



groundWork

Environmental justice action

P.O. Box 2375, Pietermaritzburg, 3200, South Africa ● 6 Raven Street, Pietermaritzburg, 3201, South Africa
Tel: +27-33-342 5662 ● Fax: +27-33-342 5665 ● team@groundwork.org.za ● www.groundwork.org.za

Att: Ms Noluthando Skaka
Secretary of Committee: Economic Development Portfolio Committee
Email: nskaka@parliament.gov.za
Fax: 086 505 5618

Friday, 22 November 2013

Dear Ms Shaka

COMMENTS ON THE DRAFT INFRASTRUCTURE DEVELOPMENT BILL, B49-2013

Published in the Government Gazette on 30 October 2013 (Notice 1078 of 2013, Government Gazette No. 36980) and introduced in the National Assembly on 4 November 2013

Who is groundWork and how does it work?

groundWork, Friends of the Earth South Africa, is a non-profit environmental justice organisation working from offices in Pietermaritzburg, working with community people throughout South Africa and Africa. These include communities in The Vaal Triangle, the Highveld region, those in Waterberg and Lephalale, south Durban and waste pickers from all provinces except the Northern Cape. groundWork seeks to improve the quality of life of vulnerable people in South Africa through assisting civil society to have a greater impact on environmental governance. groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices.

groundWork's long term goal is that "people are living well with each other and with the earth" and groundWork seeks to achieve this through making the environmental justice movement visible, effective and integrated within the broader justice movement.

groundWork was formed in 1999 to support people's struggles for environmental justice starting with people living on the fencelines of the petrochemicals industries and waste

Trustees: Thuli Makama, Joy Kistnasamy, Farid Esack, Patrick Kulati, Sandile Ndawonde, Richard Lyster, Jon White.



facilities. groundWork defines environmental justice as: “Empowered people in relations of solidarity and equity with each other and in non-degrading and positive relationships with their environments”.

Section 24 of the South African Constitution

Section 24 of the South African Constitution guarantees the right to an environment that is not harmful to health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -

- (i) prevent pollution and ecological degradation;
- (ii) promote conservation; and
- (iii) secure ecologically sustainable development and use of natural resources *while* promoting justifiable economic and social development.

The interpretation of the final part of this sub-clause is vital: ‘while promoting justifiable economic and social development.’ And the critical word here is ‘while’: does it mean ‘subject to’ or does it mean ‘at the same time as’?

In the first interpretation, ecologically sustainable development is subordinate to economic and social development and there is no necessary logic linking these orders of development. Economic or social developments may then be ‘justifiable’ according to their own internal logics and without reference to ecologically sustainable development. The environment does not therefore need to be integrated in the original conception of economic or social policies, programmes, planning or projects. In practical terms, economic development is justified only at project level: major developments are required to undergo Environmental Impact Assessments (EIA) at the end of the planning pipeline after a project has been proposed. The meaning of ‘justifiable’ is thus embodied in the performance of an EIA. Ecologically sustainable development is regarded as having been secured on the basis of whatever mitigation of environmental impacts is required by the EIA.

There are several reasons why this interpretation is unsatisfactory. Firstly, had the Constitution meant ‘subject to’, it would have been made clear in its statement. Secondly, this interpretation places a major qualification on government’s obligation to protect the environment for the benefit of present and future generations. Had this been intended, it



would have been included in the initial statement of the right rather than in a sub-clause. Thirdly, this interpretation contradicts the first part of the right to ‘an environment not harmful to [people’s] health or well-being. The context shows that subsection (b) is intended to give effect to that right, not to limit it. Fourthly, this is the only right that specifically obliges government to promote economic and social development. An interpretation that separates this obligation from its context seems particularly wilful. Moreover, the social dimension is already included in the initial statement that the right is to benefit present and future generations.

The Constitution surely requires a particular kind of economic and social development, which must be ecologically sustainable development. Further, this meaning must apply when the concept of development is used elsewhere in the Constitution as well as in legislation as proposed here.

This conclusion fits with the second and ordinary meaning of the word ‘while’. In this interpretation, ecological sustainability must be taken as the ground on which all state policies and programmes concerned with economic and social development are based – starting with macro-economic policy. These policies cannot therefore be ‘justifiable’ without specific reference to ecological sustainability. This means, at the very least, that people can oblige government to defend its economic and social policies on environmental grounds. A stronger reading of the right would create the basis for arguing that the Constitution requires sustainable development based on environmental, social and economic justice.

The Bill needs to recognise this, and ensure that it does not weaken South Africa’s Constitutional commitments and fosters private wealth instead of attempting to alleviate poverty (see comment below on Schedule 1) and securing ecologically sustainable development, based on principles of environmental justice (as per comment on environmental justice above).

Environmental Justice

Environmental justice is thus integral to justice in general and to the realisation of rights. The environmental right in South Africa’s Constitution gives people the right to ‘an environment that is not harmful to their health or well-being’ and mandates development that is ‘ecologically sustainable’. It must be read along with other rights: the right to equality means



that black and poor people should not bear the brunt of pollution while rights relating to participation, including the rights to information and assembly, mean they may not be excluded from decision making; the 'socio-economic' rights to housing, water, clean energy, sanitation and waste services are integral to the meaning of the environmental right.

groundWork supports the principle of ensuring that development is for the people of South Africa, and that such development supports taking people out of poverty. This is understood in the following manner:

- People working for reasonable remuneration in conditions that are safe, rewarding and secure, rather than in conditions that are dehumanising and exploitative;
- Communities having decent levels of affordable basic services and infrastructure to be enjoyed by all and not only those that can afford them;
- Individuals and families are able to access at the basic goods of human life starting with nutrition, water, and safe and comfortable accommodation; and
- Clean and healthy environments – where people live and work – that is nurtured by the very way people in which people live.

groundWork supports the principle of streamlined and integrated mechanisms to ensure that critical infrastructure developments that give meaning to the above are considered and approved. These processes will ensure that society moves out of poverty sooner, and are not doomed to further impoverishment. No mention is made of poverty alleviation in the objectives of the Bill.

National Environmental Management Act

While the Bill does refer to the Act and states that environmental assessments are required, the Bill falls short in two aspects: Firstly, it seeks to place time-frames on decision making which will inhibit fair, proper and informed decision-making on developments that could further impoverish people, and could lead to negating the achievement of 'secure ecologically sustainable development'. And secondly, this will result in the principles of the Act being violated, where the decisions that need to be taken locally will be taken at a national level.



Schedule 1

groundWork is concerned about the broad and undefined manner in which Schedule 1 is presented, and how projects are to be determined to be 'of significant economic or social importance'. This schedule needs to be revisited and interrogated for there are possibilities, like in the case of Sasol, where the apartheid government used state resources to foster a technology and industry that has had huge financial benefit for private investors since the 1980s when it was privatised. More specifically, 'economic facilities, mines, oil or gas pipelines, refineries and other institutions' are too vague a listing that could and probably will be open to the exploitation of state funds for private benefit.

Public consultation

Various structures that are envisaged in the Bill to deliver on infrastructure, but none of these structures in any way provide for consultation with the public on key decisions that will result in people's 'social cohesion' being threatened as in the case of south Durban, where the port expansion projects will result in residential neighbourhoods losing their status and farmers losing their land (see <http://mg.co.za/article/2013-11-22-big-business-versus-local-food-supply>). This is all too common as well in the mining areas of South Africa where local rural people are forced off their lands because of private mining. The Bill as it is written now will facilitate these processes and impact upon people's human rights.

Further input

groundWork appreciates the opportunity to comment on the Bill, and we reserve all rights to engage and substantiate and improve our comments in future process. groundWork requests an opportunity to make oral presentations to all relevant committees in Parliament when the Bill is being discussed.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'S. Peek'.

S. (Bobby) Peek



CC:

The Honourable Mrs Elsie Mmathulare Coleman MP

Chair: Economic Development Portfolio Committee

Email: vwilliams@parliament.gov.za

Fax: 021 403 2341

The Honourable Advocate Johnny de Lange MP

Chair: Water & Environmental Affairs Portfolio Committee

Email: tmadubela@parliament.gov.za