Western Cape Government

MINISTRY OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND
DEVELOPMENT PLANNING

**REFERENCE: 3/5/5 (2013/583)**

**For Attention: Ms Noluthando Skaka**

Portfolio Committee on Economic Development

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**COMMENTS ON THE DRAFT INFRASTRUCTURE DEVELOPMENT BILL**

1. We refer to the above and hereby submit comments on the draft Infrastructure Development Bill [B49-2013] ("the Bill"), as introduced into National Parliament on 4 November 2013. These comments should at all times be read together with the extensive comments which the Western Cape Government ("the WCG") submitted in respect of the previous draft of the Bill (published in Government Gazette 36143 on 8 February 2013), a copy of which is attached hereto for ease of reference and marked "Annexure A" ("previous comments").

2. It is noted that the WCG has not received any feedback or response in relation to its previous comments. This is concerning, as the Bill has far-reaching implications for, amongst others, provinces and their departments. In the circumstances, it is recommended that appropriate feedback (e.g. comments and/or a response report) be provided to provinces and other stakeholders in relation to the comments which they have previously submitted on the content of the previous version of the Bill and in relation to this version of the Bill.

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GENERAL:

Bill not supported:

3. The WCG does not support the Bill for the reasons set out in these comments.

Tagging of the Bill:

4. The tagging of the Bill has changed. Previously, it was tagged as a section 76 Bill, however, the current version of the Bill indicates that it is now tagged as a section 75 Bill. The tagging of a Bill has a bearing on the procedure which must be followed by National Parliament in order to pass the Bill. These procedures are set out in section 75 and 76 of the Constitution of the Republic of South Africa ("the Constitution")

5. The Constitutional Court stated in Tongoane and Others v Minister of Agriculture and Land Affairs and Others 2010 (6) SA 214 (CC) ("Tongoane") (a case dealing with the tagging of bills) that "any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in s 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in s 76(3)(a) – (f), over which the provinces have no legislative competence, as well as Bills, the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in s 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. Whether a Bill is a s 76 Bill is determined in two ways. First, by the explicit list of legislative matters in s 76(3)(a) – (f); and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial competence" (at paragraph 72).

6. On the face of it, the Bill purports to deal with issues which fall within the concurrent legislative competence of provinces (for example, industrial promotion, public transport, regional planning and development, trade and urban and rural development) and/or which substantially affect provinces (as will be further elucidated in these comments). In the circumstances, it would appear that the Bill has been incorrectly tagged as a section 75 Bill and should, in fact, be tagged as a section 76 Bill.

7. Where a Bill must be passed in accordance with the procedure set out in section 76 of the Constitution and this procedure is not followed, the resulting

legislation (in this case, the proposed Infrastructure Development Act) will be invalid (paragraph 109 of Tongoane).

Summary of concerns:

8. Given the lack of necessary skills and the capacity issues experienced at all spheres of government in rolling out infrastructure projects in the past, this Bill is a deliberate attempt to centralise the planning, implementation, monitoring and evaluation functions of the state's infrastructure expenditure programme. In this regard, although scant on detail, the Bill provides a framework for the continued functioning of the Presidential Infrastructure Coordinating Commission ("the Commission") and its component committees/structures and attempts to formalise the management, implementation, monitoring and evaluation of the identified strategic integrated projects ("SIPs"). It is also a deliberate attempt to centralise state infrastructure spending and it appears to be the view of the national executive that infrastructure planning should be handled by national departments in consultation with officials from the three spheres of government. The objective of the Bill is thus to regulate the identified SIPs as well as to continue the existence of the Commission which was established by Cabinet.

9. There are various concerns relating to the content of the Bill and, therefore, the Bill cannot be supported in its current form. The concerns are broadly as follows:

- The failure to address the underlying issues which cause delays in infrastructure delivery and lack of capacity;

- The failure to address the problem of implementation capacity;

- The fact that a lot of what is contained in the Bill is already governed by other legislation;

- The fact that the Bill does not address delays caused by labour disputes, which may potentially be resolved by the introduction of on-site mediators;

- The lack of provision for private sector involvement such as Public Private Partnerships;

• The fact that the Bill seems to create further levels of bureaucracy and it is possible that this may hamper co-operative government;

• The lack of clarity in relation to the role of the provincial economic departments; the co-ordination of their participation is required;

• The fact that the Bill does not address the shortage of project management and related skills in South Africa;

• The duplication of the functions of the various structures and committees established in terms of the Bill, and confusion as to how they will operate vis-a-vis each other;

• The assignment of certain line functions to the Commission, which largely comprises of executive authorities;

• The broad, but also vague, definition of "strategic integrated project" and the consequent widening of the scope and purpose of the Bill;

• The unconstitutional encroachment on provincial and municipal competences (see, amongst others, the discussions in paragraphs 44, 55, 71, 126, 129, 130, 199 of these comments);

• The failure to provide clarity and detail on how the SIPs will be funded;

• The uncertainty as to how the Commission will address any possible conflict with an organ of state that may not be in support of a proposed project in their area of jurisdiction;

• The failure to give due consideration or importance to the internationally recognised principle of sustainable development;

• The failure to consider the implications of Integrated Development Plans ("IDPs") /Frameworks or Spatial Development Frameworks ("SDF") in the Bill. In this regard, the IDP plays an important role in identifying programmes to enhance economic, social and environmental upliftment, while the SDF spatially identifies the areas earmarked for those proposed developments. These areas include development nodes (housing, infrastructure), green belts (conservancies, reserves, parks and recreation areas) and economic active zones (industries, business development). It is recommended that the Bill mentions the IDP and SDF as important spatial planning tools to consider the economic, social and environmental factors for public infrastructure development; and

• The failure to clarify the factors which will inform the designation of SIPs in the Bill;

10. Hence, the comments below highlight the concerns raised above in relation to specific clauses and point out some of the inconsistencies contained in the Bill.

SPECIFIC COMMENTS:

General:

11. It may be prudent to provide for the minimum requirements for public participation, especially when identifying and designating a SIP.

Long title of the Bill:

"approval" / "given priority in":

12. The long title of the Bill reads as follows: "To provide for the facilitation and co-ordination of infrastructure development which is of significant economic or social importance to the Republic; to ensure that infrastructure development in the Republic is given priority in planning, approval and implementation; to ensure that development goals of the State are promoted through infrastructure development; to improve the management of such infrastructure during all life-cycle phases; and to provide for matters incidental thereto" (our emphasis).

13. Reference to the term "approval" is problematic when coupled with the words "given priority in", in that the merits of each SIP must be objectively considered by the relevant authority in terms of the requirements set out in the specific legislation governing a decision-making process.

14. In the circumstances, it is recommended that the wording of the long title be amended to read "...is given priority in planning, decision-making and implementation...".

Sustainable development:

15. The long title (and the Bill for that matter) is silent on the internationally recognised principle of sustainable development, which is defined in the National Environmental Management Act 107 of 1998 ("NEMA") to mean "the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations".

16. The lack of any reference to the environment or sustainability is of concern, especially in the light of national priorities such as the National Development Plan (the "NDP"), which advocates for the "....transition to an environmentally sustainable, climate-change resilient, low-carbon economy and just society...." and the National Strategy on Sustainable Development and Action Plan, which was approved by Cabinet on 23 November 2011, and which has as priorities, amongst other things, "[s]ustaining our ecosystems and using natural resources efficiently; [m]oving towards a green economy and [b]uilding sustainable communities".

17. If such considerations are not included in the Bill, the Bill will give the impression that a development (i.e. a SIP) should be approved notwithstanding the long-term sustainability thereof and the potential adverse implications for present and future generations.

18. The inclusion of sustainable development in the Bill will reflect that careful planning will be done by taking into consideration the biophysical environment as part of the planning phase in order to place developments on areas of least ecological significance. This would entail that the Bill not only focus on and consider the economic and social benefits, but also its interdependency on the environment. This is particularly important in terms of long-term resource planning in a resource constrained environment.

19. Further, it appears that SIPs are expected to be larger developments. It is therefore of particular importance that they are sustainable. The impact of an unsustainable SIP could lead to intolerable consequences (for present and future generations) for the Republic or the region within which the SIP is located.

20. In the circumstances, it is recommended that the long title be amended to include a reference to sustainable development and that this concept be reflected throughout the Bill.

21. It is proposed that the words "environmental" be inserted after the word "economic", as follows:

"To provide for the facilitation and co-ordination of infrastructure development which is of significant economic, environmental or social importance to the Republic...".

Clause 1: Definitions

General: sustainable development:

22. It is noted that the Bill does not contain a definition of "sustainable development". In the circumstances, it is recommended that a definition of "sustainable development" be inserted (alternatively, that the Bill cross-refers to the definition in NEMA) and, again, that the principle of sustainable development is reflected throughout the Bill.

SIP:

23. It is noted that "SIP" and "strategic integrated project" are defined independently. There should be one consistent definition.

24. If the definition of "SIP" is deleted (and the definition of "strategic integrated project" is retained), then the definition of "strategic integrated project" could be amended as follows:

"'strategic infrastructure project' or "SIP" means a public infrastructure project or group of projects contemplated in section 7;"

Clause 2: Objects

Clause 2(c):

25. In clause 2(b), the word "state" (which was in the previous draft of the Bill) was replaced with the word "Republic". In the circumstances, it is recommended that the reference to "state" in clause 2(c) also be replaced with the word "Republic", for the sake of consistency.

26. In light of the aforegoing comments in relation to the need to incorporate the principle of sustainable development in the Bill, it is proposed that clause 2(b) be amended as follows to include a clear reference to sustainable development:

"the alignment and dedication of capabilities and resources for planning for sustainable strategic integrated projects across the Republic, as well as the effective implementation and utilisation of such projects in order to ensure coherence and the expeditious completion of sustainable infrastructure build and maintenance programmes."

Clause 2(g):

27. There are laws which provide for ensuring that infrastructure development is undertaken in a manner which seeks to involve all persons affected and ensure the greatest co-operation, such as the Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005), as well as the Constitution. Likewise, there are a myriad of platforms as well as mechanisms to ensure this. Also, the Constitution effectively devolves responsibility for infrastructure development to Provincial and Local Governments respectively (namely, Provincial and Municipal Planning). This, in effect, means that the Bill cannot amend the constitutional division of functions provided for in the Constitution as it relates to specific functions or functionaries.

28. Further, this clause states that national development goals are to be "advanced". It is recommended that provincial and municipal development goals be recognised as a priority in the Bill.

Clause 3: Structures and composition of the Commission

General:

29. This clause fails to provide for representatives of a member (in the absence of the member) to attend a meeting. It seems impractical not to allow a member to identify and permit another appropriate person to attend a meeting in that member's stead.

Clause 3(1):

30. In the light of the fact that the Bill defines the term "Commission", this term should be used in clause 3(1) and not the term "The Presidential Infrastructure Coordinating Commission".

Clause 3(3):

31. The potential overlap in membership and functions of the various structures of the Commission is a matter of concern. The structures should be reconsidered and duplications in functions should be removed from the Bill. Where appropriate, structures should be merged (e.g. where there are duplications in function or membership) or abandoned (e.g. where there is no objective need for such a structure). The same applies in respect of officials or other functionaries mentioned in the Bill. It is important that there is no duplication of functions and that there is a need for such persons to sit on committees or other structures. Previously, it was proposed that the Commission and the Management Committee be collapsed into one structure for a myriad of reasons. Please see in this regard paragraph 10 of the previous comments. It is also unclear what role the "forum of executive authorities" referred to in clause 7(4) of the Bill will fulfil and should be clarified.

32. This clause states that Premiers, Executive Mayors and the chairperson of the South African Local Government Association (SALGA) will be members of the Commission. This seems to suggest that the Commission will be undertaking

functions which impact upon provinces and municipalities. This lends support to the view that the Bill should be tagged as a section 76 Bill.

Clause 3(5):

33. Given the impact of the decisions of the Commission, it is recommended that there be a minimum quorum for the holding of a meeting. Decisions can then be taken on a simple majority (or other appropriate threshold) of those constituting the requisite quorum.

Clause 3(7):

34. This clause opens the door for private consultants to be approached for assistance and advice to assist the Commission to perform any of its functions. It is suggested that such advice and assistance be sought from the Director-Generals or officials from the relevant national and provincial departments. It is recommended that consideration be given to who will appoint and pay for the services of private consultants.

Clause 4:

General:

35. The functions of the Commission are cause for concern. The functions largely relate to economic and social benefits, while ecological and sustainable development considerations are not mentioned. The Local Government: Municipal Systems Act, 32 of 2000 ("the Systems Act") specifically requires services to be both financially and environmentally sustainable. As indicated above, the NDP advocates for "the transition to an environmentally sustainable low-carbon economy, moving from policy, to process, to action" and provides the following principles to guide this transition:

• Just, ethical and sustainable. Recognise the aspirations of South Africa as a developing country and remain mindful of its unique history.

• Global solidarity. Justly balance national interests with collective action in relation to environmental risks and existential threats.

• Ecosystems protection. Acknowledge that human wellbeing is dependent on the health of the planet.

• Full cost accounting. Internalise both environmental and social costs in planning and investment decisions, recognising that the need to secure environmental assets may be weighed against the social benefits accrued from their use.

• Strategic planning. Follow a systematic approach that is responsive to emerging risk and opportunity, and which identifies and manages trade-offs.

• Transformative. Address the structural and systemic flaws of the economy and society with strength of leadership, boldness, visionary thinking and innovative planning.

• Managed transition. Build on existing processes and capacities to enable society to change in a structured and phased manner.

• Opportunity-focused. Look for synergies between sustainability, growth, competitiveness and employment creation, for South Africa to attain equality and prosperity.

• Effective participation of social partners. Be aware of mutual responsibilities, engage on differences, seek consensus and expect compromise through social dialogue.

• Balance evidence collection with immediate action. Recognise the basic tools needed for informed action.

• Sound policy-making. Develop coherent and aligned policy that provides predictable signals, while being simple, feasible and effective.

• Least regret. Invest early in low-carbon technologies that are least-cost, to reduce emissions and position South Africa to compete in a carbon-constrained world.

• A regional approach. Develop partnerships with neighbours in the region to promote mutually beneficial collaboration on mitigation and adaptation.

• Accountability and transparency. Lead and manage, as well as monitor, verify and report on the transition.

36. Furthermore, the New Growth Path (2010) ("NGP") states that "[t]he main indicators of success will be jobs (the number and quality of jobs created), growth (the rate, labour intensity and composition of economic growth), equity (lower income inequality and poverty) and environmental outcomes". The NGP also

specifically calls for "environmentally friendly infrastructure" and "schemes to protect the environment", and "sustainable" growth.

37. The consideration of "sustainable development imperatives" should be included under the functions of the Commission, to be informed by sustainability considerations during the identification of SIPs, as well as during the implementation thereof.

38. In the circumstances, it is recommended that a clause 4(g)(vii) be added, which will read as follows:

"(vii) the environmental impact of strategic integrated projects."

Clause 4(b):

39. Clause 4(b) states that the Commission will "coordinate the determination of priorities for infrastructure development".

40. It is not clear what is meant by "coordinate the determination..." and the extent to which this function is intended to influence, overlap, or even usurp the planning functions of municipalities and provinces.

41. The Constitution has assigned the exclusive municipal function of "municipal planning" to municipalities. In terms of the Systems Act and the Municipal Planning and Performance Management Regulations, 2001, municipalities have been tasked to coordinate an integrated development planning process, with municipalities having to "integrate the activities of all spheres of government" and produce IDPs.

42. In term of the Systems Act and Regulations:

• "The planning undertaken by a municipality must be aligned with, and complement, the development plans and strategies of other affected municipalities and other organs of state so as to give effect to the principles of co-operative government contained in section 41 of the Constitution." (Section 24 of the Systems Act)

• A SDF "must indicate where public and private land development and infrastructure investment should take place", "must identify areas where strategic intervention is required" and "must indicate areas where priority spending is required" (Regulation 2(4) of the Regulations)

43. It is noted that while the Chairperson of SALGA is represented on the Commission, this person would not be mandated by or be empowered by the relevant legislation to act on behalf of all municipalities to decide on infrastructure development priorities. The inclusion of the Executive Mayors of metropolitan councils on the Commission is supported. It is unclear whether other municipalities will also be represented on the Commission.

44. The Bill is inconsistent with the Constitutional dispensation of the three spheres of government and the devolution of planning and implementation power to the lowest appropriate level. While it is agreed that improved planning and co-ordination is called for in terms of infrastructure development, the Bill should rather establish mechanisms to strengthen the processes at the municipal sphere, rather than duplicating efforts at the national sphere through an attempt at centralisation to a national level.

45. Similar arguments apply to the provincial competence (exclusive provincial functional area) of "provincial planning". Provinces also have concurrent competencies with the national sphere in terms of, inter alia, "Airports other than international and national airports", "Environment", "Health services", "Housing", "Industrial promotion", "Pollution control", "Public transport", "Regional planning and development", and "Urban and rural development". In this regard, the Bill does not give due consideration to the role of provinces, but rather seems to, contrary to the constitutional imperatives, centralise these functions to a national level.

46. It is suggested that greater emphasis be given to the strengthening of municipalities and provinces rather than duplicating their functions within the national sphere.

47. In the circumstances, it is recommended that clause 4(b) be amended as follows:

"to assist municipalities and provinces with coordinating the determination of priorities for infrastructure development".

Clause 4(d):

48. In clause 4(d), the wording "ensure" and "is given priority in.....approval" gives the impression that the Commission will be influencing or dictating positive outcomes to the authorities empowered to make the project-level decisions. This may constitute a ground for the judicial review of such decisions, since an argument may be made that such decisions were made because of the unauthorised or unwarranted dictates of another person or body. This clause also suggests that a SIP (identified by the Commission) is considered to be of a higher priority than any other project.

49. In the circumstances, it is recommended that clause 4(d) be amended to read as follows:

"promote the coordination and alignment between all spheres of government during the planning, decision-making and implementation stages of infrastructure development projects;"

Clause 4(f):

50. Clause 4(f) is limited to "strategic international partners" (our emphasis) with which to conclude agreements which seek to promote the objects of the Act. It is suggested that "strategic local partners" should also be included in this clause.

51. The identification of "international partners" and the conclusion of agreements with them should be done on the basis of an open tender process and not one where specific organisations or companies are targeted, in order to ensure transparent supply chain management processes. Further, the conclusion of such agreements must be subject to the Public Finance Management Act, 1999 (Act 1 of 1999) and the procurement prescripts. It may be prudent for the clause to be amended so as to expressly contain such statements.

52. Further, the Bill should clarify the capacity and mandate of the Commission in relation to the conclusion of such agreements. Will it be contracting in its own name and have legal identity? Will it be liable for performance, delivery, damages, irregularity, controversy, or any other risk flowing from the conclusion of such an agreement?

Clause 4(g)(i):

53. Clause 4(g)(i) states that one of the functions of the Commission is to identify "the current and future needs and related priorities in relation to infrastructure development of the Republic, or in the region as it relates to the Republic".

54. The wording in clause 4(g)(i) is too broad and could include almost anything. In the circumstances, the ambit of clause 4(g)(i) should be clarified in the Bill, including, amongst others, the meaning of the terms "related priorities" and "region".

55. Further, consideration should be given to how this clause relates to, or usurps, the role of municipalities and provincial governments in terms of their constitutional planning mandates. This is especially relevant considering the poorly defined list of infrastructural projects in Schedule 1 and the vague wording of clause 7.

Clause 4(g)(ii):

56. Clause 4(g)(ii) states that one of the functions of the Commission is to identify "any legislation and other regulatory measures that impede or may impede infrastructure development, and advise the executive authority of the relevant sphere of government".

57. It should be considered how the identification of legislation and regulatory measures by the Commission and the subsequent advising of the relevant executive authority will assist a specific project, as the necessary approval in terms of the relevant legislation or regulatory measure will still be required. Is it perhaps with the view to amending such legislation so that unnecessary delays are avoided in the future?

58. It is inappropriate to assume that regulatory requirements are responsible for impeding development. Often it is not regulatory requirements per se that impede service delivery, but the implementation thereof. It would be more appropriate for the Commission to "assist all spheres of government to identify and address institutional frameworks that may impede effective planning for and implementation of SIPs".

Clause 4(g)(iii):

59. Clause 4(g)(iii) states that one of the functions of the Commission is to identify "the direct and indirect impact of any strategic integrated project on job creation, youth employment and economic inclusiveness".

60. What is the purpose of this provision? It is assumed that these factors are considered prior to the identification and designation of any SIP, as such information should inform the process of identification and designation of SIPs. If this is so, then surely these are only some of the relevant factors which must be considered, including, for example, sustainability. This clause should therefore contain a more considered list of factors, including the sustainability of any SIP.

61. Further, the term "economic inclusiveness" should be clarified in the Bill. In this regard, details of which persons (natural and juristic) are intended to be included and the reason/s for their inclusion should be provided.

Clause 4(g)(iv):

62. Clause 4(g)(iv) states that one of the functions of the Commission is to identify "the direct and indirect impact of any strategic integrated project on job creation, youth employment and economic inclusiveness".

63. What is the purpose of this provision? Again, this is information which should be assessed prior to the determination of a SIP.

64. The lack of any provision dealing with the socio-ecological considerations is a serious omission. The fact that the Bill refers to environmental authorisations does not detract from the need for balanced considerations when identifying a SIP.

65. The meaning of "economic equality" and "social cohesion" should also be clarified.

66. Further, as indicated above, it is recommend that a clause 4(g)(vii) be added, which reads as follows:

"the direct or indirect impact of any strategic integrated project on the environment".

Clause 4(h):

67. Clause 4(h) provides that one of the functions of the Commission is to "evaluate existing infrastructure with a view to improving planning, procurement, construction, operations and maintenance".

68. It is recommended that the above wording be amended to include a requirement in relation to environmental sustainability.

Clause 4(i):

69. Clause 4(i) states that a function of the Commission is to "consider proposals for infrastructure development and maintenance".

70. This implies that maintenance is not considered part of infrastructure development. It is unclear whether a SIP can only be maintenance related.

71. Further, in the light of the fact that the matters contemplated in this clause are municipal and provincial competencies, it is unclear what function the Commission would serve herein.

72. It is also unclear from whom the Commission would receive proposals and in what capacity the Commission will determine such proposals. This should be clarified.

Clause 4(l)

73. It is unclear what would constitute a "decent" employment opportunity. This term is extremely subjective and should be replaced with more objective wording; alternatively, the meaning should be clarified in this clause or in the form of a definition.

74. Further, this clause refers to the term "historically disadvantaged persons", but this term is not defined in the Bill. It is therefore unclear as to who is being referred to. This should be clarified.

75. It is unclear how the provisions of clause 4(l) will be achieved. Other than through the existing Broad-Based Black Economic Empowerment legislation, how will the Commission ensure that preferred partners create "decent" employment opportunities?

76. Further, the focus of this clause appears to be that of economic and social development, to the exclusion of sustainable environmental development. As indicated previously, the Commission should also encourage and promote environmentally friendly infrastructure development and sustainable development. Failure to adhere to such principles is merely short term planning for job creation, as opposed to ensuring its longevity.

Clause 4(n):

77. Clause 4(n) indicates that one of the Commission's functions is to "develop and issue guidelines and frameworks to facilitate and align the implementation of strategic integrated projects".

78. It is recommended that reference is also made to the planning of such SIPs.

Clause 5:

79. Despite our extensive previous comments, the content of clause 5 has remained the same as in the previous version of the Bill.

80. Clause 5(1) provides that: "The Commission may, for the purposes of implementing a strategic integrated project, expropriate land or any right in, over or in respect of land."

81. What is the legal basis upon which the Commission will expropriate land? In terms of the current Expropriation Act, 1975 (Act 63 of 1975) ("the Expropriation Act, 1975"), the Minister of Public Works and an executive committee of a province are authorised to expropriate in terms of section 2(1), which power can be delegated to state officials. In terms of the draft Expropriation Bill, 2013 (that was published in Government Gazette 36269 for public comment), there are also limitations placed on who can expropriate. Until a new Expropriation Act is in force, however, the current Expropriation Act, 1975, will apply to expropriations and this Bill conflicts with it in many aspects. Another important conflict between this Bill and the current expropriation law is that our courts have held that an expropriation must be for a public purpose – and that concept has to be distinguished from a public interest. Our courts have held that under the current Expropriation Act, 1975, the expropriation for the benefit of a third party cannot be for a public purpose, notwithstanding that it may be in the public interest, (see Administrator, Transvaal and Another v J van Streepen 1990 (4) SA 644 (A)). The draft Expropriation Bill, 2013, proposes to vastly extend those powers so as to allow the Minister to expropriate on behalf of a juristic person but still only on certain conditions (see clause 4 of the draft Expropriation Bill, 2013) one of which is that the juristic person concerned must satisfy the Minister that it (and not a third party like the Commission) requires the property for a public purpose or interest and it has failed to reach agreement on price with the owner.

82. Clause 5(1) appears to propose a second parallel method of expropriation by the Commission itself, but does not give any indication as to the process that will

be followed and appears to conflict with both the existing expropriation legislation and the new draft Expropriation Bill, 2013 in this respect, given that it appears to anticipate the Commission itself being the expropriator i.e. the entity which will own and operate the land in question (as opposed to the agent of the organ of state which is destined to do so in terms of its own constitutional mandates).

83. Clause 5(2)(a) states as follows:

"(2) Any expropriation in terms of this section must comply with the Constitution of the Republic of South Africa, 1996, particularly sections 25 and 33, and must be effected in accordance with-

(a) any legislation which specifically deals with expropriation enacted after the commencement of this Act."

84. This appears to imply that any legislation dealing with expropriation enacted prior to the commencement of the proposed Act (i.e. this Bill) - i.e. the Expropriation Act, 1975 will not be applicable to an expropriation undertaken for the purposes of the proposed Act. Both the legality and rationality of this approach is questioned.

85. As mentioned above, a draft Expropriation Bill, 2013, has been drafted by the Department of Public Works and been published for comment, and it is anticipated that the draft Expropriation Bill, once enacted, will repeal the Expropriation Act, 1975. However until then, the Expropriation Act, 1975, remains in force and must be complied with. Hence the words "enacted after the commencement of this Act" should be deleted from clause 5(2)(a), and an expropriation undertaken for purposes of this Bill must be effected in accordance with any legislation specifically dealing with expropriation, irrespective of when they were enacted (provided they are still in force).

86. Clause 5(3) is problematic, as the issue of how and why land can be expropriated in terms of the Expropriation Act, 1975 has been determined by our courts to mean that it can only be for a public purpose and not for the public interest. Hence, the reference to "public interest" should be removed from this clause. In addition, the method and determination of payment of compensation is now highly regulated by the Expropriation Act, 1975, read with the case law

pertaining thereto. It is accordingly suggested that this clause be redrafted to align it with any applicable case law, the current Expropriation Act, 1975, which is in force and also section 25(3) of the Constitution.

87. Clause 5(4) is contrary to the Expropriation Act, 1975 and the case law which has made it clear that an expropriation takes place on the date of service of the notice of expropriation and the determination and payment of compensation is not a pre-requisite for the transfer of ownership. Compensation can and most often is paid well after title has been transferred (see Government of the Republic of South Africa v Motsuenyane and Another 1963 (2) SA 484 (T)) and the draft Expropriation Bill does not appear to change this aspect of our law. Accordingly, this clause, which appears to suggest that a dispute over the compensation to be paid can be used to then "impede" an organ of state from serving a notice of expropriation and thereby expropriating land, is not correct.

88. In addition, it is a well-established principle of our expropriation law that for purposes of determining a fair market value for the asset that has been expropriated, (i.e. the compensation to be paid), the expropriation itself must be "thought away", (see section 12 of the current Expropriation Act, 1975, and Tongaat Group Ltd v Minister of Agriculture 1977 (2) SA961 (A), where the court held that the value of land which has been expropriated should be determined without reference to the use of the property after the expropriation.) This clause should be deleted as it accordingly appears to serve no valid purpose and may well trigger extensive litigation in so far as it may be perceived as a deviation from the court sanctioned current method of the calculation of compensation.

Clause 6:

Clause 6(2):

89. This clause should clarify what criteria the President will use to select members of the Management Committee from the members of the Commission.

90. In the light of the exclusive planning functions of the provincial and local spheres of government, it is recommended that this provision expressly states that members of such spheres are represented on the Management Committee (should this structure be retained).

91. Further, it is suggested that the Bill expressly lists the critical infrastructure role-players in national, provincial and local government that must serve on this Management Committee in order to avoid the erosion of their roles, responsibilities and mandates. For example, the Minister of Public Works, along with his or her provincial roads and public works counterparts, must serve on this committee.

92. It is also recommended that this clause be amended to state that persons with appropriate technical expertise will be appointed as members of the Management Committee.

93. Is intended that there will be separate Management Committees for SIPs?

94. This clause should also be amended subject to any changes which are introduced as a result of the comments relating to the structures of the Commission (see paragraphs 29 and 30 above).

Clause 6(3):

General:

95. The wording of clause 6(3) is ambiguous and should be amended in order to avoid any confusion. In this regard, the clause can be read to refer to the functions of the Commission or the functions of the Management Committee. It states that "[t]he Management Committee must assist the Commission to carry out its functions..." (our emphasis) and then proceeds to list a number of functions. These could be seen as the Commission's functions. While it is acknowledged that the Commission's functions are listed in clause 4, and hence it would appear that clause 6(3) lists the Management Committee's functions, it would still be prudent to amend this clause in order to avoid any misinterpretation of this clause.

Clause 6(3)(c):

96. This clause states that the Management Committee is tasked with the duty of "monitoring the implementation of strategic integrated projects, subject to the guidance and directions of the Commission".

97. What then is the purpose of the Construction Industry Development Board ("CIDB"), the relevant Provincial Treasuries and National Treasury, and the implementation of an Infrastructure Delivery Management System as prescribed by the CIDB? All these institutions and mechanisms also monitor and evaluate infrastructure development in South Africa.

Clause 6(3)(d):

98. In terms of clause 6(3), the Management Committee must assist the Commission to carry out its functions, which may include, amongst others, "ensuring coordinated regulatory approvals" (clause 6(3)(d)). The co-ordination of application processes (or information gathering processes) and the integration/co-ordination of decision-making processes are already governed by the provisions of various statutes. It is not clear how the Management Committee would be able to co-ordinate approvals, in circumstances where the various approvals are regulated by specific legislation which must be complied with by various competent authorities. At best, the Management Committee, if it is retained as a structure, would be in a position to promote the co-ordination of application procedures and decision-making processes within the context of the legal provisions of the various relevant statutes. Additional functions could also be to identify blockages, delays, institutions or prescripts that impede infrastructure delivery and to recommend solutions to the responsible competent authorities.

Clause 6(3)(e):

99. It is recommended that this clause be amended to clarify which reports are being referred to in this clause.

Clause 6(3)(f):

100. The reference to "investigations" is vague. It is recommended that the clause be amended to clarify which types of investigations are being referred to in this clause.

Clause 6(3)(g):

101. It is recommended that this clause be amended to clarify which types of reports are being referred to in this clause.

Clause 7:

Clause 7(1):

General:

102. Clause 7(1) is extremely broad and also vague as to what will qualify as a SIP. For example, it is not clear as to what is meant by "installation, structure, facility, system, service or process" relating to any matter specified in Schedule 1, in clause 7(1)(a); what would be considered to be of "significant economic or social importance" in clause 7(1)(b)(i); or what would be considered as "contribut[ing] substantially to any government strategy or policy" in clause 7(1)(b)(ii). Nor is it clear as to what is meant by "region in the Republic" as stated in clause 7(1)(b)(i). These criteria can be open to interpretation and, therefore, should be made clear. The definition of what constitutes a SIP (given what is also said below) should be elaborated upon. It should, further, refrain from incorporating all infrastructure related projects or groups of projects under the definition, as this will increase red tape and require compliance with an additional piece of legislation, which will, in turn, create further delays in infrastructure delivery.

103. Furthermore, clause 7 and Schedule 1, as they currently read, together with the definition of "infrastructure" as defined in clause 1 of the Bill, are unrestricted and any project (which falls within specific government departments) could be considered a SIP.

104. The purpose of the Bill is to assist with facilitation, coordination and planning – namely, with improved prioritisation. The Bill should be amended to be more specific in this regard and should specifically link with the existing integrated planning and prioritisation processes. While it is noted that the Bill now refers to a "national infrastructure plan", it should also provide for Provincial Infrastructure Development Plans/Frameworks (which are already called for in terms of Provincial Planning and Regional Planning), and Municipal Framework Development Plans/Frameworks (which are already called for in terms of the Systems Act and the Regulations, as part of the IDP). To the extent that the "national infrastructure plan" differs from a specific National Spatial Development Plan/Framework, then it is recommended that the Bill incorporates provisions relating to the latter. Proper planning would then strategically identify the infrastructure development priorities in terms of "infrastructure-led growth" and spatial targeting (in terms of the National Spatial Development Perspective and the NDP, and sectoral targeting (in terms of the New Growth Path) (with a specific sector targeted in specific areas as identified in the infrastructure frameworks).

105. Further, it is noted that in order for a project to qualify as a SIP, it must comply with all three criteria set out in clauses 7(1)(a) to (c), but that it only needs to comply with one of the three criteria listed in clause 7(1)(b). In order to distinguish SIPs from other projects, it is suggested that clause 7 be redrafted more clearly. The clause should also state that for a project to qualify as a SIP, it must comply with all three criteria set out in clause 7(1)(b). A SIP cannot be defined by its value only, as there could be a project of a certain monetary value but with little strategic impact. Hence, the"or" at the end of clause 7(1)(b)(ii) should be changed to "and".

Clause 7(1)(b)(iii):

106. The clause should stipulate the methodology that the Commission will use in order to determine the monetary value referred to in this clause. The monetary value could also potentially be inserted in this clause. It is important that the methodology for determining the monetary value should not be arbitrary.

Clause 7(1)(c):

107. This clause refers to a "strategic infrastructure project", which is not a defined term. This term is used again in clause 7(3). What is the distinction between a "strategic infrastructure project" and a "strategic integrated project"? To the extent that the inclusion of the term "strategic infrastructure project" in the Bill was an error and the intention was, in fact, to refer to "strategic integrated project", then this error must be corrected.

Clause 7(2):

108. Any values contemplated in this clause should not be determined arbitrarily. It is recommended that appropriate methodologies be inserted in this clause.

Clause 7(4)(a):

109. The Bill should clarify the purpose and mandate of the forum mentioned in this clause. Further consideration should be given as to whether there is a need for such a forum.

110. Further, the clause should specify which executive authorities will be represented and who will be representing them. Further, the number of representatives should be stipulated. In this regard, it is also suggested that the Bill clarifies how many representatives will sit on the Commission and its other structures.

Clause 7(4)(b):

111. This appears to be a duplication of the function of the Secretariat as set out in clause 10(b). This clause should accordingly be reconsidered.

Clause 7(4)(c):

112. It is unclear why the Secretariat will not be performing this function itself. This should be clarified.

Clause 8:

Clause 8(1):

113. The Bill should make provision for a pre-feasibility study to be conducted in relation to the social, economic and environmental impacts of a proposed project, including the disadvantages and benefits, prior to the decision being made on whether a project should be designated as a SIP in terms of clause 8(1). Such a decision must be appropriate in light of the outcome of the assessment.

114. It is noted that the Bill is silent on any form of assessment that will inform the designation of a SIP. It is illogical to designate a SIP before properly assessing its implications (even if only at a strategic level). In the Bill, once a SIP has been identified and designated, the focus shifts to the implementation thereof and

there is very little emphasis on its impact. Conducting a form of assessment (such as a strategic environmental assessment) prior to the designation of a SIP is critical for informed decision-making.

115. The Bill should therefore be amended to include the integration and co-ordination of planning for SIPs at all spheres of government, based on an appropriate level of strategic assessment.

Clauses 8(2) and 8(3):

116. Clause 8(2) provides that:

"If the Commission designates a strategic integrated project which must be implemented, it must determine whether the State or the organ of state has the capacity to implement the project or whether the project must be put out to tender."

117. In addition, clause 8(3)(a) provides that:

"Such Minister as the Commission may determine must, whenever the Commission decides that a strategic integrated project must be implemented and put out to tender by notice in the Gazette and in at least one national newspaper, request the relevant accounting officers or accounting authorities to call for such tenders."

118. It is unclear which "organ of state" is being referred to in clause 8(2).

119. Further, the State or the organ of state may have the capacity to implement a portion or aspects of the project and hence only aspects or portions thereof might need to be put out to tender – but this is not reflected in these clauses.

120. In terms of this clause, the Commission determines whether there is capacity to implement the project or whether it must be put out to tender. The Bill, therefore, creates a central infrastructure agency which will handle the procurement process and suggests that the Commission will directly oversee and

determine the capacity of the State or the organ of the state to implement a SIP. This may prove to be problematic in practice and this approach is therefore not recommended.

121. Further, when is the decision, as contemplated in clause 8(3), made – is it before or after the designation of the SIP?

122. Further, clause 8(3) states that SIPs must be put out to tender by notice in the Government Gazette and in at least one national newspaper. It is recommended that the notice be published as widely as possible to ensure that it is viewed by its target audience. It is therefore recommended that this clause be amended to state that notice must be given in at least two national newspapers (which was the position in the previous version of the Bill).

Clause 8(4):

General:

123. Clause 8 is silent on the provisions of the Construction Industry Development Board Act, 2000 (Act 38 of 2000), which require the registration of projects on a register of projects and the advertising of all infrastructure related projects, excluding housing, on the CIDB I-Tender System. Thus, it is recommended that it become mandatory for all SIPs to be registered on a national register of projects managed by the CIDB.

124. It is further recommended that provision be made in clause 8 that any national infrastructure development plan be aligned with the NDP. It should also be clarified whether the national infrastructure plan and any project plans will be subject to review. If so, an explicit statement to this effect should be incorporated into the Bill.

Clause 8(4)(a):

125. Clause 8(4)(a) states that:

"Where a strategic integrated project has been designated for implementation, every organ of state must ensure that its future planning or implementation of infrastructure or its future spatial planning and land use is not in conflict with any strategic integrated project implemented in terms of this Act".

126. This clause stipulates that the spatial planning and land use of an organ of state must not be in conflict with a SIP designated by the Commission. It also suggests that a designation of a SIP overrides the municipal Spatial Development Framework and land use planning and that the Bill will trump such Spatial Development Planning. This clause could pose numerous challenges for municipalities and provincial departments as far as the alignment and/or integration of their land use and spatial polices or legislation is concerned. The question that could be asked is what happens when a municipality or provincial government's legislation or policy is in direct opposition to what is proposed? In the event of conflicts, numerous challenges could be experienced e.g. litigation. It is noted that clause 8(4)(b) does provide for an express dispute resolution mechanism. However, the Bill creates the impression that spatial planning and land use policy/legislation of organs of state could be trumped by a SIP. This clause undermines the municipality's role and the province's role in respect of their competences.

127. This clause removes the powers of all organs of state responsible for planning in their area (municipal and provincial authorities) by directing them to ensure that future plans are not in conflict with a SIP. On the face of it, this clause appears to be unconstitutional. The provision essentially usurps the function of municipalities and provinces in that they are limited in the scope of their planning mandate by decisions and plans which have been approved by the Commission.

128. Parts A and B of Schedule 5 of the Constitution clearly provide for provincial planning and municipal planning respectively, which vest exclusively with provinces or municipalities, as the case may be.

129. The integration of planning requirements of all spheres of government into the municipal planning processes (i.e. IDP and SDF planning processes) is a key component for co-ordination and integrated decision-making. This crucial mandate has been designated to local authorities and for the Commission to now

determine national plans, which impact on the local authority, and which will limit their capacity and decision-making in forward planning, is unlikely to withstand constitutional challenge.

130. The same is true for provincial planning, which is an exclusive competence of the province, as recognised in the Constitution. The courts have repeatedly emphasised that each sphere of government is to exercise its powers in a manner which does not interfere with the functions and competencies of another sphere of government. Clause 8(4)(a) is inconsistent with this approach and hence is unlikely to withstand constitutional challenge should it remain.

131. Instead of doing what is proposed in clause 8(4), it is recommended that the Commission do the following:

• Determine whether and ensure that the SIPs are in line with the relevant spatial planning and land use tools; and

• Coordinate the various applications for the necessary authorisations required.

132. For example, urban edges, IDPs and Environmental Management Frameworks ("EMF") are developed in line with the provisions of the Constitution, as well as the provision of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) ("PAJA") and follow public participation procedures and many variables are considered in the planning, design, finalisation and amendment of such plans. The Bill cannot prescribe (without an exception) how these 'tools' should be changed. Also, what would be the value of such public participation in the tool development/amendment processes if the outcome has already been predetermined by the Commission and the overruling power contained in the Bill?

133. Furthermore, the concept of reasonable administrative action has been enshrined in especially section 6(2)(f)(ii) and (h) of PAJA. Reasonable administrative action in terms of section 33 of the Constitution has also been held to mean that a functionary (such as the various decision-makers in respect of the approval of various aspects of infrastructure development) is obliged to make decisions that are rationally justifiable (Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241)). The decision-maker cannot therefore

be obliged to exercise its discretion/decision making power in a particular manner merely because the project has been identified by national policy makers as a SIP. The decision-maker is required to exercise its discretion in a rational and unfettered fashion.

134. Having regard to the proposed system or approach in the Bill for the identification of SIPs and the requirement that all organs of state may not conduct land use planning or spatial planning in conflict therewith, it appears that decision-makers would be bound by the policy decisions of the Commission. Such decision-makers will be fettered by the exercise of their discretion as they are required to do in terms of the relevant legislation that regulates land use planning approvals and environmental authorisations as such discretion as they were required to exercise were exercised, not by them, but by the Commission, or because they accepted the designation of the project by the Commission and did not bring their own independent discretion to bear on the decisions that they were required to make, or because by basing their decisions on the designation of the Commission, the relevant decision-maker was applying a policy decision that unlawfully fettered his or her discretion he or she might have exercised.

135. Clause 8(4)(a) may add an extra layer of bureaucracy to provincial and local government infrastructure development, as any project decided upon by provinces or local government will need to first be checked for compatibility with any SIP planned by the Commission through the steering committee.

136. Furthermore, clause 8(4)(a) does not address the status and link between a SIP and the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008) ("the ICM Act"), which does not directly regulate spatial planning, but codifies the principle of the sanctity of the sea-shore, the sea and the sea-bed through the concept of coastal public property, which may not be privately owned. If, for example, a SIP is identified on coastal public property, for example the development of an island in the sea, it would militate against the principles enshrined in the ICM Act and the concept of the sanctity of coastal public property.

Clauses 8(4)(b) and 8(4)(c):

137. Both these provisions ignore the constitutionally mandated functions of provinces and local authorities and hence conflicts between municipal and provincial planning and that of a SIP cannot be remedied by reference to the Intergovernmental Relations Framework Act.

138. Further, it is suggested that the word "national" be deleted from clause 8(4)(c), as conflicts should be resolved with reference to any applicable legislation.

Clause 9:

139. The Secretariat, established in clause 9, comprises only of national Ministers and Deputy Ministers, as determined by the President and, given the name of this structure, implies that these Ministers and Deputy Ministers, read with clause 3(2)(b) and clause 10(g), are actually taking minutes for the Commission. It is recommended that this clause be amended to provide for secretarial support and administrative support to the Secretariat. It is noted that secretarial support is provided for steering committees in terms of clause 16(3).

140. While it is noted that the Chairperson of the Secretariat is the Minister of Economic Development, it is submitted that the Secretariat of the Commission cannot be merely any organ of state, but must be the organ of state which has been mandated to manage the construction industry and the delivery of infrastructure in South Africa, as failure to do so will make the existence of such an organ of state questionable. It is therefore recommended that the Secretariat be the Public Works Department or a Department entrusted with the responsibility and mandate to manage the construction industry and infrastructure delivery in South Africa.

Clause 10:

Clause 10(a):

141. Clause 10(a) refers to "...the implementation and long term utilisation of any strategic integrated project".

142. It is not clear what the terms "long term" and "utilisation" in clause 10(a) would entail. This should be clarified.

Clause 10(j):

143. Clause 10(j) provides that the Secretariat must "manage the implementation of the day to day work of the Commission....". This seems to be a duplication of the function of the Management Committee as stated in clause 6(3), which provides that "[t]he Management Committee must assist the Commission to carry out its functions...".

144. This clause should accordingly be reconsidered.

Clause 11:

General:

145. While improved intergovernmental co-operation and co-ordination is required to improve planning and facilitate strategic projects, the organs of state responsible for administering the regulatory processes must be in a position to, in an unbiased and objective manner, consider the merits of a specific project. For the officials responsible for administering the legislation to sit on a steering committee with the main purpose of "giving effect" "to the Commission's decision to implement a strategic integrated project" and to "facilitate" the "implementation of" projects, would cause a conflict of interest.

146. While the Commission might, through the different infrastructure plans/frameworks, identify strategic priority projects, the actual decision to grant or refuse the different permits/licences/authorisations rests with the relevant regulatory authorities. It is recommended that the wording in the Bill be amended in accordance with the above, i.e. the Commission identifies priority projects, to be decided by the relevant regulatory authorities, but provision should be made for improved co-ordination and co-operation in terms of priority projects.

147. In addition to the above, it is submitted that consideration of feasible alternatives (i.e. technology and/or location and/or alignment) will be crucial to any SIP being successfully implemented.

Clause 11(a):

148. Clause 11(a) states that one of the main purposes of the steering committee is "to develop mechanisms to identify and determine the different projects which constitute a strategic integrated project, and submit them for approval by the Secretariat".

149. It is assumed that the development of mechanisms to identify and determine SIPs will be the first step in the process of designating SIPs. How does this relate to other strategic planning processes at all spheres of government that identified developmental needs?

Clause 11(c):

150. Clause 11(c) refers to "approval by the Secretariat". It is recommended that the approval be granted by the Commission and based on a recommendation from the steering committee.

Clause 11(d):

151. It appears that this is a duplication of the function performed by the Management Committee, as set out in clause 6(3)(c). This clause should accordingly be reconsidered.

11(g):

152. It is unclear how this clause is intended to operate, in light of clause 8(4)(c).

Clause 12:

General:

153. It is recommended that a provision be inserted in the Bill which states the tenure of members of the steering committee (and, for that matter, the tenure of all the persons sitting on the Commission or its structures).

Clause 12(1):

154. It is unclear whether a SIP co-ordinator could be a person or agency falling outside of government.

Clause 12(1)(b):

155. Clause 12(1)(b) suggests that officials from the Department of Environmental Affairs ("DEA"), from all spheres of government can be appointed to serve on the steering committee. This raises a number of potential issues: Firstly, there could be a potential conflict of interests; secondly, any meetings, questions and or discussion on Environmental Impact Assessment ("EIA") project details may be seen as an interference with informed decision-making; thirdly, it is not clear what these officials' roles would be in the event of unlawful commencement or any other related enforcement action in terms of NEMA and fourthly, there could be allegations of bias in the decision-making process by third parties.

156. The function of the steering committee remains a concern if it means that a member of, for example, the DEA must sit on the steering committee and be the decision-maker for an application for environmental authorisation.

157. It is therefore unclear how the Bill will resolve the potential conflict between the functions of organs of state being represented on the steering committee (with the function of promoting SIPs during all stages of decision-making and implementation) and their role as objective decision-making authorities. This should be clarified in the Bill.

158. Furthermore, it should be mandatory to appoint officials from departments with expertise or representing any other relevant portfolio necessary for the implementation of the SIP, otherwise key role players may be omitted. Clause 14(2) makes it mandatory for each steering committee member to evaluate the SIP from the perspective of their expertise. This suggests that members with relevant expertise must sit on the steering committee; their appointment cannot, therefore, be discretionary.

Clause 12(1)(c):

159. It should be noted that should a person who is not employed in the public sector be appointed as a member of a steering committee, such person will also have direct access to Ministers and Deputy Ministers.

Clause 12(3):

160. It is recommended that the Bill contains a provision which sets out the requirements for being the SIP co-ordinator. In this regard, it is recommended that a similar provision to clause 12(5) should apply in respect of a person holding the position as SIP co-ordinator.

Clause 12(6)(a):

161. Clause 12(6)(a) states that a member of a steering committee, who can be an official representing a department in the three spheres of government, has the authority to take decisions on behalf of the organ of state he/she represents (excluding any decision to grant an approval, authorisation, licence, permission or exemption). It is noted that this power is subject to the provisions contained in clause 20(4). Clause 20(4)(a) states that a member of a steering committee may exercise or perform any power or duty on behalf of the organ of state he or she represents, if such power or duty is delegated or assigned to him or her by virtue of any law. Clause 20(4)(b) states that the "head of the organ of state may, for the purposes of paragraph (a) and in so far as legislation administered by that organ of state does not provide for a delegation or assignment of a power or duty contemplated in that paragraph, delegate or assign the power or duty to the relevant member of the steering committee by virtue of this subsection."

162. The broad authority vested in a member of a steering committee by virtue of clause 12(6)(a) could lead to some unintended consequences, since the functions of the steering committee are extremely wide. As such, it is not clear whether the proviso contained in clause 20(4)(a) (where the clause is subject to clause 20(4)(c)) is sufficient enough to cover all decisions which the member of the steering committee is expected to take.

163. Hence, the function of the steering committee remains a concern if it means that a member of, for example, the DEA, must serve on the steering committee and take certain decisions on behalf of the organ of state he or she represents. It is also unclear how the different roles (namely, member of steering committee versus the decision-maker in terms of NEMA) are to be separated from each other.

Clause 12(7)(a):

164. Clause 12(7)(a) provides that "a member of the steering committee must be available at all times to perform his or her functions as a member of the steering committee." This implies that serving on the steering committee could be construed as a "full-time" job. Consideration should be given as to how this will affect officials representing departments who serve on the steering committee, as such officials already have full-time jobs. Is the intention to appoint someone whose main focus will be to participate on the steering committee? Given the capacity constraints already experienced by many organs of state, this may be problematic (particularly given the role of steering committee members). The expectation on members of a steering committee is unclear.

Clause 12(9):

165. Clause 10(c) states that the Secretariat is tasked with the responsibility of appointing members to a steering committee. However, clause 12(9) states that the Commission "may... reconstitute the steering committee in order for it to reflect the necessary skills and expertise...". Should this not be the responsibility of the Secretariat, given its function set out in clause 10(c)?

Clause 12(11):

166. It is recommended that the Bill clarifies what is meant by a "technical committee".

Clause 13:

167. It is recommended that a similar provision should apply in respect of members of the Commission and all of its other structures.

Clause 13(1):

168. The definition of "family member" is very wide. The Bill should clarify the position regarding persons who are not closely related e.g. second, third, or further cousins. In such cases, it is possible that neither the member of the steering committee nor the relative might be aware of the family connection.

Clause 13(6)(a):

169. It seems unduly harsh to criminalise an "offer" for goods or services. It is recommended that this clause be amended so as not to criminalise offers made innocently or in error.

170. Further, it is recommended that criminal sanctions should only apply where the parties are aware of the family or other connections.

Clauses 13(7) and 13(8):

171. It is recommended that clauses 13(7)(a) and (b) be merged into one paragraph, as they both carry the same sanctions.

172. Clause 13(7)(b) states that "any person" who contravenes clause 13(6) is guilty of an offence. In the light of the fact that only a select group of persons are

mentioned in clause 13(6), it may be more appropriate for clause 13(7)(b) to apply only in respect of the persons mentioned in clause 13(6) and not to "any person", which is a very wide term.

Clause 14:

Clause 14(1):

173. In the light of the fact that there will be more than one steering committee, it is suggested that the word "The" at the beginning of the sentence in clause 14(1) be replaced with the word "A".

Clause 14(1)(b):

174. Clause 2(g) (objects) refers to the term "local industrialisation". In clause 14(1)(b), the term "localisation" is used. The wording of the Bill should be consistent.

Clause 14(1)(c):

175. Clause 14(1)(c) provides for the development of project plans which seem to largely focus on actions, targets/deliverables and time periods – and do not include a critical project aspect such as procurement. It is suggested that the clause be amended to read: "...adopt one or more project plans including feasibility, financial, operational and maintenance plans setting out actions, targets, periods of time and procurement strategies...''.

176. Further, it is unclear when the project plans required in this clause must be developed and adopted. Will this be a requirement to inform designation, or will this be a requirement subsequent to designation?

177. Further, it is recommended that project plans be subject to review.

Clause 14(1)(e):

178. Clause 14(1)(e) provides that the steering committee must "determine the approvals, authorisations, licences, permissions or exemptions required to implement the strategic integrated project." These approvals, authorisations and the like are critical to the success of the project and need to be thoroughly planned, tracked and managed – and should therefore form an integral part of the project plan.

Clause 14(1)(f):

179. Clause 14(1)(f) states that the steering committee must "ensure that all appropriate persons are appointed as members of the steering committee" However, how would the steering committee do this when the Secretariat, as per clause 10(c), appoints members to the steering committee? In the circumstances, it may be more prudent to state that the steering committee should identify gaps in expertise and inform the Secretariat thereof in order for the Secretariat to make the appropriate appointments.

Clause 14(1)(g):

180. This seems to be a duplication of the function of the Management Committee stipulated in clause 6(3)(d) and should be reconsidered.

Clause 14(1)(h):

181. This seems to be a duplication of the function of the Secretariat stipulated in clause 10(b) and should be reconsidered.

Clause 15:

Clause 15(1):

182. It may be prudent to use the term "identified" instead of "determined", as the word "determined" creates the impression that the steering committee decides applications for approvals, authorisations, etc.

183. It is also important that the applicant takes responsibility for its application and is proactive in identifying which approvals, authorisations, etc are required. It should hence not only be the responsibility of the steering committee to identify which approvals, authorisations, etc are required.

184. It is unclear what the situation would be if the project has to go out to tender? Has clause 15(1) been drafted to apply when the tender process has already been concluded and the contract already awarded?

Clause 15(2):

185. Clause 15(2) states that: "A member of the steering committee referred to in section 12(1)(a) must do everything possible within his or her power to ensure that an application—

(a) complies with applicable legislative and other requirements; and

(b) includes all relevant information to enable the relevant authority to consider the application without delay."

186. Since the most significant delay preventing a decision on an environmental authorisation is due to the applicant failing to include all relevant information to enable the competent authority to consider the application, thereby requiring the competent authority to request an amendment or the submission of additional information, this clause places a large responsibility on the steering committee member (who will in most instances probably be an official representing a department). The clause therefore implies that the individual (steering committee member) will have to form part of the planning and design process as well as work together with the appointed independent environmental assessment practitioner ("EAP"). It is submitted that the level of involvement and time capacity issues are not realistic or fair.

187. The steering committee member will therefore have to ensure that the competent authority in terms of NEMA will not request additional information or amendments that are not carried out by the EAPs within the EIA process. This individual will have to be fully involved in the public participation process and discussions with line functions to achieve such. This is not supported. The timing of this involvement is also too early to predict whether any further amendments, etc. may be required to the SIP before it complies with all legislation (e.g. certain vital issues that may have been overlooked by the project team may only become apparent during the public participation process). The potential conflict of interest and perception of bias is also a concern.

188. It is submitted that the level of involvement of any steering committee should be limited to an advisory role at most. Consideration should also be given to seconding such steering committee members to the committee for the duration of

the SIP and thus removing them from influencing the decision and subjecting the decision to a possible review by the courts.

189. In the circumstances, it is recommended that this clause be deleted, alternatively, reworded in light of the above comments.

Clause 15(4):

190. Clause 15(4) provides that: "If the approval, authorisation, licence, permission or exemption is not granted the relevant authority must provide reasons for such refusal to the steering committee and the applicant." It must be noted that relevant legislation might contain appeal processes against a decision of the authority which the applicant can have recourse to and decide to institute, or alternatively there are other pieces of legislation that govern the request for information or the request for reasons following an administrative action which the applicant can also utilise, namely the Promotion of Access to Information Act, 2000 (Act 2 of 2000) and PAJA. It is thus suggested that clause 15(4) be reworded to place the responsibility on the steering committee or applicant to request reasons for such refusal.

Clause 15(5):

191. It is recommended that the Bill clarifies what will ensue after the steering committee has complied with this clause i.e. there should be detail regarding how the steering committee and/or the Secretariat will take the matter forward.

Clause 16:

Clause 16(2):

192. Clause 14(1)(i) also requires the steering committee to submit reports to the Secretariat. Clause 16(2) therefore seems to be a duplication of this obligation. It is unclear whether the reports contemplated in clauses 14(1)(i) and 16(2) differ or are the same.

Clause 16(3)(a):

193. Clause 16(3)(a) refers to "the Economic Development Department". It is recommended that reference be made to the "Department", which is defined in clause 1 as "the Economic Development Department".

Clauses 17 and 18 and Schedule 2 - processes

194. There is a perception that environmental authorities are the cause for delays in making a decision on an application. It is submitted that such perception is incorrect. Competent authorities in terms of NEMA are required to comply with statutory time periods during each stage in the process. In this regard, it is submitted that the most significant delay preventing a decision on an application for environmental authorisation is due to the applicant/EAP failing to include all relevant information to enable the competent authority to consider the application and thus requiring the relevant authority to request an amendment or the submission of additional information.

195. It is suggested that clauses 17 and 18 and Schedule 2 be removed from the Bill for the following reasons:

• No motivation has been provided for the timeframes contained in Schedule 2. There are likely to be several unintended consequences that will result from the arbitrary timeframes suggested. It is unacceptable that such timeframes are set with no consultation with the various competent authorities affected by the proposed timeframes, especially since no justification is provided for the proposed timeframes.

• The Bill is in conflict with a number of statutes that set requirements for regulatory processes (especially timeframes). For example, the NEMA EIA Regulations, 2010 regulates the processes, timeframes, determine the competent authorities and stipulates the appeal process for EIAs required in terms of section 24 of NEMA. NEMA and its EIA Regulations were developed over many years, in line with international practice, and are well understood by the environmental sector. A separate EIA process and timeframes (as contemplated in Schedule 2) is not supported.

• Government should follow the same processes and meet the same requirements in respect of SIPs as that of the non-government sector.

• In the environmental sector, steps are currently being taken to improve integrated decision making, stream-line decision-making, whilst improving the achievement of sustainable outcomes. In particular, NEMA and its EIA Regulations are currently being amended to further align the environmental authorisation process with the licensing processes of the Departments of Mineral Resources and Water Affairs and to render the time frames more stringent. The DEA has agreed with the Departments of Mineral Resources and Water Affairs on timeframes of approximately 300 days for the issuing of environmental authorisations, which period is slightly longer than the timeframe proposed in Schedule 2. It is suggested that this process be written into revised EIA Regulations and that this process be uniformly applied to all listed/specified activities, including SIPs.

• It is important that realistic timeframes be included in legislation in order not to compromise the environment and to avoid taking decisions in the absence of all the relevant information.

• At the core of the EIA process is the investigation and consideration of the potential consequences or impacts of alternatives to the activity on the environment and the assessment of the significance of those potential consequences and impacts, including the option not to implement the activity. Alternatives are not merely project development type alternatives but include technology/layout design, etc. alternatives. [Section 24(4)(b)(i) of the NEMA].

• One should also not assume that decision-making in terms of other legislation is faster as this may not be the case.

• Further, the Bill does not take cognisance of the fact that various pieces of legislation make provision for an internal appeal process. Once all the internal remedies are exhausted, there is a further possibility of an interested or affected party taking a decision on review to the High Court.

196. It should be noted that clause 17(2) states that it is a "guide for the implementation", but then proceeds to state that timeframes may not be

exceeded which would imply that any failure to adhere to the 250 day process would constitute non-compliance therewith.

197. Clause18 refers to the NEMA process, yet the Bill proposes that an additional process (Schedule 2) be applied to SIPs. This fragmentation and duplication, as well as uncertainty that will flow therefrom, is not supported, especially since the minimum requirements are not specifically indicated in the Schedule.

198. Furthermore, clause 18 states that "Whenever an environmental assessment is required in respect of an integrated strategic project such assessment must be done in terms of the National Environmental Management Act, 1998 (Act 107 of 1998), with specific reference to Chapter 5".

199. If the aim is to achieve improved co-ordination and alignment, then this could be best achieved at the level nearest municipalities. The municipalities will in many or most instances have to also consider certain approvals in terms of their exclusive "municipal planning" competence. In this regard, Provinces are best placed to co-ordinate their EIA processes with municipalities' municipal planning processes.

200. The Bill should simply provide for improved co-ordination if EIAs are required. In addition to the above, NEMA itself, in sections 24K and 24L, permits authorities to co-ordinate the respective requirements of different legislation and avoid duplication. It is submitted that the committee should rather focus on encouraging such agreements in relation to SIPs (as has been done in respect of NEMA and the Less Formal Township Establishment Act, 1991).

Clause 18 – further comments:

201. The deletion of the latter part of clause 18 as contained in the previous version of the Bill, i.e."...and shall be considered by the national department of the environment" is supported.

202. This clause leaves out critical pieces of other legislation pertaining to development related applications. For example, the Conservation of Agricultural Resources Act, 43 of 1983, the National Water Act, 36 of 1998, the Heritage Resources Act, 25 of 1999, the National Environmental Management Waste Act, 59 0f 2008 and the National Environmental Management Air Quality Act, 39 of 2004.

203. Given that all statutory requirements relevant to a SIP must be complied with in any event, and in light of the above comments, the recommendation to delete clause 18 is reiterated.

204. It is recommended that clause 18 be amended to simply provide for the promotion of improved co-ordination between all statutory approvals/authorisations required for any SIP.

Clause 20:

Clause 20(4)(a):

205. Clause 20(4)(a) is not supported. Permitting a member of the steering committee to exercise or perform any power or duty on behalf of the organ of state that he/she represents, when having regard to the functions performed by the steering committee (e.g. clause 14(2) of the Bill) will create a perception of bias in favour of the development and leave the decision open to review by the courts. This would also create a conflict of interest in that they are now the decision-maker in certain situations when they were part of the Committee that developed and adopted the project plan.

Clause 21:

Clause 21(1)(b):

206. Clause 21(b) states that the Minister may make regulations regarding "the criteria that must be applied in the implementation of a strategic integrated project relating to—

(i) skills development;

(ii) Green Economy;

(iii) employment creation;

(iv) youth employment;

(v) rural development; and

(vi) Broad-Based Black Economic Empowerment."

207. It must be noted that a myriad of legislation already exists which relates to these issues, save, it appears, in respect of youth employment. However, it is not recommended to deal with youth employment in terms of this Bill. Rather, it would be more appropriate for this issue to be dealt with in terms of labour law and, potentially, the B-B BEE legislation.

Schedule 1:

208. The list provided in Schedule 1 is worded too widely and must be substantially narrowed. For example, not all communication installations require an EIA in terms of the NEMA and not all these types of developments are of significant economic or social importance. While it is noted that clause 7(1)(a) stipulates which types of projects would qualify as a SIP, the criteria at present is quite broad and also vague and thus requires further consideration and redrafting.

209. Also, it must be noted that organs of state/ state owned entities will not always be the initiator of the types of developments listed in this Schedule.

210. It is unclear why the following have not been included in Schedule 1; namely, sports, cultural, recreational and tourism facilities, general government facilities for service delivery and storage, urban revitalization of decaying cities and towns and building of new towns and cities. Would these projects not qualify as SIPs as defined in clause 7 should they meet all the criteria?

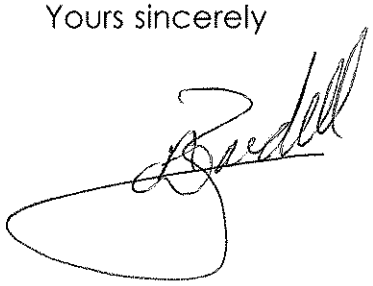
Schedule 2:

211. There is the concern that based on the definition of a SIP, it may include project proposals (e.g. noxious industries, hydraulic fracturing, etc.) that will require technical and specialist input. Due to the anticipated complexity of SIPs (nature and scale) and the sensitivity of the receiving environments (i.e. complex socio-ecological and socio-economic systems), it highly unlikely that such projects can be completed within the proposed timeframes. In the instance where an EIA for such activity is to be conducted (or any other comprehensive assessment process), it will be very difficult to adhere to the timeframes set out in Schedule 2, particularly in the absence of a strategic environmental assessment or EMF and norms and standards.

212. Whilst the co-ordination of planning and regulatory processes is supported, these co-ordination and integration functions should be addressed within the various statutes that govern them.

213. The timeframes provided in Schedule 2 should not be a "one size fits all" for all SIPs. Shortened timeframes that affect the quality of information required for decision-making may result in the project being delayed unnecessarily.

Yours sincerely



A BREDELL

**MINISTER**

DATE: 2/12/2013