Western Cape Government

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ENVIRONMENTAL AFFAIRS AND
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COMMENTS ON THE DRAFT INFRASTRUCTURE DEVELOPMENT BILL, 2013

We refer to the above and hereby submit comments on the Draft Infrastructure Development Bill, 2013, (the Draft Bill), as published in Government Gazette 36143 on 8 February 2013.

GENERAL

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 Draft 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 Draft 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. It is also a deliberate attempt to centralise state infrastructure spending and it appears to be the view of the executive, that infrastructure planning should be handled by national departments in consultation with officials from the three spheres of government. The objective of the Draft Bill is thus to regulate the identified strategic integrated projects (to date 17 such projects have been identified) as well as to continue the existence of the Commission which was established by Cabinet.

While the intention of the Draft Bill, namely to provide for the "facilitation and co-ordination of infrastructure development", is a good one, there are various concerns relating to the contents of the Draft Bill and the Draft Bill cannot therefore be supported in its current form. These concerns are as follows:

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- The lack of provision made in the Draft Bill for parliamentary oversight;
- The failure to address the underlying issues which cause delays in infrastructure delivery and lack of capacity;
- The fact that a lot of what is contained in this Draft Bill is already governed by other legislation;
- The duplication of the functions between the various structures and committees established in the Draft Bill, and confusion as to how they will operate *vis-a-vie* 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 Draft Bill;
- The unconstitutional encroachment on provincial and municipal competences;
- The failure to provide clarity and detail on how these strategic integrated projects will be funded; and
- 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.

Hence, the comments below highlights the concerns raised above in relation to specific clauses and points out some of the inconsistencies contained in the Draft Bill.

SPECIFIC COMMENTS

Long title

1. The long title of the Draft 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; and to ensure that development goals of the State are promoted through infrastructure development; and to provide for matters incidental thereto."

2. The long title, in its first sentence, limits the facilitation and co-ordination of infrastructure development to that which is only of significant economic or social importance to the Republic. There is a need to include the environmental sustainability considerations in terms of the development requirements for the country. This is particularly important in terms of long-term resource planning in a resource constrained environment. The long title should therefore include that the Draft Bill should facilitate and co-ordinate infrastructure development which is of significant economic, environmentally sustainable and social importance.

3. Reference to the term "approval" in the second sentence of the long title is problematic when coupled with the words "given priority in". The merits of each project must be objectively considered by the relevant authority in terms of the requirements set out in the specific legislation

governing a decision-making process. As such, the wording should be amended to read "...is given priority in planning, decision-making and implementation...".

Definitions – Clause 1

4. In clause 1, the phrase "approval, authorisation, licence, permission or exemption" is defined as:

"means any approval, authorisation, licence, permission or exemption which in terms of any relevant law requires—
(a) the consideration of jurisdictional facts or of certain requirements or criteria; and, in addition thereto,
(b) the exercise of a discretion whether or not to grant approval, authorisation, licence, permission or exemption; or
(c) either the consideration of jurisdictional facts or of certain requirements or criteria or the exercise of a discretion whether or not to grant the approval, authorisation, licence, permission or exemption,
and includes decisions such as to approve an environment impact assessment, to authorise the zoning of land or to approve any planning, use or development of land."

It is suggested that paragraphs (a) and (b) be combined to form one paragraph and that paragraph (c) be renumbered as (b). In addition, the words "approve an environment impact assessment" should be changed to read "grant an environmental authorisation".

Objects of Act - Clause 2

5. This clause does not address environmental sustainability at all and nor does it make reference to sustainable development. In this regard "sustainable development" is defined in the National Environmental Management Act, 1998 (Act 107 of 1998) (the 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". If such considerations are not included, the Draft Bill gives the impression that development should be approved regardless of the long term sustainability of the development and the potential adverse implications for present and future generations. It is suggested that the objects of the Draft Bill include reference to sustainable development.

6. Should the objects of the Act not also provide for the minimum requirements for public participation especially when identifying and designating a strategic integrated project?

7. With regard to clause 2(e), it must be noted that there are laws that 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 of the Republic of South Africa, 1996 (the Constitution). Likewise, there are a myriad of platforms as well as mechanisms to ensure this as well. 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 Draft Bill cannot amend the Constitutional division of functions provided for in the Constitution as it relates to specific functions or functionaries.

Continued existence, structures and composition of Presidential Infrastructure Coordinating Commission – Clause 3

8. Clause 3(1) refers to the fact that the Presidential Infrastructure Coordinating Commission was established by a Cabinet decision but does not state the date or resolution number of such decision. It is suggested that the date of the Cabinet decision and resolution number be included in this clause.

9. Clause 3(3) lists the various persons that will constitute the Commission, however, no provision is made for a representative of a member (in the absence of a member) to attend a Commission meeting. In the absence of knowing how frequently the Commission will hold its meetings, how practical would it be for not allowing delegation to a representative of a member to attend a meeting of the Commission?

10. Furthermore, it is acknowledged that one of the purposes of the Draft Bill is to ensure that infrastructure development in the country is given priority in planning and this is reflected in the level of seniority stipulated for membership of the various structures created in the Draft Bill, namely the Commission, the Management Committee (established by clause 6), the Secretariat (established by clause 9) and the Steering Committees (contemplated in clause 11). However, concern has to be registered about the composition of the various structures, particularly with regard to the potential overlap in membership, especially between the Commission and the Management Committee. It is suggested that consideration should be given to collapsing these two structures, namely the Commission and the Management Committee for the following reasons:

- The proposed composition of the Management Committee creates the potential for a high degree of overlap in its membership and that of the Commission.
- A review of the functions of the Commission and the Management Committee reveals that their business will be of such a similar nature (and in some instances the functions of the Management Committee are similar to that of the Secretariat) that it does not justify having two structures and the time and expense required to maintain them.
- The Commission and Management Committee are, in any event, likely to meet infrequently, given their size and the level of membership.
- The reporting by the Secretariat to both the Commission and the Management Committee (as per clause 10(g)) is also likely to be wasteful.

It is therefore proposed that the Draft Bill be restructured so as to provide for the collapsing of the Commission and the Management Committee into one structure. In other words, the Draft Bill should provide for only the Commission, the Secretariat and the relevant steering committees. The composition of the Commission should be such that the Premiers may be represented by members of the Provincial Executive, and should include the members of Municipal Councils as contemplated in clause 6(2).

11. Clause 3(7) 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.

Functions of the Commission - Clause 4

12. In clause 4(a), 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. It is suggested that clause 4(a) be amended to read: "....priority in planning, decision-making and implementation". This clause also suggests that a strategic integrated project (identified by the Commission) is considered to be of a higher priority than any other project.

13. Clause 4(b) states that a function of the Commission is to: "determine and develop infrastructure priorities"; clause 4(c) refers to "designate strategic integrated projects"; clause 4(f)(i) states that a function of the Commission is to: "determine the current and future needs and priorities of the Republic in relation to infrastructure development". The question is how these functions relate to the role of municipalities and provincial government in terms of their constitutional planning mandates.

In South Africa, the Constitution has assigned the function of "municipal planning" to municipalities. In terms of the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000) (the MSA), and the Local Government: Municipal Planning and Performance Management Regulations, 2001 (the Regulations), municipalities have been tasked to coordinate an integrated development planning process with a view to producing Integrated Development Plans (IDPs).

In terms of the MSA and the 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. (See section 24 of the MSA).

- A Spatial Development Framework reflected in a municipality's IDP 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. (See regulation 2(4) of the Regulations).

While the Chairperson of the South African Local Government Association (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.

In this regard the Draft 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 coordination is called for in terms of infrastructure development, the Draft 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.

14. 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 Draft 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.

It is suggested that greater emphasis be given to the strengthening of municipalities and provinces rather than in all instances having the functions resort within the national sphere.

15. Clause 4(e) is limited to "strategic international partners" 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 with whom to conclude such agreements with. Furthermore, the identification of such partners and the conclusion of agreements with them should be done on a 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. Also, the conclusion of such agreements must be subject to the Public Finance Management Act, 1999 (Act 1 of 1999) and the procurement prescripts. Furthermore, clarity is sought on the status of the Commission in the conclusion of such agreements – will it be contracting in its own name and have legal identity

of some sought thereby being held accountable for any irregularity, controversy, or any other risk flowing from the conclusion of such an agreement?

16. Clause 4(f)(ii) states that a function of the Commission is to "determine any legislation and other regulatory measures that impede or may impede infrastructure development, and advise the executive authority of the relevant sphere of government". Clarity is sought on how this determination made 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 amend such legislation so that unnecessary delays are avoided in the future? Furthermore, what is meant by "impede" in this context?

17. Clause 4(f)(iii) states that a function of the Commission is to: "determine the impact on job creation of any strategic integrated project" and clause 4(g)(ii) states that a function of the Commission is to: "identify the social impact of strategic integrated projects". It is assumed that these factors are considered prior to the identification and designation of any strategic integrated project as such information should inform the process of identification and designation of strategic integrated projects.

18. Clause 4(i) states that a function of the Commission is to: "consider proposals for infrastructure development and maintenance". This implies that maintenance is not considered part of infrastructure development. Furthermore, no further mention is made of maintenance in the Draft Bill. It is therefore not clear whether a strategic integrated project can be only maintenance related. Furthermore, does this clause, together with clause 4(k) which states that a function of the Commission is to: "call for proposals for the implementation of strategic integrated projects" mean that the Commission will be performing line functions such as calling for tender proposals and considering such tender proposals?

19. Clause 4(j) states that a function of the Commission is to: "promote investment and identify and develop strategies to remove impediments to investments". It is unclear what is meant by "impediments" and how it will be removed.

20. Clause 4(m) states that a function of the Commission is to: "promote the creation of decent employment opportunities and skills development, training and education, especially for historically disadvantaged persons and communities, women and persons with disabilities, in so far as it relates to infrastructure and any strategic integrated project." It is noted that the Draft Bill does not contain a definition for the term "historically disadvantaged persons" and hence it is unclear as to who is being referred to. Furthermore, clarity is sought on how the provisions of clause 4(m) 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? Will this be written into their contracts explicitly? It is likely that it would be discovered that there is a skills deficit if this is the case.

21. The functions that the Commission is tasked with is also a cause for concern in that the focus largely relates to economic and social benefits (see clause 4(m) in particular), while ecological and sustainable development considerations are not mentioned.

The MSA specifically requires services to be both financially and environmentally sustainable. The National Development Plan, 2030 *Our Future- Make it work* (NDP) also advocates for the transition to an environmentally sustainable low-carbon economy, moving from policy, to process, to action, as well as for the following principles to guide the 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."

Furthermore, the New Growth Path, 2010 (the NGP) states that "The 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.

Hence, the Commission should also encourage and promote environmentally friendly infrastructure development and sustainable development.

22. The functions of the Commission are silent on the participation of general South-African owned enterprises and enterprises owned by previously disadvantaged individuals, in the delivery of infrastructure development. The Commission's functions are also silent on promoting and encouraging the utilisation of equipment, products and material that are produced within South Africa and that are within the infrastructure development sector or industry. It is suggested that the Commissions function should also be to ensure and promote the participation of general South-African owned enterprises and enterprises owned by previously disadvantaged individuals in strategic integrated projects and also that products, equipment and materials that are produced in South Africa are utilised in such projects, subject to the Broad-Based Black Economic Empowerment Act, 2003 (Act 53 of 2003) and the Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000). This would aid in stimulating economic growth and assist in job creation and retention.

<u>Expropriation of land by Commission – Clause 5</u>

23. 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." Clarity is sought as to 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 new draft Expropriation Bill, 2013 (that has just recently been 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 Draft Bill conflicts with it in many aspects. Another important conflict between this Draft 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 recently thus 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 new 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.**

The current 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).

24. Clause 5(2)(a) states that: "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 any legislation which specifically deals with expropriation enacted after the commencement of this Act." This appears to imply that any legislation dealing with expropriation enacted prior to the commencement of this Act (the Draft Bill) - i.e. the current Expropriation Act, 1975 (Act 63 of 1975) will not be applicable to an expropriation undertaken for the purposes of this Act and both the legality and rationality of this approach is questioned.

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 current Expropriation Act, 1975. However until then, the current 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 Draft Bill must be effected in accordance with any legislation specifically dealing with expropriation, irrespective of when they were enacted if they are still in force.

25. Clause 5(3) is problematic as the issue of how and why land can be expropriated (in terms of the current 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 (see 23 above). 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.

26. Clause 5(4) is contrary to the current Expropriation Act, 1975 and the case law which have 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 new 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.

In addition it is a well-established principle of our current expropriation law that for purposes of determining a fair market value for the asset that has been expropriated, (ie 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.

Management Committee - Clause 6

27. Subject to what is stated in item 10 above, the following specific comments are made in respect of clause 6 relating to the Management Committee. Firstly, clause 6(2) which deals with the composition of the Management Committee is very vague as it is not clear which province, which Premier and which Municipal Council is being referred to. Is it perhaps to the province in which, or the Premier of the province in which the strategic integrated project will be implemented? Furthermore, would all the members of the Cabinet and the Executive Council of a province or of all 9 provinces serve on the Management Committee? Would there be separate Management Committees for separate strategic integrated projects? This clause should be reconsidered in light of these questions raised as well as what is stated in item 10 above. Furthermore, it is suggested that the Draft Bill expressly list the critical infrastructure role-players in national, provincial and local government that must serve on this Management Committee/Commission 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.

28. In addition, the composition especially of the Management Committee, similarly to the Commission consists of members of executive authorities. There is no technical expertise present in this implementing structure (namely, the Management Committee). It is suggested that people with technical expertise be included.

29. Clause 6(3)(b) states that the Management Committee must "monitor and evaluate infrastructure development in the Republic." Clarity is sought as to what 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 would be, as all these institutions and mechanisms also monitor and evaluate infrastructure development in the Republic of South Africa.

30. Clause 6(3)(d) reads that the Management Committee must "ensure coordinated regulatory approvals". The coordination of application processes (or information gathering processes) and integration/coordination of decision making processes are already governed by the provisions of various statutes. It is not clear how the Management Committee can coordinate approvals, where the various approvals are regulated by specific legislation that must be complied with by the various competent authorities. At best, the Management Committee, if still a structure, may promote the coordination 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.

Requirements for strategic integrated project - Clause 7

31. Clause 7(1) is extremely broad and also vague as to what will qualify as a strategic integrated project. For example, it is not clear as to what is meant by "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 "contribute substantially to any government strategy or policy". 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 more clearer. The definition of what constitutes a strategic integrated project (given what is also said below) should be elaborated upon and refrain from incorporating all infrastructure related projects under the definition as this will increase red tape and an additional piece of legislation to be complied with, thereby creating further delays in infrastructure delivery.

32. Furthermore, clause 7 and Schedule 1 (which contains a mixture of that which is a provincial concurrent competency, an exclusive provincial competency and also a local government competency), as it currently reads, together with the definition of "infrastructure" as defined in clause 1 of the Draft Bill, is unrestricted and any project (which falls within specific government departments) could be considered a strategic integrated project. The purpose of the Draft Bill is to assist with facilitation, coordination and planning – namely, with improved prioritization. The Draft Bill should be amended to be more specific in this regard and should specifically link with the existing integrated planning and prioritization processes. The Draft Bill should provide for a specific National Spatial Development Plan/Framework, 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 MSA and Regulations as part of the Integrated Development Plan). Proper

planning would then strategically identify the infrastructure development priorities in terms of "infrastructure-led growth" and spatial targeting (as per the National Spatial Development Perspective and the National Development Plan, and sectoral targeting (as per the New Growth Path) (with a specific sector targeted in specific areas as identified in the infrastructure frameworks).

33. Further, it is noted that in order for a project to qualify as a strategic integrated project, 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 strategic integrated projects 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 strategic integrated project, it must comply with all three criteria set out in clause 7(1)(b). A strategic integrated project 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".

Designation of strategic integrated project and conflicts in infrastructure or planning thereof - Clause 8

34. The Draft 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 strategic integrated project in terms of clause 8(1). Such a decision must be appropriate in light of the outcome of the assessment.

35. 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." In addition, clause 8(3) 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, call for such tenders by notice in the *Gazette* and in at least two national newspapers." Firstly, it is not clear as to which "organ of state" is being referred to in clause 8(2). Secondly, 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 the clause. Thirdly, why is the Commission determining whether there is capacity to implement the project or whether it must be put out to tender? The Draft Bill is basically creating 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 strategic integrated project. This may prove to be problematic in practice. Fourthly, when is the decision, as contemplated in clause 8(3), made – is it before or after the designation of the strategic integrated project?

36. Clause 8(4)(a) states that: "Where a strategic integrated project has been designated for implementation or where such a project is provided for in any national infrastructure plan, any state owned entity or other organ of state must ensure that its planning or implementation of infrastructure or its spatial planning and land use is not in conflict with any strategic integrated project implemented in terms of this Act or envisaged in such national infrastructure development plan." This clause stipulates that the spatial planning and land use of an organ of state must not be in conflict with a strategic integrated project designated by the Commission. It also suggests that a designation of a strategic integrated project overrides the municipal Spatial Development Framework and land use planning and that the Draft 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 a 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 strategic integrated project. This clause undermines the municipality's role and the province's role in respect of their competences.

37. Instead, should the Commission not rather do the following:

- Determine whether and ensure that the strategic integrated projects are in line with the relevant spatial planning and land use tools; and
- Coordinate the various applications for the necessary authorisations required.

For example, urban edges, Integrated Development Plans and EMFs 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) and follow public participation procedures and many variables are considered in the planning, design, finalisation and amendment of such plans. The Draft 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?

38. Furthermore, the concept of reasonable administrative action has been enshrined in especially section 6(2)(i)(ii) and (h) of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000). 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 strategic integrated project. The decision-maker is required to exercise its discretion in a rational and unfettered fashion.

Having regard to the proposed system or approach in the Draft Bill for the identification of strategic integrated projects 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.

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 strategic integrated project planned by the Commission through the steering committee.

39. Furthermore, clause 8(4)(a) does not address the status and link between a strategic integrated project and the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008) (the ICM), 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 strategic integrated project 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.

40. It is suggested that provision be made in clause 8 that any national infrastructure development plan be aligned with the National Development Plan.

41. It is also suggested that the word "national" be deleted in clause 8(4)(b) as any conflict which arises in the application of clause 8(4)(a) must be resolved in terms of the Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005) and should be subject to <u>any</u> legislation and not limited to only "national" legislation regulating spatial planning and land use management.

42. Clause 8 is silent on the requirement of the Construction Industry Development Board Act, 2000 (Act 38 of 2000) which requires the registration of projects on the register of projects and to advertise all infrastructure related projects excluding housing on the CIDB I-Tender System. Thus it is

recommended that it become mandatory for all strategic infrastructure projects to be registered on a national register of projects managed by the Construction Industry Development Board.

Secretariat of Commission - Clause 9

43. 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. Surely, this clause should provide for actual secretarial support and administrative support to this Secretariat.

44. 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 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 the Republic of South Africa as failure to do so will make the existence of such an organ of state questionable. The Secretariat should therefore be the Public Works Department or a Department entrusted with the responsibility and mandate to manage the construction industry and infrastructure delivery in the Republic of South Africa.

Functions of Secretariat – Clause 10

45. Clause 10(g) which provides that the Secretariat must "manage the implementation of the day to day work of the Commission...." seems to be a duplication of the function of the Management Committee as stated in clause 6(3) which provides that "The Management Committee must manage the affairs of the Commission, including....".

Appointment and composition of multidisciplinary steering committee, and continued existence of certain steering committees- Clause 11

46. Clause 11(1) should also provide that the Premier of the province in which the strategic integrated project falls, or the MEC in the province under whose portfolio the strategic integrated project falls, be consulted before the names of the proposed members of a steering committee are submitted to the Secretariat for appointment.

47. Clause 11(2)(b) provides that a steering committee may consist of: "officials representing departments in the three spheres of government responsible for environment, water, public works, finance, planning, land use management or any other relevant portfolio or representing any other person who will be required to grant an approval, authorisation, exemption, licence, permission or exemption necessary for the implementation of the strategic integrated project." The word "may" allows the responsible Minister the discretion to appoint various members of the steering committee

which may consist of a number of experts, including officials responsible for environment. It should be mandatory to appoint officials from departments with expertise or representing any other relevant portfolio necessary for the implementation of the strategic integrated project, otherwise key role players may be omitted.

48. Clause 11(2)(b) also suggests that officials from the Department of Environmental Affairs, 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 potential conflict of interests; secondly, any meetings, questions and or discussion on EIA project details may be seen as an interference with informed decision-making; thirdly, it is not clear what this individual's role would be in the event of unlawful commencement or any other related enforcement action in terms of the National Environmental Management Act, 1998 (Act 107 of 1998); and fourthly, there could be allegations of bias in the decision-making process by third parties.

49. Clause 11(2)(d) states that a steering committee may consist of "any other person appointed by the Secretariat." Clarity is sought as to whether such person can be a private individual as well. If so, how does this tie in with clause 11(5)(b) that states that "a member of a steering committee has direct access to the head of the organ of state he or she represents"? Clause 11(5)(b) goes further to state that a member of the steering committee has direct access to the Management Committee and the Secretariat – which largely comprises of Ministers and Deputy Ministers. Surely, it is inappropriate that an organisation's representative can have direct access to another Minister or Deputy Minister without following the necessary channels.

50. Clause 11(3)(a) states that the Director-General of the Department of the Minister of Economic Affairs or the Department of such Minister as the Commission may determine as principally responsible for the strategic integrated project, is the Chairperson of the steering committee. It is, however, suggested that the Director-General of the organ of state mandated with managing the construction industry and infrastructure delivery in the Republic of South Africa be the Chairperson of the steering committee. Thus it is recommended that it be the Director-General of Public Works or his or her delegate.

51. Clause 11(5)(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. Clause 20(4)(a) states that an official can only 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. But clause 20(4)(b), provides 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." The broad authority vested in an official by virtue of

clause 11(5)(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 official is expected to take.

Hence, the function of the steering committee remains a concern if it means that a member of, for example, the Department of Environmental Affairs, 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 the NEMA) are to be separated from each other.

52. Clause 11(6)(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. How will this affect officials representing departments who serve on the steering committee as such officials already have full-time jobs?

53. Clause 11(7)(a) provides that "the Secretariat may, on good cause shown and following a recommendation by a steering committee appoint additional members to the steering." Clarity is sought as to whether such members can be private individuals as well. If so, how does this tie in with clause 11(5)(b) that states that "a member of a steering committee has direct access to the head of the organ of state he or she represents"?

Disqualification from membership of steering committee, disclosure and offences - Clause 12

54. Clause 12 (1) provides a definition for "family member". Clauses 12(3)(a) and (b) explains the circumstances under which a person who occupies a public office may not be appointed as a member or remain as a member of the steering committee – which largely focuses on such person benefitting financially from the strategic integrated project or where such person has any direct or indirect interest in any business or organisation which would in any manner whatsoever benefit financially from the strategic integrated project. Surely these clauses should also include reference to such person's family member benefitting financially, and if so, then he or she may not be appointed as a member or remain as a member of the steering committee. Similarly, clause 12(4) should also include reference to a family member benefitting after a person has been appointed as a member of the steering committee. Main purposes of steering committees - Clause 13

55. Clause 13(e) states that one of the purposes of the steering committee is: "to serve as a one-stop-shop where any matter relating to the implementation of a strategic integrated project can be resolved."

While improved intergovernmental cooperation and coordination 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 to administer 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.

While the Commission might, through the different infrastructure plans/frameworks identify strategic integrated projects, the actual decision to grant or refuse the different permits, licences or authorisations rests with the relevant regulatory authorities. The wording in the Draft Bill should therefore be amended in accordance with the above, namely that the Commission identifies strategic integrated projects, to be decided by the relevant regulatory authorities, but provision should be made for improved coordination of processes and cooperation in terms of these strategic integrated projects.

56. In addition to the above, it is submitted that consideration of feasible alternatives (namely, technology and/or location and/or alignment) will be crucial to any strategic integrated project being successfully implemented.

57. The purpose of the steering committee outlined in clause 13(c) seems to be a duplication of the function also to be carried out by the Management Committee as per clause 6(3)(c).

Functions of steering committees - Clause 14

58. Clause 14(1)(a) provides for the development of a project plan which seems to largely focus on actions, targets/deliverables and time periods – and does not include critical project aspects such as cost and procurement. It is suggested that the clause be amended to read: "...adopt a project plan setting out costs, actions, targets, periods of time and procurement strategies relating to ....".

59. Clause 14(1)(c) provides that the steering committee must "determine the approvals, authorisations, licences, permissions or exemptions required to implement the strategic integrated project." These approvals, authorisations, etc. are clearly 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.

60. Clause 14(1)(d) states that the steering committee must "ensure that all appropriate persons are appointed as members of the steering committee in light of paragraphs (b) and (c)." However, how would the steering committee do this when the Secretariat, as per clause 10(c), appoints members to the steering committee after receiving names from the persons listed in clause 11(1).

61. Given that there will be more than one steering committee, it is suggested that the word "The" in clause 14(1) be replaced with the word "A".

Approvals, authorisations, licences, permissions and exemptions - Clause 15

62. With regard to what is contained in clause 15(1), clarity is sought as to 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?

63. Clause 15(2) states that: "A member of the steering committee referred to in section 11(2)(b) 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."

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.

The steering committee member will therefore have to ensure that the competent authority in terms of the 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 strategic integrated project 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.

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

64. 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 the Promotion of Administrative Justice Act, 2000 (act 3 0f 2000). 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.

65. The Draft Bill, in clause 15(6) seems to pre-empt a positive decision in all instances. Clause 15(6) provides that: "The Secretariat may—

(a) enter into negotiations with the relevant authority with a view to obtaining the necessary approval, authorisation, licence, permission or exemption and must make every reasonable effort to avoid an intergovernmental dispute; or

(b) refer the matter to the Management Committee or Commission for any decision or action."

Once a decision is taken to issue or refuse an approval, authorisation, licence, permission or exemption, the decision-maker is *functus officio* and unless there is an internal appeal process provided for in the relevant sector legislation, the secretariat will not have the opportunity to negotiate a positive outcome as envisaged in clause 15(6)(a) after the decision has been taken. The decision-maker cannot issue another decision on the same facts of the application. The only remedy in such instances would be to take the decision on review to court and allow for the principles of administrative law to apply.

66. The Draft Bill further provides for the Secretariat to refer such a matter (refusal) to the Management Committee or the Commission "for any decision or action". It is not clear what decision or action can be taken in this regard other than to amend the strategic integrated project to take into account the concerns or reasons for the refusal and resubmit an application.

Clause 15(6) should therefore be deleted.

Steering committee and procedures - Clause 16

67. Clause 16(2) is a duplication of clause 14(1)(g) which also requires that a progress report be submitted to the Secretariat on a monthly basis. Clarity is sought on whether a different report or the same report is required as per clause 16(2)? Furthermore, do the words "at least on a monthly basis" in clause 16(2) mean that a report can be submitted more frequently than on a monthly basis? These issues raised should be clarified.

Processes relating to implementation of strategic integrated project - Clause 17 and Environmental assessments – Clause 18

68. Although the overall intention of the Draft Bill is that decisions pertaining to approvals, licences, authorisations and permits, will still be considered in terms of sector legislation, an exception is made in relation to the environmental authorisation decision-making process, which is not understood.

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 the 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.

It is suggested that clause 17 and 18 and Schedules 2 and 3 be deleted from the Draft Bill for the following reasons:

(a) Specific legislation, namely the NEMA and the Environmental Impact Assessment Regulations, 2010 exist which regulates the processes and timeframes, determines the competent authorities and stipulates the appeal processes. This legal framework was developed over a number of years and is in line with international practice and is also well understood by the sector.

(b) The Department responsible for environmental affairs is committed to expedite decision-making processes in relation to strategic integrated projects. However, it is important that government should follow the same processes and meet the same requirements as that of the non-governmental sector.

(c) The Environmental Impact Assessment Regulations, 2010 contain time-frames and, for the past year no delays and backlogs have occurred (due to the fact that the capacity was increased significantly at national and provincial level and smarter systems and monitoring mechanisms were

put in place). There are also dedicated teams working on government projects. Although longer time frames are prescribed, on average, applications take 3 to 6 months to be finalised (at a national level), but where decisions do take longer, it is often because the applications are complex or the applicants themselves delay the matters.

In addition to the above, steps are currently being taken to amend the Environmental Impact Assessment Regulations, 2010, to further align the environmental authorisation processes with the licencing processes of the Departments of Mineral Resources and Water Affairs and to render the time frames more stringent. The Department of Environmental Affairs has agreed with the Departments of Mineral Resources and Water Affairs on a time frame of a maximum of 300 days for the issuing of environmental authorisations, which period is slightly longer than the timeframe proposed in Schedule 3. It is suggested that this process be written into revised EIA Regulations in terms of the NEMA and that this process be uniformly applied to all listed/specified activities, including strategic integrated projects.

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 available information.

(d) At the core of the environment impact assessment 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. (See section 24(4)(b)(i) of the NEMA).

(e) The triggers, processes and timeframes set out in Schedule 2 and 3 of the Draft Bill are different from what is currently contained in the NEMA and the Environmental Impact Assessment Regulations, 2010. As indicated earlier, a separate environmental impact assessment process and timeframes for strategic integrated projects is not supported.

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

The Draft 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 an affected party taking a decision on review to the High Court.

69. Furthermore, clause 17(2) states that: "The processes set out in Schedules 2 and 3 provide a framework and guide for implementation of any strategic integrated project" but also states that "the timeframes in Schedule 3 may not be exceeded." Surely then Schedule 3 is not a guide but something that must be complied with. Also, stating that the timeframes 'may not be exceeded"

implies that immediately anything goes over that date, the decision then taken or actions taken become irregular as there is non-compliance with the law.

70. In clause 18(1), reference is made to the processes in the NEMA, yet the Draft Bill proposes that an additional process (as outlined in Schedule 3) be applied to strategic integrated projects (as per clause 17). This fragmentation and duplication, as well as uncertainty that will flow therefrom are not supported, especially since the minimum requirements are not specifically indicated in the Schedule.

71. 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 and shall be considered by the national department responsible for the environment."

This clause, read together with the current ambit of what could constitute a "strategic integrated project" is of major concern.

If the aim is to achieve improved coordination 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 coordinate their EIA processes with municipalities' municipal planning processes.

The shift away from the constitutional dispensation of three spheres of government, with municipalities and provinces being distinct and having specific and exclusive jurisdiction, to centralisation to a national level is of concern.

The Draft Bill should simply provide for improved coordination if EIAs are required. In addition to the above, NEMA itself, in sections 24K and 24L, permits authorities to coordinate 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 strategic integrated projects (as has been done in respect of NEMA and the Less Formal Township Establishment Act, 1991).

Hence, given the wide and vague description of what constitutes "strategic infrastructure" the designation of the national Department of Environmental Affairs as the competent authority for such projects, will seriously hamper the ability to align strategic environmental/planning efforts between provincial and municipalities. Although the coordination of strategic projects is supported, this should form part of the process in the development of municipal IDPs/SDFs and provincial PSDFs. In any event, it should be noted that the national department responsible for the environment will be the competent authority in those situations as set out in section 24C of the NEMA. Hence, clause 18 in its current form is not supported.

Delegation and assignment- Clause 20

72. Clause 20(1) provides that: "The Minister may delegate or assign.....". Reference to Minister here is the Minister of Economic Development. Would the other Ministers, referred to in the Draft Bill not have the power to delegate and assign?

73. Clause 20(4) is problematic as permitting a member of the steering committee to exercise or perform any power or duty on behalf of the organ of state that he or she represents, when having regard to the functions performed by the steering committee (e.g. clause 14(2) of the Draft Bill) will create a perception of bias in favour of the development/project 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 also part of the committee that developed and adopted the project plan.

Regulations – Clause 21

74. 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) rural development; and
(v) Broad-Based Black Economic Empowerment."

It must be noted that a myriad of legislation already exists which relates to these issues listed above.

Schedule 1 (Section 7(1)(a))

75. 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 strategic integrated project, the criteria at present is quite broad and also vague and thus requires further consideration and redrafting.

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.

76. Clarity is sought on why the following are not included in Schedule 1, namely sports, cultural, recreational and tourism facilities; and 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 strategic integrated projects as defined in clause 7 should they meet all the criteria?

Schedule 2 – Section 17(2)

77. Though it is suggested that Schedule 2 be deleted from the Draft Bill, it must be noted that the numbering on the flow-chart is incorrect as numbers 7 and 8 are missing. Furthermore, should the acquisition of land rights not happen earlier in the process due to the fact that it is a time-consuming process. This is a high risk area - any delays in the acquisition of rights to land could potentially have a significant and costly impact on the implementation of the project.

78. Also, it is not perfectly clear how the processes in Schedule 3 fit into Schedule 2. It is not clear what is meant by the "development and mitigation plan" referred to in process steps 5 to 7 in Schedule 3.

Schedule 3 – Section 17(2)

79. Whilst the coordination of planning and regulatory processes are fully supported, these coordination and integrations functions should be addressed within the various statutes that governs them (see discussion item 68 above).

Yours sincerely

Anton Bredell
Minister
Date: 3/4/2013