Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

The Honourable Ms F C Bikani, MP
Acting Chairperson of the Portfolio Committee on Mineral Resources
c/o Ms Ayanda Boss
The Coordinator
Portfolio Committee on Mineral Resources
By email at aboss@parliament.gov.za

Cc: The Honourable Mr Johnny de Lange MP
Chair: Portfolio Committee on Water Affairs and Environmental Affairs
Per email: jdelange@parliament.gov.za and tmadubela@parliament.gov.za

6 September 2013

Dear Honourable Chairperson

COMMENTS ON THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL, 2013 [B15-2013]

1. On 8 February 2013, the Centre for Environmental Rights (CER) submitted detailed comments on the draft Mineral and Petroleum Resources Development Amendment Bill, 2012 published for comment on 27 December 2012 (Notice 1066 of 2012, Government Gazette No. 36037, 27 December 2012) ("the draft Bill"). Those comments were amplified by an oral submission made to officials from the Department of Mineral Resources on 5 March 2013, at one of the few stakeholder engagement workshops on the Bill held in Pretoria.

2. None of our comments are reflected in the Mineral and Petroleum Resources Development Amendment Bill, 2013 [B15-2013] published for comment on 31 May 2013 (Notice 567 of 2013, Government Gazette No. 36523) ("the Bill").

3. To assist the work of the Portfolio Committee, the Centre for Environmental Rights has collaborated in the preparation of three substantive joint submissions with other non-government organisations, academics and experts, which will be submitted separately, and in respect of which the organisations, academics and experts in question have requested the opportunity to make oral submissions at the public hearings on the Bill.

4. In this document, we deal with three aspects only:
    a. Shortcomings on the consultation for the Bill;
    b. Annexure A: CER Letter to Minister dated 6 April 2011;
    c. Annexure B: A list of what appears to be drafting errors in the Bill;
    d. Annexure C: Detailed comments on specific provisions in the Bill.

5. We do not seek to made oral submissions on these aspects, and trust that the Portfolio Committee will be provided with a copy of this written submission.

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6. In this submission, "mining" should be read to refer to all prospecting, mining, reclamation, reconnaissance and exploration activities regulated by the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) (MPRDA, or "the principal Act").

Shortcomings on consultation for the Bill

7. Civil society organisations and communities have long complained about the DMR's neglect of these groups as interest groups in development of mineral resources in South Africa. This was again illustrated by the process followed in the development and publication of the Bill.

Civil society groups

8. In February 2011, the Centre for Environmental Rights (CER) wrote to the DMR on behalf of a number of NGOs requesting an opportunity to make inputs into draft legislation being developed, followed by further correspondence in March 2011. The purpose of these requests was to convey to the DMR the very grave concerns of civil society (including, in particular, the mining-affected communities we represent) in order for these to be accommodated in any draft legislation being developed.

9. On 18 March 2011, we finally received the following reply from Mr Mosa Mabuza from the DMR:

> *"Our policy and legal team enjoined with the responsibility of drafting the amendment is at the advanced stage of concluding this internal process, upon which we will be calling upon individual and group stakeholders to make their meaningful contributions to this process. We have included you in the database of stakeholders to be engaged in the process of consultations and eagerly await your much valued engagement and contribution towards finalization of the amendments."*

10. In view of this refusal to engage directly with our concerns, we then prepared unsolicited written comments on key concerns on the Bill, submitted on 6 April 2013 on behalf of 13 NGOs and law clinics across the country. A copy of that submission is attached as **Annexure A**.

11. On 15 April 2011, we received a response from the Minister, acknowledging the inputs, and deferring further engagement to the Parliamentary process. We regarded this as a lost opportunity for the Minister and DMR to take our serious issues on board.

12. Subsequent to the 15 April 2011 communication, the first request for consultation to the public was on 27 December 2012, when the draft Bill was published for comment. On 8 February 2013, the CER and many of our partner organisations submitted detailed comments on the draft bill, making many of the arguments we made in 2011. On 5 March 2013, several of our organisations were invited to make an oral submission to the DMR. Despite the short notice, since this was the first time in living memory that we had been invited to the DMR's offices in Pretoria, we cancelled existing commitments and incurred the expense of traveling to Pretoria to make a submission.

13. When the Bill was introduced in Parliament in June 2013, it was clear that our detailed comments had been rejected almost in their entirety, including drafting errors pointed out.

Communities affected by mining

14. The DMR has stated on a number of occasions in different forums that it has consulted communities on "the objectives of the review of the regulatory framework":
    a. In its Annual Report 2011-12, it stated that the DMR has "successfully concluded consultations with communities in Kuruman in the Northern Cape, Mokopane in Limpopo, Delmas in Mpumalanga and Brits

in the North West", and that "the inputs received from these interaction will be incorporated into the MPRDA amendments".[1]

b. In the Explanatory Memorandum published with the Bill, the DMR includes in the list of parties consulted "communities in Limpopo, Mpumalanga, North West and Northern Cape Provinces".
c. In its presentation to the Portfolio Committee at the briefing on the Bill on 30 July 2013, the DMR recorded "Consultation with communities in Limpopo, Mpumalanga, Northern Cape and North West provinces were held in 2011."
d. It therefore appears that the DMR may be relying on two-year old consultations in 2011 with potentially as few as four mining-affected communities – well before the draft Bill was published in December 2012.
e. At that consultative meeting on 5 March 2013 referred to above, we commented on the absence of consultation with communities on the Bill, and particularly the many communities with whom we interact through our case work and the Mining-Environment-Communities Alliance in which many of us participate. We were advised that the DMR had consulted with the Department of Land Affairs and Rural Development, and that there was no need to do further consultation with communities on the Bill.

15. We respectfully request the Portfolio Committee to take this matter up with the Minister and the DMR to ensure more comprehensive consultation with mining-affected communities on the specific proposals in the Bill, and incorporation of their concerns in the Bill.

No stakeholder status

16. Ultimately, what appears from the aforegoing is that the DMR still does not regard civil society and communities as stakeholders with the same status as industry and labour. As early as March 2011, the Minister stated in public that she has accepted contributions from MIGDETT (the Mining Growth, Development and Employment task team, consisting of government, business and labour) on amendments to the MPRDA.[2] Yet civil society and community groups have no representation on these kinds of forums, and their inputs are effectively ignored. Even the cover sheet for the Bill called for written representations by "the Mining and Minerals industry and interested and affected parties".

17. This is extremely unfortunate, and does not bode well for improved relationships between mining-affected communities, civil society organisations and both mining companies and the DMR. It also means that very few of our shared concerns have been taken into account in the Bill.

18. We understand that the proposals in the Bill are based on an agreement concluded between the Ministers of Mineral Resources and Environmental Affairs, and that the details of this agreement are being thrashed out by an interdepartmental committee. Unfortunately the work of that committee has been carried out behind closed doors, and save for what we see in the Bill, we are therefore not in a position to comment on its proposals.

19. What we do know is that the agreement between the two Ministers, as evidenced in the Bill, contradicts the decision by the legislature through legislation passed by Parliament in 2008 in which the power to issue environmental authorisation for mining activities would be transferred to environmental authorities. There has been no public consultation on this new agreement, save for those surrounding this Bill.

20. We thank the Portfolio Committee for the opportunity to comment on the Bill and hope that our concerns can be addressed.

Yours sincerely

[1] P. 12-13
[2] http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=16862&tid=29706

CENTRE FOR ENVIRONMENTAL RIGHTS

Per: 

Melissa Fourie
Executive Director

Annexure A: CER Letter to Minister dated 6 April 2011

Annexure B: Errors

This annexure points out a list of what appears to us be drafting errors. Many of these errors were pointed out to the DMR in our comments on the draft Bill on 8 February 2013, but not corrected in the Bill.

Clause 1: Amendment of section 1 (Definitions)

1 Section 1(u): The definition of "prospecting area". Subsection(u)(a) erroneously refers to a "mining" right when it should refer to a "prospecting" right.

Clause 3: Amendment of section 5A of Act 28 of 2002, as inserted by section 5 of Act 49 of 2008 (Prohibition relating to as *[sic]* illegal act)

2 It appears that the draft Bill inadvertently amends the first sentence of section 5A by substituting the phrase "conduct technical cooperation operations" with "conduct technical cooperations". The original phrase should prevail.

Clause 18: Amendment of section 23 of Act 28 of 2002 as amended by section 19 of Act 49 or 2002 (Granting and duration of mining right)

3 The amendment to subsection (1)(a) refers to the principles in section 37(2), which was deleted by Act 49 of 2002. The words "section 37(2)" should be replaced with "section 2 of the National Environmental Management Act, 1998 (Act 107 of 1998)."

Clause 22: Amendment of section 27 of Act 28 of 2002, as amended by section 23 of Act 49 of 2008 (Application for, issuing an duration of mining permit)

4 Subsection (3)(c) (not granting permit on adjacent land) introduced by the 2012 Draft Bill, not carried forward in the 2013 Bill – it seems inadvertently.

5 We strongly oppose the insertion of the word "and" rather than "or" after paragraph (a) as part of the proposed amendment of subsection (3). Such an amendment, which, we submit, is not the intention of the drafters, would significantly limit the circumstances under which the Minister may refuse to grant a mining right, which is in appropriate given the objects of the MPRDA.

Clause 19: Amendment of section 24 of Act 28 of 2002, as amended by section 20 of Act 49 of 2008 (Application for renewal of a mining right)

6 Considering the reference to compliance with the environmental authorisation in the proposed section 24(2)(b), it is appropriate to amend the proposed section 24(3)(a) to include NEMA; not doing so would make a nonsense of including the environmental authorisation in the report. The proposed subsection should therefore read "…and is not in contravention of **[any relevant provision of]** this Act or the National Environmental Management Act, 1998 **[any other law]**".

Clause 29: Amendment of section 43 of Act 28 of 2002, as amended by section 34 of Act 49 of 2008 (Issuing of a closure certificate)

7 Under section 43(5), the Bill erroneously conflates the departments of water affairs and environmental affairs. It should be made clear that both of these departments, along with the Chief Inspector of Mines, "have confirmed in writing that the provisions pertaining to health and safety and management of pollution to water resources, the pumping and treatment of extraneous water and compliance to the conditions of the environmental authorisation have been addressed."

8 The same conflation error occurs at section 43(5A).

Clause 36: Amendment of section 49 of Act 28 of 2002, as amended by section 40 of Act 49 of 2008

(Minister's power to prohibit or restrict prospecting or mining)

9 The section now provides that the minister may invite applications for prospecting, mining etc in certain areas. Given that the title of this section is "The Minister's power to **prohibit or restrict prospecting or mining**", it is nonsensical to place this provision here.

10 The section also refers to a non-existent subsection 2(c).

Clause 67: Amendment of section 94 of Act 49 of 2008 (Prohibition of obstruction, hindering or opposing of authorised person)

11 This clause proposes deleting a subsection which does not exist in the principal Act.

Clause 69: Amendment of section 98 of Act 28 of 2002, as amended by section 69 of Act 49 of 2008 (Offences), as read with Clause 70: Amendment of section 99 of Act 28 of 2002 (Penalties)

12 We find no section 22A in the principal Act or the Amendment Act of 2008.

Annexure B: Detailed comments

Clause 1: Amendment of section 1 (Definitions)

1. The definition of historically disadvantaged person has been limited to "South African citizens… disadvantaged by unfair discrimination before the Constitution took effect" rather than "any person". The limitation is not supported.

Clause 2: Amendment of section 2 of Act 28 of 2002 ("the MPRDA, or the principal Act"), as amended by section 2 of Act 49 of 2008

2. Section 2(d) of the principal Act included the phrase "historically disadvantaged persons, including women…". The section was amended by the 2008 Amendment Act to say "historically disadvantaged persons, including women and communities…". The Bill now proposes removing the phrase "including women and communities". The amendment is not supported for reasons that follow in the paragraph below.

3. The emphasis on expanding opportunities to women and communities in particular was appropriate and necessary given their significant exclusion from sharing in the benefits in the exploitation of the nation's mineral and petroleum resources. As the extraction of minerals still does not adequately create opportunities for women and communities or benefit women and communities, the decision to amend the section to exclude women and communities is not justifiable. The need for women and communities to be the focus of opportunities and benefit sharing in the minerals sector is stronger today than it has been in the past and it is submitted that the phrasing in the 2008 Amendment Act should prevail.

Clause 12: Amendment of section 17 of Act 28 of 2002 as amended by section 13 of Act 49 of 2008 (Application for prospecting right)

4. We strongly oppose the retention of the obligation on the Minister to grant rights should certain conditions be fulfilled. To give effect properly to the objectives of the Act, the Minister must have a discretion whether or not to grant a right, which discretion may be guided by the requirements of section 17(a) to (f), but which must operate over and above those requirements. We therefore submit that the word "must" in section 17(1) be replaced with the word "may".

5. We support the addition of paragraph (c) in subsection (2) as a new ground for refusal of applications for prospecting rights.

Clause 13: Amendment of section 18 of Act 28 of 2002, as amended by section 14 of Act 49 of 2008 (Application for renewal of prospecting right)

6. Subsection 5, dealing with a prospecting right remaining in force until an application for renewal of the right has been determined, has been amplified. The amplification highlights concerns about prospecting long beyond the period initially envisaged, with DMR turnaround times being what they are, and with no provision for public participation in that intervening period. Comment should be considered.

Clause 18: Amendment of section 23 of Act 28 of 2002 as amended by section 19 of Act 49 or 2002 (Granting and duration of mining right)

7. As argued in the context of prospecting rights above, we strongly oppose the retention of the obligation on the Minister to grant rights should certain conditions be fulfilled. To give effect properly to the objectives of the Act, the Minister must have a discretion whether or not to grant a right, which discretion may be guided by the requirements of section 23(a) to (h), but which must operate over and above those requirements. We therefore submit that the word "must" in section 23(1) be replaced with the word "may".

8. We strongly oppose the insertion of the word "and" rather than "or" after paragraph (a) in "and" rather than "or" after paragraph (a) as part of the proposed amendment of subsection (3). Such an amendment would

significantly limit the circumstances under which the Minister may refuse to grant a mining right, which is inappropriate given the objects of the MPRDA.

9. Further in relation to subsection (3), we propose that a similar ground for refusal be inserted as has been inserted in clause 12(e) of the Bill dealing with the Minister's refusal of prospecting rights, namely, the submission of inaccurate, incorrect or misleading information by the applicant in support of its application or any matter required to be submitted in terms of the Act.

Clause 19: Amendment of section 24 of Act 28 of 2002, as amended by section 20 of Act 49 of 2008 (Application for renewal of mining right)

10. To preserve the integrity of the revised process for renewal of a mining right, it is vital that the compliance report referred to in the proposed section 24(b) be an "independent audit report".

11. Considering the reference to compliance with the environmental authorisation in the proposed section 24(2)(b), it is appropriate to amend the proposed section 24(3)(a) to include NEMA; not doing so would make a nonsense of including the environmental authorisation in the report. The proposed subsection should therefore read "… and is not in contravention of **[any relevant provision of]** this Act or NEMA **[any other law]**.

12. Subsection 5, dealing with a mining right remaining in force until an application for renewal of the right has been determined, has been amplified. The amplification highlights concerns about mining long beyond the period initially envisaged, with DMR turnaround times being what they are, and with no provision for public participation in that intervening period.

Clause 20: Amendment of section 25 of Act 28 of 2002, as amended by section 21 of Act 49 of 2008 (Rights and obligations of holder of mining right)

13. Subsection (2)(h) is substituted in order to require the holder to submit an annual report detailing compliance with the Charter and the SLP. It is submitted that this subsection should be further amended to include the provision of the required information to affected communities, relevant structures and other interested and affected parties.

Clause 22: Amendment of section 27 of Act 28 of 2002, as amended by section 23 of Act 49 of 2008 (Application for, issuing an duration of mining permit)

14. Although we appreciate the rationale for this proposal, from an environmental point of view it is not desirable to limit the development of a mineral resource to a specific timeframe as is proposed in the draft section 27(1)(a). Doing so may undermine the sustainable development of mineral resources as is required by the principal Act: rushing applicants to develop resources can result in poor decisions and less attention to maximum beneficiation or sustainable benefits.

15. The additional proposed subsection 6(d) should expressly refer to other statutory tools or measures of damage or degradation. We propose that the subsection be amended so as to include a reference to having regard to available statutory tools, recognised classification systems or measures of damage or degradation to determine whether the mining will result in unacceptable pollution, ecological degradation or damage to the environment.

16. The additional subsection (6)(e) should be amended to read "the applicant is not in contravention of any provision of this Act or NEMA."

17. Subsection (9) is new, dealing with a mining permit remaining in force until an application for renewal of the right has been determined. The insertion highlights concerns about mining long beyond the period initially envisaged, with DMR turnaround times being what they are, and with no provision for public participation in that intervening period.

Clause 28: Amendment of section 37 of Act 28 of 2002, as amended by section 30 of Act 49 of 2008 (Environmental Management Principles)

18. While the intention of the drafters of the Bill appears to be to limit the application of NEMA, the meaning of the proposed substitution is not clear. Moreover, the amendment may contradict the objects of the MPRDA as provided in section 2(h) and endorsed by the Constitutional Court in the decision of *Maccsand*[3], handed down in April 2012.

19. "Environmental requirements" is not defined, and it is unclear what aspects of the Act are governed by NEMA. It is submitted that the current wording of section 37 (as it is in the principal Act) should be retained.

No clause: Insertion of sections 38A and 38B in Act 28 of 2002, by section 32 of Act 49 of 2008 (Environmental Authorisations)

20. Section 38B deems those in possession of an approved environmental management plan or programme to have an environmental authorisation in terms of NEMA; section 38B(2) allows the Minister to direct a holder to "upgrade" the environmental management plan or programme "if he or she is of the opinion that the prospecting, mining, exploration and production operations is likely to result in *unacceptable pollution, ecological degradation or damage to the* environment." In the ordinary course, a licence or permit application must be refused where it will result in unacceptable pollution, ecological degradation or damage to the environment. Where the Minister finds that such activities have been licenced, an investigation must be instituted to assess whether the holder has failed to comply the conditions set out in its permit or licence, or its environmental management plan or programme. If the holder is in compliance but should not have been awarded the licence (due to the unacceptable pollution) provision must be made for this to be addressed properly and not merely through an authorisation "upgrade". Any such process must take place in consultation with the Minister of Water and Environmental Affairs and all other affected parties.

Clause 29: Amendment of section 43 of Act 28 of 2002, as amended by section 34 of Act 49 of 2008 (Issuing of a closure certificate)

a. Under subsection (5A), the consequences, should the DWA and DEA or Chief Inspector of Mines not confirm within 60 days that the provisions of subsection (5) have been addressed, remain unclear.
b. We welcome certain revisions to the proposed subsection (14) which render it clear that the exemption applies to the retention of financial provision only. We are concerned about the reference to "invasive operations" since this is not defined. We propose that this should rather be a reference to "environmental damage, pollution and ecological degradation". It remains a concern that no procedure is stipulated for determining how "invasive operations" or "environmental damage" is to be assessed.

Clause 31: Amendment of section 45 of Act 28 of 2002, as amended by section 36 of Act 49 of 2008 (Minister's power to recover costs in event of urgent remedial measures)

21. We support the requirement that the Minister of Mineral Resources must act in consultation with the Minister of Water and Environmental Affairs, and the requirement that the Minister may only use public funds to cover the necessary measures, if the funds raised by way of a High Court application to seize and sell the property of the right holder are insufficient.

[3] *Maccsand (Pty) Ltd v City of Cape Town and others* 2012 (4) SA 181 (CC)

22. It is unclear how this section would interact with the provisions of NEMA, particularly section 28 (Duty of care and remediation of environmental damage) and section 31L (Power to issue compliance notices), or section 19 of the National Water Act, 1998 (Act 36 of 1998) (NWA). In particular, it is not clear whether the powers of the Minister of Mineral Resources in terms of section 45 of the MPRDA have any bearing on the powers of the Minister of Environmental Affairs in terms of section 28 of NEMA, or the powers of environmental management inspectors in terms of section 31L of NEMA, or the powers of a catchment management agency under section 19 of the NWA.

Clause 32: Amendment of section 46 of Act 28 of 2002, as amended by section 37 of Act 49 of 2008 (Minister's power to remedy environmental damage in certain circumstances)

23. We are concerned about the proposed amendment to subsection (2), as a result of which the Minister would no longer be entitled to use funds appropriated by Parliament for that purpose if there is insufficient financial provision.

24. We are further concerned about how this provision interacts with sections 28 and 30 of NEMA, and sections 19 and 20 of the NWA. It is unclear how the obligations and duties of the Regional Manager will align with the obligations of the Environmental Management Inspectors designated in terms of section 31B of NEMA and mandated in terms of section 31D.

Clause 33: Amendment of section 47 of Act 28 of 2002, as amended by section 38 of Act 49 of 2008 (Minister's power to suspend or cancel rights, permits or permissions)

25. We are opposed to the removal of subsection (1)(d), as a result of which the submission of inaccurate, false, fraudulent, incorrect or misleading information would no longer be a basis for the Minister to suspend or cancel a right, permit or permission.

26. We are furthermore concerned about the removal of subsection (3) which required the Minister to issue directives. The remaining provisions are discretionary. The removal of this subsection also renders subsection (4) incapable of application.

27. In circumstances when the Minister fails to act in terms of section 47 despite a breach by a holder, provision must be made for the Minister to be compelled to do so (see, for example, section 28(12) of NEMA).

New clause 35: Amendment of section 48 of Act 28 of 2002, as amended by section 39 of Act 49 of 2008 (Restriction or prohibition of prospecting and mining on certain land)

28. There is no mention of protected areas, critical biodiversity areas or any reference to the mining and biodiversity guidelines. The Act needs to reflect the importance of safeguarding biodiversity and the exercise of due diligence regarding transformation of the natural environment including its restoration and rehabilitation throughout the mining cycle.

Clause 36: Amendment of section 50 of Act 28 of 2002 (Minister may investigate occurrence, nature and extent of mineral resources)

29. Throughout this section we propose that the owner and the occupier and the person in control of the land is given notice and consulted.

Clause 39: Amendment of section 53 of Act 28 of 2002, as amended by section 42 of Act 49 of 2008 (Use of land surface rights contrary to objects of Act)

30. With reference to the Constitutional Court's decision in Maccsand,[4] it is our submission that this section 53 may fall foul of the Constitution in that it purports to permit the Minister to make land use planning decisions. It is therefore invalid.

Clause 40: Amendment of section 54 of Act 28 of 2002

31. The reference to "unreasonable demands" in subsection (1)(b) is unclear and is not clarified in the Bill.
32. It is submitted that the Regional Manager is not the appropriate party to make recommendations in regard to expropriation or any other matter as the Regional Manager is also required to chair RMDEC and to make a decision on the licence application.
33. Consideration must be given in this section to the procedures followed in obtaining the right and ensure that the owner and the lawful occupier and the person in control of the land has been properly and fully consulted and has been given an opportunity to be heard and to lodge objections in respect of the mining.
34. The relationship between traditional authorities and communities must be carefully considered in the amendment of this section. Where, for example, a traditional authority has agreed to allow a holder access to land (for compensation or otherwise) but the community has not, appropriate measures must be taken to address this.

Clause 41: Amendment of section 56 of Act 28 of 2002, as amended by section 43 of Act 49 of 2008

35. The Bill does not address the measures required to ensure that the obligations of a company are met when the company is finally deregistered. The MPRDA simply provides that, in the event that a company is finally deregistered, the right will lapse in terms of section 56(c). While a right may lapse, any outstanding issues in regards to the company's obligations to rehabilitate or to undertake activities under an SLP must be matters that are resolved prior to the final deregistration of a company.

Clause 65: Amendment of Section 91 of Act 28 of 2002 (Power to enter prospecting areas, mining areas or retention area)

36. We only comment on the proposed amendment to this section to the extent that it is relevant to inspection and enforcement of compliance with the environmental provisions that would remain in the MPRDA should the Bill be passed. We record that it is our understanding of the legislation that only environmental management inspectors designated by the Minister of Environmental Affairs under section 31B of NEMA are empowered to monitor and enforce compliance with NEMA and the environmental authorisations issued thereunder. This means that, whereas it is proposed in the Bill that the DMR would have the power to issue environmental authorisations, either:
    a. additional capacity must be provided within environmental authorities (primarily DEA and provincial environment departments) to do compliance monitoring and enforcement of environmental authorisations issued for mining activities; or
    b. the Minister of Environmental Affairs must designate DMR compliance and enforcement staff (who again will require additional capacity) as environmental management inspectors under section 31B(1)(a)(ii). Note that such DMR staff would have to comply with the Qualification Criteria, Training and Identification of, and Forms to be used by, Environmental Management Inspectors (GN R494 in GG 28869 of 2 June 2006) and complete the prescribed training before qualifying for designation.

37. We support the deletion of a member of the Board from the power to enter mining and related areas.

38. We also point out that section 91 does not afford authorised persons with the powers of arrest with or without a warrant other than those provided for in section 40 of the Criminal Procedure Act, 1977 (CPA) for peace officers, or in section 42 of the CPA for private persons. Powers of arrest should be a feature of any set of powers made available to enforcement officials.

[4] *Supra*

Clause 66: Amendment of section 93 of Act 28 of 2002, as amended by section 67 of Act 49 of 2008 (Orders, suspensions and instructions)

39. We support the amendments to this section rendering the making of orders, suspensions and instructions mandatory by the authorised person in the event of contravention of the Act or of a right, permit or permission, or environmental authorisation.

40. We point out that, to comply with PAJA, any such order would have to be preceded by reasonable notice to the prospective recipient of the order, and an opportunity to make representations why such order should not be issued. The reasonable notice can be short depending on the situation. While this process does not strictly speaking have to be spelled out in the MPRDA because of the application of PAJA, in our experience officials only apply what is in the Act, and it is therefore advisable to include such a process, remembering that non-compliance with PAJA can result in the order being set aside by a court, with costs to be paid by the DMR (a lesson learned the hard way by other departments). We recommend that the DMR considers utilising the process provided for in Regulation 8 of the EMI Regulations in relation to compliance notices issued under section 31L of NEMA.

41. In addition, s93(b)(i) does not enable the authorised person to act against a person or company that no longer holds the right, permit or permission and is no longer on or in control of the site/operations. Taking into account the number of unrehabilitated mines in South Africa which continue to cause environmental and other damage despite the expiry of the right, it is essential that the DMR be granted the power to hold accountable previous holders of rights, permits and permissions for failures to comply with the terms of their rights, permits, permissions and environmental management programmes and plans.

42. The powers afforded to an authorised person in terms of section 93(1)(b) (powers to take action in cases where any term or condition of a right, permit or condition has been contravened) are, due to a drafting error, not afforded to an authorised person in terms of section 93(1)(a), which provides that:

> *"If an authorised person finds that a contravention or suspected contravention of, or failure to comply with –*
> *(a) any provision of this Act; or …"*

43. There is no equivalent in section 93(1)(a) to section 93(1)(b)(i) and (ii), meaning that no enforcement action can be taken against a person who has contravened any provision of the Act, where this contravention is unrelated to a term or condition of an existing right, permit or permission. It is submitted that this is a serious error which has the consequence, as we have already experienced in our case work, that important provisions of the Act can be contravened with impunity. We submit that this section must be amended to provide for an authorised person with appropriate powers to deal with contraventions of the Act, in circumstances where these contraventions do not involve failures to comply with the terms or conditions of rights, permits or permissions.

Clause 68: Amendment of section 96 of Act 28 of 2002, as amended by section 68 of Act 49 of 2008 (Internal appeal process and access to courts)

44. We support the deletion of the Director-General as appeal authority. In many instances, this provision means that an affected party would be lodging related appeals of separate decisions to the Minister and Director-General. This dual appeal not only causes great confusion and additional work for the appellant, the respondent and the DMR, but in our experience is in any event ignored by the DMR by processing both appeals as one.

45. We are of the view that the proposed section 96(1)(b) needs to be more specific, and at least to read:
"The Minister of Environmental Affairs if the decision was taken in terms of the National Environmental Management Act, 1998 (Act 107 of 1998) or relates to environmental matters and issues incidental thereto.

Such appeal will be regarded as an appeal under the National Environmental Management Act, 1998 (Act 107 of 1998)."

46. The proposed section 96(2)(a) should refer only to appeals under subsection (1)(a), since NEMA has its own suspension provision (section 43(7)) that will apply to appeals under the proposed section 96(1)(b).

47. It is not clear why subsection (3) has been retained in the Bill, since the issue of exhausting domestic remedies is adequately dealt with in section 7 of PAJA. We submit that this section in the principal Act should be scrapped in its entirety.

Clause 69: Amendment of section 98 of Act 28 of 2002, as amended by section 69 of Act 49 of 2008 (Offences), as read with Clause 70: Amendment of section 99 of Act 28 of 2002 (Penalties)

General comments about the new penalty regime proposed in the Bill

48. In principle, we support the incorporation of administrative or civil penalties in any regulatory system. Provision for non-criminal penalties akin to those provided for in the Competition Act, 89 of 1998 ("the Competition Act") is in line with international trends, and the Centre has for a long time advocated the use of administrative or civil penalties to improve compliance with environmental legislation.[5]

49. Having said that, no modern regulatory system can function without appropriate criminal sanctions operating alongside such a civil/administrative penalty system. The modern approach is that civil/administrative penalties should be the normal consequence of any violation, with criminal sanctions reserved for violations that are egregious, such as where the violator attempted to hide the criminal conduct.

50. The first draft of the Bill introduced the new concept of daily fines in the proposed section 99(1A)(f). Such fines have shown to be extremely effective in other jurisdictions to deter ongoing violations and the proposed provision was commendable. It is therefore extremely unfortunate that Section 99(1A)(f) has now been removed from the Bill.

51. We have the following major concerns about the proposed penalty regime:
    a. Turnover penalties are not generally appropriate for criminal fines. The Competition Act, our best example of administrative penalties, reserves turnover penalties for administrative penalties for certain specific violations, and retains ordinary criminal fines in the form of monetary fine, imprisonment or both (see section 74 of that Act) for offences under the Act itself.
    b. The imposition of administrative penalties require a fair process based on the rule of law. The proposed administrative penalties are significant, and could potentially bankrupt a mining company. It is not at all appropriate to give the power to impose administrative penalties to a single official in the DMR (the Regional Manager), likely doesn't comply with PAJA (particularly the *nemo iudex in re sua* principle of administrative justice given the Regional Manager's role in the licencing process and in RMDEC), and also invites corruption. The only way to address this, and the accepted practice in South Africa and other jurisdictions, is to have an administrative tribunal like the Competition Tribunal.
    c. Calculations of administrative penalties should be done with reference to particular factors that should be taken into account by the body imposing the fine, such as those used in the Competition Act (section 59(3)):
        "(a) the nature, duration, gravity and extent of the contravention;
        (b) any loss or damage suffered as a result of the contravention;
        (c) the behaviour of the respondent;

[5] Fourie, M. "How civil and administrative penalties can change the face of environmental compliance in South Africa." South African Journal of Environmental Law and Policy, 2009. Vol. 16, No. 2, 93-127.

(d) the market circumstances in which the contravention took place;
(e) the level of profit derived from the contravention;
(f) the degree to which the respondent has cooperated with the Competition Commission and the Competition Tribunal; and
(g) whether the respondent has previously been found in contravention of this Act."

d. The general approach to administrative penalties is that such fines are paid to the National Revenue Fund (section 213 of the Constitution). This allows proper allocation of resources by National Treasury, instead of it being ring-fenced for activities that may or may not be in line with national government policy at the time (such as those listed in the proposed section 99(1B)(5).

Specific comments about the proposed penalty provisions in the Bill

52. As argued in paragraph **Error! Reference source not found.** above, non-disclosure to the DMR by an applicant of any agreements with interested and affected parties should be included in the offences listed in section 99.

53. The two offences for which the most severe penalties are reserved are contraventions of sections 21 and 28 of the principal Act. These are both related to record-keeping and disclosure of prospecting, reconnaissance, mining and mineral processing data to the Regional Manager. Whereas there are obviously good reasons for ensuring that mining companies submit these records to the DMR, whether it is justifiable to punish such an offence with a maximum fine of 10% of annual turnover or four years' imprisonment or both, is disputable particularly in light of the devastating environmental damage that can be caused by mining without a right or environmental authorisation, or even for not complying with licence conditions, which is only punished with 5% of annual turnover.

54. Moreover and in any event, the proposed maximum penalties in sections 99(a) and (c) are not consistent. The general principle applicable to maximum fines and imprisonment is that they increase proportionally. For an unexplained reason, the offences under the proposed section 98(a)(iii) are punished with 10 years' imprisonment but 5% of annual turnover, while the offences under the proposed section 98(a)(i) deserves four years' imprisonment but 10% of annual turnover. This is a problem inherited from the principal Act of 2002, and should be addressed in the Bill.

55. It is wholly inappropriate to criminalise a contravention or failure to comply with the objects of the principal Act as the Bill purports to do by including section 2 under the proposed amendment to Section 98(a)(i). It is also inappropriate to criminalise contraventions of the Council for Geoscience's obligation to advise the Minister (section 21(1B)). The references to section 2 should be deleted from the proposed section 98(a)(iii).

56. Similarly, large portions of section 27 are obligations on the Regional Manager and the Minister (Application for, issuing and duration of a mining permit), but still included in the offences in the proposed section 98(a)(iii). It is inappropriate to criminalise contraventions with such obligations.

57. There appears to be no penalty provision for offences listed in the proposed section 98(a)(iv). Section 98(a)(iv) are again excluded from the alternative penalty calculation in the proposed section 99(1A). Note that the principle of *nulla poena sine lege*, if no penalty is provided, there is in law also no offence under section 98(a)(iv).

58. The proposed penalties in section 99(1A), which provides an alternative penalty calculation, needs to be revised substantially. The proposed penalties are by orders of magnitude too low to achieve any of the objectives of criminal prosecution, and are also completely disproportionate to the turnover penalties provided for in section 99(a). To still be talking about maximum criminal penalties of R20,000 (the proposed section 99(1A)(e) or even R800,000 (the proposed 99(1A) (c) and (f)) is laughable in the context of a mining

industry whose earnings are recorded in millions and billions. Even NEMA has maximum penalties of R10 million.

59. Moreover, it should always be possible to determine annual turnover for a corporate entity. The Companies Act, 2008 (Act 71 of 2008), the Close Corporations Act (Act 69 of 1984) and the Income Tax Act, 1962 (Act 58 of 1962) all require companies and close corporations (as well as sole proprietorships beyond a threshold) to keep financial records and produce financial statements, even if not audited. In the case of the Income Tax Act, the entities should be rendering returns that provide turnover information.

60. It would be inappropriate, against public policy and against principles of good governance to give the Regional Manager a discretion whether or not to refer offences for prosecution to the National Prosecuting Authority, as is proposed in the proposed clause 99(1B)(b). The Public Service Commission's Code of Conduct already places a positive obligation on all civil servants to report any criminal activity to the appropriate authorities.

61. Moreover, the enforcement options listed in the proposed clause 99(1B)(b) should all be available to the DMR, not mutually exclusive elective options. There is no reason why a violator should not pay an administrative penalty and face criminal prosecution, which has entirely different consequences.

Clause 71: Amendment of section 102 of Act 28 of 2002, as amended by section 72 of Act 49 of 2008 (Amendment of rights, permits, programmes and plans)

62. Given the significant potential environmental impact of mining, we propose that the consent of the Minister to applications for amendment under this section be given in consultation with the Minister of Water and Environmental Affairs.

63. In section 102(2) of the principal Act as amended by section 72 of Act 49 of 2008, the proviso "unless the omission of such area or share was a result of administrative error" should be amended in the Bill to read "administrative error in the documents referred to in (1) above". This subsection 102(2) should also make clear that it applies to both sections 2(a) and (b), and not just section 2(b).

64. We draw to the DMR's attention that, because of the application of PAJA, if any rights are affected by the proposed decision to give consent for an amendment or variation, the Minister should give notice of (or require the applicant to give notice of) such proposed decision to affected parties, and provide a reasonable opportunity to comment. This would include, by law, giving affected parties access to sufficient information to allow them to comment on the proposed decision. We submit that this process should be provided for expressly in the Bill. In any event, it is our view that granting such consent under section 102 without complying with PAJA would make that decision of the Minister subject to review for non-compliance with PAJA.

No clause: No proposed amendment to section 107 of Act 28 of 2002 (Regulations)

65. The 2013 Bill refers to s107(a) as if it was not deleted by the 2008 Amendment Act, and inserts a new subsection(1)(aa) providing that the Minister may make regulations regarding "the rehabilitation of disturbances of land where such disturbances are connected to prospecting or mining operations". This seems to be in conflict with environmental management of mines in terms of NEMA.

66. We also draw the DMR's attention thereto that the Bill contains no proposed amendment to section 107(3), which limits the Minister's power to prescribe penalties for non-compliance with regulations to "a fine or imprisonment for a period not exceeding six months". Because of the application of the Adjustment of Fines Act, 1991 [Act 101 of 1991], the maximum fine that a magistrate could impose for the offence of contravening regulations under the MPRDA remains a negligible R10,000.

No clause: No proposed amendment to section 109 of Act 28 of 2002 (Act binds State)

67. This provision in the MPRDA excludes the State from criminal liability for violations of the MPRDA. Given increasing state involvement in mining, marked by the launch of the first state owned mine in Ogies in 2011, it is imperative to remove the phrase “save in so far as criminal liability is concerned” through an additional proposed amendment in the Bill to ensure a level playing field for all mining companies.