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WRITTEN SUBMISSION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON MINERAL RESOURCES ON THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL [B15-2013]

To: Ms Ayanda Boss
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Parliamentary Portfolio Committee on Mineral Resources
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The opinions and views expressed in this written submission are those of the author and do not necessarily represent or purport to represent the opinions or views of the Cliffe Dekker Hofmeyr Inc where the author practises as an attorney.

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INTRODUCTION

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1 PURPOSE OF SUBMISSIONS

1.1 The DMR is commended for taking into account the various recommendations made by members of the mining and petroleum industry of South Africa. There are however certain section of the *Mineral and Petroleum Resources Development Bill* [B15-2013] (**"the Bill"**) which still needs to be addressed before being passed as law.

1.2 The submissions and recommendations contained in this document are limited to a few issues as will be identified below. The author is of the view that the failure to address those issues could potentially defeat the intention of the Department of Mineral Resources (**"the DMR"**) to ensure that the Bill removes ambiguities that exist within in the *Mineral and Petroleum Resources Development Act* No. 28 of 2002 (**"the MPRDA"**) as amended by the *Mineral and Petroleum Resources Development Amendment Act* No. 49 of 2008 (**"the Amendment Act"**) and improves the regulatory system.

1.3 The intention of the submission is not to criticise the DMR on the proposed amendments contained in the Bill, but to highlight areas within the Bill which are potential loose cannons which could make the Bill susceptible to a constitutional attack or result in future ambiguities should it not be addressed at this stage.

1.4 In this submission the following issues are discussed and recommendations are made on proposed amendments to the Bill. These issues are:

1.4.1 The 'new' section 42A on Reclamation Permits in respect of Historical Mine dumps. The crux of the submission and recommendation is that the Minister be granted more <u>flexibility</u> (within a prescribed framework and ascertainable requirements) on the duration of a retention permit when its initially granted or during a renewal period in order to avoid constitutional challenges that this section amounts to expropriation.

1.4.2 The potential conflict which could arise between applicants for prospecting

and/or mining rights and applicants for exploration and/or production rights over the same land. Specifically in the current context where South Africa is in the process of executing an Integrated Energy Plan where conflicts could arise during onshore exploration for gas and/or oil with application for mineral rights.

1.4.3 Designated Minerals: the amendment of the draft definition to 'Designated Resources' in order to include both the concept mineral and petroleum as already defined in the MPRDA.

1.4.4 Strategic Minerals: the amendment of the draft definition to 'Strategic Resources' in order to include both the concept mineral and petroleum as already defined in the MPRDA. Further the inclusion of a regulatory framework within the body of the MPRDA which empower to Minister to declare certain minerals and/or petroleum as strategic in order to avoid a constitutional challenge that the Minister, despite the definition of the 'Strategic Minerals' in the Bill is not empower in law to declare minerals as strategic. The legislature is under a constitutional duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them.

1.4.5 The 'new' proposed section 32(1A)(b) be amended by substituting the word "gas" at the end of the sentence with the word "petroleum" as defined in the MPRDA to refer to all forms of petroleum. The amendment will avoid future ambiguity.

1.4.6 It must be considered whether the current drafting as to what percentage of the participation interest of a new exploration right or production right will be deemed 'a free carried interest' for the state is not ambiguous. The new subsection seems to imply that the state shall have "**a** free carried interest" at the issuing of any new exploration rights or production rights to applicants. In financial terms "**a** free carried interest" refers to a singular interest which equates to a 1% participation interest, subject to the option to acquire "*a further interest*", which further interest the state must pay for.

1.5 **NO ORAL SUBMISSION WILL BE MADE; HOWEVER I TRUST THAT THE PARLIAMENTARY PORTFOLIO COMMITTEE WILL IN GOOD FAITH CONSIDER THE WRITTEN SUBMISSIONS.**

REGULATION OF HISTORIC MINE DUMPS: RESIDUE STOCKPILES

2 INTRODUCTION

2.1 The proposed amendments are welcomed, but are opened to attack and might be susceptible to a constitutional challenge.

2.2 The effect of the proposed amendments, should it be proclaimed as is, is significant on the current owners of historic mine dumps as it essentially obliges such owners to start reclaiming or processing the material at the historic mine dumps within the time period the reclamation permit provides for or such renewal period the Minister grants.

3 IMPACT ON PROPERTY RIGHTS: EXPROPRIATION DEBATE

3.1 Should the holder of the reclamation permit fail to process or reclaim the material at the mine dumps within the initial period (maximum of 4 years) and subsequent renewal period (maximum of 2 years) no further renewal of such permit can be permit. This even if the holder would be able to demonstrate to the Minister that despite reclaiming from or processing the material at the mine dumps during the tenure of the reclamation permit there are still material at the mine dumps it intends to process or reclaim.

3.2 The further implication of the proposed amendment is that a third party would be entitled to apply for a reclamation permit in respect of historic mine dumps the holders of old order rights or converted rights to whom a reclamation permit was initially granted, but was unable to process or reclaim material on the mine dumps with the prescribed period and prior to the expiry of the permit. This could be deemed as a fundamental infringement of the proprietary rights of the holders of old order right or converted mining rights as even if such holder will be able to demonstrate to the Minister in its application for a reclamation right that it will take in excess of the 6 year period (taking into account the renewal) for it to be able

effectively and economically process or reclaim the minerals contained in the mine dumps.

3.3 The obvious question which then comes to mind is whether the limitation imposed by this new right to be created by the proposed amended to the MPRDA could be deemed as a form of expropriation. The reason being that property right of the owners of the historic mine dumps are being limited in the following manner:

3.3.1 Such owners will no longer be able to choose not to process or reclaim the material in the mine dumps (either due to market conditions for the sale of such minerals or other economic conditions specific to the company or market within which the company who owns the mine dump operate);

3.3.2 Should such owner be unable to process or reclaim the material in the mine dumps within the time period prescribed in the reclamation permit and any subsequent renewal thereof the right to reclaim will still be forfeited to a third party.

3.4 The limitation proposed to the ownership right over the historic mine dumps might be justifiable should the Minister be empowered with more flexibility on the period within which a reclamation permit may be granted or renewed taking into account that relevant circumstances of each applicant.

Investor Impact

3.5 The proposed amendment could potential also have an impact on the decision of proposed investors to investment in processing plants to process or reclaim historic mine dumps due to the limited period within which they would have to recoup the investment even if the material to be reclaimed from the mine dumps has a lifespan in excess of 6 years.

4 FLEXIBILITY: DURATION OF RECLAMATION PERMIT

4.1 The limitation of the time period of a reclamation permit to a maximum period of only 6 years (the initial period and renewal period) is very restrict as Minster even if she would want to grant a further renewal in addition to first renewal period

based on the information demonstrated to her, she would not be able to do so and would act *ultra vires* by doing so.

4.2 For this reason it might be more practical to allow either for a longer initial period within which the permit may be granted or at least grant the Minister the right to be able to grant a renewal of the reclamation permit for more than merely the once-off renewal currently contemplated by the proposed amendment.

4.3 It is respectfully submitted that the provision regulating the maximum period a reclamation permit may be grant for, be amended in order to grant the Minister more flexibility. It is accordingly recommended that:

4.3.1 The initially period be retained as 4 years, but that Minister be granted the power to renew the reclamation permit for further periods, each of which may not exceed 4 years at a time.

4.3.2 A new section be introduced to regulate the grounds for the renewal of the reclamation permit. The section must accordingly state what the holder of the reclamation permit must comply with for the renewal application to be considered and similar to the renewal of a prospecting right or mining right must state under what circumstances the Minister must grant the renewal.

4.4 By providing for a renewal period where the Minister has more flexibility to decide the period of renewal or any consecutive renewals based on objective requirements an applicant must comply with, makes the proposed amendment less susceptible to a constitutional attack.

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ASSOCIATED MINERALS AND PETROLEUM: CONFLICT OF RIGHTS

5 INTRODUCTION

5.1 The separation of the minerals provisions of the MPRDA from the petroleum provisions, although practical will become a problem for the DMR to administer as potential conflicts could exist with applicants for prospecting and/or mining rights and applicants for exploration and/or production rights over the same land.

5.2 The MPRDA in respect of mineral rights currently provides that the Regional Manager <u>must</u> accept an application for a prospecting or mining right, as the case may be, by any person who wishes to apply therefor to the Minister, if *inter alia "(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.*" Similarly the MPRDA provides in respect of petroleum rights that the designated agency (which will now be replaced with the Regional Manager) must accept an application for an exploration or production right, as the case may be, if *inter alia "(b) no other person holds a technical co-operation permit, exploration right or production right for petroleum over any part of the area.*"

5.3 The MPRDA does not empower the Regional Manager to reject or <u>not to accept</u> an application for a prospecting or mining right, as the case may be, should someone else already hold a technical co-operation permit, exploration right or production right for petroleum over the same land or area, *vice versa*. There might be some practical manner where both a mining right and a production right over the same land could be exercised jointly but independently without any effect or minimal effect on the resources of the other by restricting the respective rights to certain seams, mineralised bodies or stratum (if at all possible; taking into account that petroleum in most instance constitutes a liquid hydrocarbon).

5.4 However in most instances the restriction of the mining right or production right to certain seams, mineralised bodies or stratum will not be possible. A good

example of a potential conflict is where one person lodged an application for the exploration of coal-bed methane over an area of land where another person lodged an application for the prospecting of coal. The grant of both minerals and petroleum rights over the same land will result in a serious administrative nightmare as it is not possible to conduct both mining for coal and the production of coal-bed methane gas independently as the one activity will adversely impact the other. The mining of the coal can cause destruction of the methane in that the methane is liberated and dissipated. Conversely, the mining of methane can result in damage to the coal in that it causes fragmentation of the coal, rendering it of limited use.

5.5 In order to avoid potential overlapping applications in respect of mineral and petroleum rights, specifically in light of the South African governments initiatives to ascertain whether it is commercially and environmentally feasible to produce shale methane gas in the Great Karoo Basis, it is proposed that section 16(2) and section 22(2) of Chapter 4 (mineral rights) of the MPRDA and section 79(2) and section 83(2) of Chapter 6 (petroleum rights) of the MPRDA be amended to remove any administrative ambiguities or difficult which the respective Regional Managers could potentially experience. It should be understood that the MPRDA does not provided the Minister with a discretion to refuse an application for either a mining right or production right, as the case may be, but the Minister is obliged to grant such right subject to compliance with the prescribed requirements by the applicant.

5.6 Should the application provisions of Chapter 4 and Chapter 6 to the MPRDA not be amended, the position will be regulated by the common law which might defeat the objectives of the DMR in respect of the exercise of mineral and petroleum rights.

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DESIGNATED MINERALS AND STRATEGIC MINERALS

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6 INTRODUCTION

6.1 The South African government's intention is to declare certain mineral as strategic minerals and others as designated minerals for the purpose of achieving the economic developmental objectives of the country. The Bill refers to both strategic minerals and designated minerals, but only the phrase designated minerals is used in the Bill.

6.2 It seems that DMR has a clear intention to keep a distinction between what minerals the Minister may declare as 'designated minerals' and what minerals the Minister may declared 'strategic minerals'. Designated Minerals is understood to merely refer to minerals designated for beneficiation purposes by the Minister and is also used in the proposed amendment to section 26 of the MPRDA. However the phrase 'strategic minerals' is not used anywhere else in the draft Bill, save for the proposed definition. Amendments and/or additions are proposed to the definition of 'designated mineral' and the definition of 'strategic minerals', including proposal on the use of the definition 'strategic minerals' in the principle legislation. Please consider the proposals below.

7 DEFINITION OF "DESIGNATED MINERAL" AND USE THEREOF

7.1 The proposed amendment currently defines designated minerals as '*means such minerals as the Minister may designate for beneficiation purposes as and when the need arises in the Gazette*;"

7.2 It is proposed that the definition be amended in order to include references to petroleum resources to align it with the proposed amendment to section 26(1) of the MPRDA which now specifically includes petroleum resources for purpose of beneficiation in the Republic. As the MPRDA already includes definitions for minerals and petroleum respectively the legislature's intention will be clear should reference merely be made to 'designated resources' as the phrase will then refer to both mineral and petroleum resources intended to be assigned for

beneficiation by the Minister. It is accordingly proposed that the current proposed definition be substituted for a definition which reads as follows:

*'**Designated Resources**' means such mineral and/or petroleum as the Minister may designate for beneficiation purposes in the Government Gazette from time-to-time as and when the need arises;*

7.3 Should the definition of designated minerals not be clarified it could result in future regulatory difficulties for the Minister should she intend to designate certain petroleum resources for beneficiation.

8 DEFINITION OF "STRATEGIC MINERAL" AND USE THEREOF

8.1 Similar to the discussion of the definition of 'designated mineral' it is proposed that the current proposed definition of 'strategic mineral' be amendment in order to include both minerals and petroleum resources. The following revised definition is proposed:

*'**Strategic Resources**' means such mineral and/or petroleum as the Minister may declare in the Government Gazette to be of strategic importance to the people of South Africa and the State as the custodian mineral and petroleum resource for the benefit of all South Africans;'*

8.2 The definition could potentially also be linked with one of the objects of the MPRDA to promote the economic growth and mineral and petroleum development in South Africa.

8.3 In addition to the amendment of the definition of 'strategic minerals', it is proposes that the definition must be used in the body of the MPRDA to ensure legislative certainty which provide for objective requirements the Minister must comply with before declaring certain minerals as strategic resources. A strategic mineral or resource is generally regarded as a mineral which is of importance to the state's economy, in particular for defense issues and does not have many replacements. It also usually implies to a state's perception of vulnerability to supply disruptions (electricity), and of a need to safeguard its industries from repercussions of a loss of supplies. See - http://www.usgs.gov/blogs/features/usgs_top_story/going-critical-

being-strategic-with-our-mineral-resources/

8.4 It is proposed that a legislative basis (certainty) be incorporated into the body of the MPRDA in order to empower the Minister to be able to declare certain mineral resources as strategic. The legislature us under a constitutional duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them.

8.5 It is accordingly proposed that a new section be introduced to the MPRDA which takes the following into account:

8.5.1 a clear distinction to be drawn as to when a mineral or petroleum may be classified as designated mineral [resources] and/or strategic mineral [resources];

8.5.2 if an overlap exist between designated minerals [resources] and/or strategic minerals [resources] this must be made dealt with;

8.5.3 when a mineral and/or petroleum is declared strategic mineral [resources], the effect thereof on holders of rights must be ascertainable and not infringe their constitutional rights. The reason and consequences of declaring a mineral strategic should be made clear and must, *inter alia*, at the minimum provide:

8.5.3.1 to what extent a holder of a right would be prohibited or restricted from exporting such the declared strategic mineral or petroleum

8.5.3.2 the domestic requirements which must be catered for;

8.5.3.3 the consequences of the failure to declare such mineral or petroleum as strategic i.e. could potentially prejudice the national security or national interest such as energy security, defence etc;

8.5.3.4 whether such mineral or petroleum will have to be supplied into the market either at export parity pricing or on a government set cost-plus basis.

8.6 Should no clear provision be introduced in the body of the MPRDA to empower

the Minister or at least provide for certain parameters in section 107 (regulations) of the MPRDA to enable the Minister to lawfully issue regulations relating to strategic resources any mineral declared to be strategic by the Minister could be open to attack on the basis of irrationality and infringing the rule of law principle.

9 THE MINOR AMENDMENT OF THE PROPOSED NEW SECTION 32(1A)(B) AND SECTION 33

9.1 The new proposed section 32(1A) reads:

"*(1A) The holder of an exploration right has—*

(a) conducted appraisal operations on the land or area to which the application relates;

(b) proved the commercial discovery of gas;

(c) a market development programme; and

(d) complied with the provisions of this Act and the terms and conditions of the exploration right.";

9.2 It is proposed that the new proposed section 32(1A)(b) be amended by substituting the word "gas" at the end of the sentence with the word "petroleum" as defined in the MPRDA. The amendment will avoid future ambiguity.

9.3 Section 33 of the MPRDA must also be amended in order to ensure that the Minister has the statutory powers to refuse a retention permit, as the section currently only makes provision for minerals and not petroleum. This will align it with the new proposed section 32(1A).

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FREE CARRIED INTEREST: THE STATE'S RIGHTS

10 INTRODUCTION

10.1 The offshore exploration and production of oil and gas by private entities in South Africa's exclusive economic zone is still in its infancy stages. However in recent years the pace of exploration activities and proposed production has gain significant momentum. Save for the Petroleum, Oil and Gas Corporation of South Africa SOC Limited ("**PetroSA**") being South Africa's state-owned petroleum company, a number of privately owned companies are now prepared to take on the risk of exploration and production on the offshore of South Africa.

10.2 The exploration activities require significant amount of capital to be invested before such quantities of petroleum are discovered within an exploration area which will permit the economic development thereof, thereafter further capital needs to be injected in the proposed production of the discovered oil and/or gas.

11 IMPACT OF FREE CARRIED INTEREST: INVESTOR FINANCIAL CONSIDERATION

11.1 The proposed amendment contain in the Bill proposes that the state or PetroSA as the state oil company be entitled to a 'free carried' share in the net profits derived from the exercise of an exploration right or production right issued to a company for the exploration or production of petroleum, despite the state not contributing to the capital expenditure.

11.2 The proposed amendment is ambiguous as to what percentage of the participation interest of a right will be deemed 'a free carried interest' for the state. The relevant new sections are:

11.2.1 the proposed new section 80(7) which reads "*The State has a right to* ***a free carried interest*** *in all new exploration rights, with an option to acquire* ***a further interest*** *on specified terms through a designated organ of state or state-owned entity determined by the Minister in the Gazette.*"; and

11.2.2 the proposed new section 84(6) which reads *The State has a right to* ***a free carried interest*** *in all new production rights, with an option to acquire* ***a further interest*** *on specified terms through a designated organ of state or state-owned entity determined by the Minister in the Gazette.*"

11.3 The ambiguity is the following:

11.3.1 The new subsection implies that the state shall have "a free carried interest" at the issuing of any new exploration rights or production rights to applicants. In financial terms "a free carried interest" refers to a singular interest which equates to a 1% participation interest, subject to the option to acquire "*a further interest*".

11.3.2 As the sections currently reads the free carried interest in respect of the right initially issued is not and cannot be determined by the Minister in the Gazette and the state is only entitled to a singular interest (1%) in the respective right, including further singular (1%) interest for any subsequent "*further interest*" the state decides to exercise in terms of the option.

11.3.3 The "*further interest*" once the state exercises the option does also not seem to contemplated that it shall be a further free carried interest, but that the state subject to specified terms through the designated organ of state or state owned entity will most probably have to pay for the '*further interest*'.

11.3.4 The only matter which may be determined in the Gazette by the Minister on the current reading is which designated organ state or state-owned entity will hold the interest.

11.4 The DMR must consider whether the aforesaid interpretation of the proposed amendment to introduce "a free carried interest" is an unintended consequence. As the current terms and conditions to exploration rights provides that:

"***State Option***

*"From the grant of any production right in respect of any portion of the Exploration Area, the State shall participate as a member of the Holder Group and be granted not less **than ten (10) percent Participation Interest** in such a production right unless the State renounces in writing to the Holder such participation within ninety (90) days from the grant of the Production Right.*

As a member of the Holder Group, the State shall pay its Participation Interest share of all costs and expenses related to the Development Plan and approved production work programme in respect of the Production Area, excluding any costs and expenses related to any previous and/or further exploration or appraisal operations conducted within the Production Area."

11.5 If it is not an unintended consequence then it essentially implies that:

11.5.1 For each and every exploration and/or production right granted by the Minister the state shall retain 1% of the participation interest (free carried) in such right;

11.5.2 Any further right the state decides to obtain from the issued right in terms of the option shall be paid for by the state on normal commercial basis;

11.6 Should the aforesaid be the intention, then the question of whether it might deter invest in the upstream Oil and Gas Industry might be irrelevant or of minimal effect.

11.7 However, should it be an unintended consequence that the state will only be restricted to a 1% free carried interest and have to pay for all further interest it intends to acquire the new section 80(7) and section 84(6) will need to be amended to remove the ambiguity. Further proper consideration will then need to be taken of the impact on investment in the Oil and Gas Industry should be state be entitled to a 10% free carried interest, including the option to obtain a further free carried interest. The financial rational for an investor must be considering taking into account:

11.7.1 capital and operational expenditure during exploration phase and the production phase;

11.7.2 Tax Regime for the oil companies incurring the capital and operation expenditure:

11.7.2.1 Royalties;

11.7.2.2 Income Tax;

11.7.2.3 Dividend Payment to the State as shareholder etc

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