supplemented with a clause that prescribes that documents and notices are translated into the primary language spoken in the community that is affected by mining and in language that is easily understood by a lay reader. The risks associated with the proposed mining activity, and in particular the effect that mining may have on the immediate environmental and social well-being of a community, must, at the very least, be set out in clear, precise and accessible language (and not be hidden in tables or scientific jargon).

52. Once licences and authorisations have been awarded, copies of those documents must be made public and must be provided to affected communities. It is essential that communities have access to environmental authorisations, environmental management plans and prospecting or mining licences, rights or permits. These documents must be provided to affected communities and I&APs, along with the record of decision, within 30 days of the decision being taken and, in addition, such documents must be made available to communities and other affected parties on request at any stage after the decision has been taken and without requiring a request in terms of PAIA.

53. The disclosure of environmental authorisation, licences, plans and permits to communities enables communities to know their rights and to assist the DMR in the monitoring of compliance with those authorisations. This is in the interests of both the DMR and the communities who are affected by mining.

C. CONSULTATION AND COMMENT ON THE BILL BY COMMUNITIES

54. The draft bill was published for comment on 28 December 2012 and comment became due on 8 February 2013. This is, unarguably, a uniquely difficult time for communities, particularly rural communities to comment on draft legislation.

55. It is clear to us that no measures were put into place to facilitate comment on the draft bill by rural communities.

56. The draft bill was made additionally difficult to comment on as it endeavoured to simultaneously amend the Amendment Act. As the Amendment Act was not brought into force prior to the publication of the draft bill, it was extremely difficult to obtain a copy of an amended MPRDA. As a result, communities were required to access and comment on three pieces of legislation – the Act, the Amendment Act and the draft bill. The Minister's failure to issue a reconciled and single version of these three documents, and to explain the intention and objectives behind the draft bill by way of explanatory memorandum, stood in the way of community participation and comment.

57. The memorandum to the Bill provides that communities in Limpopo, Mpumalanga, North West and Northern Cape Provinces were consulted on the Bill. In the DMR's presentation to the National Assembly's Portfolio Committee on Mineral Resources on 30 July 2013, it was stated that these consultations took place in 2011. This contradicts the statement in the memorandum that communities had been consulted on the draft bill and the Bill.

58. It is also not clear where and exactly when these consultations took place, and the DMR has not made any comments or responses from the alleged community consultation available. Moreover, no consultations took place in the Eastern Cape, Free State, Gauteng and KwaZulu-Natal.

59. It is submitted that the release of the draft bill, with its significant implications for communities, without giving affected communities a meaningful opportunity to comment, inhibited the rights of those communities to administrative justice and democratic participation.

Yours sincerely

MEJCON-SA Steering Committee

Mashile Phalane – Chairperson

Gedenezar Dladla – Deputy Chairperson

Dawid Markus – Secretary

Ernest Mahlalela – Treasurer

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