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

Honourable S Luzipo, MP
Chairperson: Portfolio Committee on Mineral Resources and Energy

For attention: Mr Arico Kotze
Per Email: akotze@parliament.gov.za

Your ref: Gas Amendment Bill [B9-2020]
Our ref: TPM/DS/DM
30 July 2021

Dear Honourable Luzipo,

SUBMISSIONS ON THE GAS AMENDMENT BILL [B9 – 2020] PUBLISHED FOR COMMENT ON 25 JUNE 2021

a. In this document, the Centre for Environmental Rights ("CER") submits comments on the draft Gas Amendment Bill published for comment on 25 June 2021, published in Government Gazette No 44438 of 13 April 2021 ("the Bill") in its own name and on behalf of groundWork.

b. The CER's vision is a South Africa where every person's constitutional right to an environment that is not harmful to health or well-being, and to have the environment protected for future generations, is fully realised. Our mission is to advance the realisation of environmental rights as guaranteed in the South African Constitution by providing support and legal representation to civil society organisations and communities who wish to protect their environmental rights, and by engaging in legal research, advocacy and litigation to achieve strategic change.

c. groundWork is a non-profit environmental justice service and developmental organisation working primarily in Southern Africa in the areas of climate and energy justice, coal, environmental health, global green and healthy hospitals, and waste. groundWork seeks to improve the quality of life of vulnerable people in South Africa, and increasingly in Southern 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.

d. Thank you for the invitation to make submissions on the Bill, our main submissions are summarised below:

   (i) The Minister has failed to consider the implications of the Bill in the context of the climate emergency. South Africa, and the African continent generally, is extremely vulnerable to the impacts of climate change. Temperatures in the region are increasing at twice the rate of the global average. It is the government's constitutional imperative to protect South Africans against the impacts of climate change. This includes investing in abandoning fossil fuels and not putting frameworks in place that facilitate or accelerate new fossil fuel development such as gas infrastructure. The International Energy Agency said in a recent report [1] that if the world is to avoid irreversible, catastrophic climate change, we cannot afford any new investments in fossil fuels.

[1] https://www.iea.org/reports/net-zero-by-2050

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(ii) The Bill does not make adequate provision for consultation with parties interested in and affected by the activities contemplated by the Bill, or for access to information by those parties, and therefore fails to give effect to the constitutional rights to fair administrative action and access to information.

(iii) The Bill supports fossil fuel development which will have far reaching implications for people both nationally and globally ranging from environmental impacts to the displacement of livelihoods in the affected areas to increasing our carbon emissions which will in turn have an impact on climate change. Consultation processes therefore need to be inclusive of all communities on a national scale.

(iv) The powers and obligations afforded/imposed on the Minister and the Energy Regulator under the Bill are problematic. Firstly, the Minister is not granted a discretion to award licences and rights contemplated under the Bill – if certain criteria are met, the Minister is obligated to grant these permits and rights.

(v) The Minister has irregularly sought to violate the One Environmental System (OES) in the Bill and encroaches into the sphere of environmental regulation by granting this authority to the Energy Regulator, thereby encroaching into the territory of the Minister of Forestry, Fisheries and Environment.

Impetus of the Bill in the context of climate emergency

1. We note that the object of the Bill is to modernise the Gas Act, in line with current and foreseeable developments in the gas industry. This is highlighted by the intentions of the Minister to develop the Gas and Petroleum industry as a tool for economic development and to further resolve the South African energy crisis.[2] We submit that the Bill has serious implications for the climate crisis, and South Africa's own vulnerability thereto, this must be seriously reconsidered.

2. The government has confirmed South Africa's extreme vulnerability to the impacts of climate change.[3] These impacts will largely be felt through: significant warming (as high as 5–8°C, over the South African interior by the end of this century, as a conservative estimate);[4] impacts on water resources, such as decreased water availability; and a higher frequency of natural disasters.

3. Already the impacts of drought, extreme weather events, and fires in South Africa have cost the country billions.[5] Virtually every province in the country has recently experienced, or is currently experiencing, severe, extended drought. The impacts of climate change are crippling livelihoods and jobs, and will have long-term impacts on food security, food prices, human settlements, and health.[6] Government is having to subsidise these high costs, and will increasingly have to do so.

[2] https://www.africanews.com/2020/10/13/minister-of-mineral-resources-energy-hon-gwede-mantashe-sets-out-post-pandemic-plan-for-south-africa-s-energy-sector//

[3] P8, National Climate Change Response White Paper 2011, at https://www.environment.gov.za/sites/default/files/legislations/national_climatechange_response_whitepaper.pdf. See also the Address by the Minister of Environment, Forestry and Fisheries, Ms Barbara Creecy in the National Assembly in response to the State of the Nation Address (SONA) on 18 February 2020 ("SONA Response Address"), available at https://www.gov.za/speeches/minister-creecy-18-feb-2020-0000 where Minister Creecy noted those impacts occurring across the country in the form of prolonged periods of drought, severe storms and flooding.

[4] P128, Long Term Adaptation Scenarios: Climate Trends and Scenarios for South Africa.

[5] Western Cape Government: Environmental Affairs and Development Planning "Western Cape Climate Change Response Strategy 2nd Biennial Monitoring and Evaluation Report 2017/18" (March, 2018) available at https://www.westerncape.gov.za/eadp/files/atoms/files/WC%20Climate%20Change%20Response%20Strategy%20Biennial%20M%26E%20Report%20%282017-18%29_1.pdf.

[6] P129, Long Term Adaptation Scenarios: Climate Trends and Scenarios for South Africa.

4. The UN's Intergovernmental Panel on Climate Change (IPCC) has confirmed a global average temperature increase of 1.5 degree Celsius above pre-industrial levels, to be the tipping point for our climate, with severe consequences for Southern Africa, including that in Southern Africa the rate of increase is twice that. [7]

5. The World Economic Forum's annual "Global Risks Report"[8] lists the climate crisis and environmental threats as the top five global risks in terms of likelihood. These are the world's top risks ranked by the likelihood of a global risk occurring over the course of the next 10 years. These are risks which have already materialised and will become more severe unless urgent meaningful action is taken.

6. It is the constitutional imperative of government, to ensure that people in South Africa are protected against these impacts – that their rights enshrined in the Bill of Rights in the Constitution of the Republic of South Africa, 1996 ("the Constitution") are upheld and protected. Economic development and job creation/sustainable livelihoods will be compromised in a country devastated by the effects of climate change.

7. In the next 10 years, significant ambition is needed to sufficiently reduce emissions within the necessary trajectory range and to get South Africa where it needs to be. Doing this requires a commitment to abandon fossil fuels as soon as possible – and certainly not lock-in to new fossil fuel infrastructure which is not needed, which the Bill seeks to accelerate. This renders it irrational.

8. Given South Africa's extreme vulnerability to the impacts of climate change[9] - arguably any decision to lock the country in to more harmful greenhouse (GHG) emissions, through fossil fuel exploitation, which is neither necessary nor desirable, would be in direct contravention of the state's constitutional obligations to protect the rights of the people of South Africa, and the duty of care embodied in section 28 of the National Environmental Management Act, 1998 ("NEMA").

9. Already South Africa is falling behind on its global and constitutional obligations to address climate change. The country's commitments fall outside the fair share range; and are not consistent with the Paris Agreement 2° Celsius target – let alone the 1.5° benchmark set by the IPCC.

10. On South Africa's present emissions trajectory (if all government targets were in the same range as South Africa's), warming (at a global average) would reach between 3 and 4° Celsius.[10] This would be even more for South Africa - its Nationally Determined Contribution confirms that even a global average temperature increase of 2°C translates to up to 4°C for South Africa by the end of the century.[11] The effects of this will be catastrophic – impacting particularly on the most vulnerable sectors of South African society.

11. In addition, studies have increasingly shown that moving towards gas as a bridge fuel towards transitioning to clean energy cannot be supported. Firstly, the IPCC's 1.5°C target cannot be met with new gas development. Research has shown that in order to meet Paris' 1.5°C target gas reserves already found in the ground must be left in the ground and all new fossil fuel development must be halted. In fact, even emissions from existing and proposed energy infrastructure represent more than the entire carbon budget that remains if our target is 1.5°C.

12. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate

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[7] In her SONA Response Address (see footnote 3), Minister Creecy noted that "Science tells us that our country and our continent are warming much faster than the rest of the world. Whereas the world, on average, has warmed by roughly 1 degree, above pre-industrial times, in southern Africa, the rate of warming is twice that".

[8] At https://www.weforum.org/global-risks/reports.

[9] P8, National Climate Change Response White Paper 2011, at https://www.environment.gov.za/sites/default/files/legislations/national_climatechange_response_whitepaper.pdf.

[10] https://climateactiontracker.org/countries/south-africa/.

[11] Id. See also "The Carbon Brief Profile: South Africa" available at https://www.carbonbrief.org/the-carbon-brief-profile-south-africa.

change, sustainable development, and efforts to eradicate poverty also submits that in order to reach that target of 1.5°C, electricity sectors around the world must decarbonize by 2050: gas plants cannot replace coal plants if we are to reach that target.

13. The objects of the Bill include: *to modernise the Act, in line with current and foreseeable developments in the gas industry landscape, enhance compliance monitoring and enforcement provisions of the Act and incorporate provisions dealing with unconventional gases and new transportation technologies of natural gases that are not explicitly included in the Act. It further intends to address new technological advancements in the gas sector, particularly the transportation of gas by means other than a pipeline, including, but not limited to, transportation as liquefied natural gas and compressed natural gas.*

14. We understand that historically, gas has been considered a "bridge fuel"—cleaner and with lower carbon dioxide emissions than coal or oil—and a potential tool to help address climate change. However, LNG is neither clean nor particularly low in emissions. In addition, the massive investments in new infrastructure to support this industry, including pipelines, liquefaction facilities, export terminals, and tankers, creates new fossil fuel dependence, making the transition to actual low-carbon and no-carbon energy even more difficult.[12]

15. We note that, compared with coal, burning gas emits just half as much carbon dioxide, the GHG that is the primary driver of climate change. However, the extraction, processing, and transport of gas also emits GHGs, including large amounts of methane from leaks and intentional releases at wells, pipelines, and storage and processing facilities. Methane, which is the principal component of gas, does not persist in the atmosphere as long as carbon dioxide, but its climate impact is more than 80 times stronger in the short-term (20-year) time frame and 28 times stronger over the long term (100-year) time frame; it is the second-biggest driver of climate change. [13]

16. Additionally, it has been found that, export of gas extends the gas life-cycle, adding steps for liquefaction, overseas tanker transport, and regasification during which even more carbon dioxide and methane are emitted. These increase the total GHG emissions resulting from the use of gas— and raise serious questions about the effectiveness of internationally traded gas as a strategy to reduce emissions and combat climate change.[14]

17. We submit that before any decision to promulgate this Bill can be made, consideration must be given to: the multifaceted impacts of the Bill for the climate crisis, including the additional GHG emissions that would arise from the exploitation and transportation of gas, which would be accelerated under this Bill – including indirect emissions from construction, transportation and decommissioning, rehabilitation etc. – and the implications of the Bill for the following:

    17.1. the exacerbation of South Africa's own vulnerability to the climate crisis, including the social, external costs of these GHG emissions, the resultant climate impacts for South Africa and the constitutional rights of people in South Africa;[15]

    17.2. South Africa's international climate commitments under the Paris Agreement and its GHG emission trajectory; and

[12] https://www.nrdc.org/sites/default/files/sailing-nowhere-liquefied-natural-gas-report.pdf, page 4

[13] Ibid page 8

[14] Ibid page 9

[15] The Interagency Working Group on the Social Cost of Greenhouse Gases (IWG) in the USA has attributed global amounts in scope and applicability, representing the costs of global climate impacts. This is a widely used method for calculating the cost of projects' GHG emissions. The social cost of carbon, as determined by the IWG, is a consensus of the estimate of the social cost of carbon as calculated by three proprietary models: FUND, DICE, and PAGE, as described in the Technical Support Document available at https://www.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf (p5):
"*We rely on three integrated assessment models (IAMs) commonly used to estimate the SCC: the FUND, DICE, and PAGE models. These models are frequently cited in the peer-reviewed literature and used in the IPCC assessment. Each model is given equal weight in the SCC values developed through this process, bearing in mind their different limitations*."

17.3. the extent to which the further exploitation of gas would even be economically and legally viable in a market where fossil fuels are increasingly constrained and such projects are likely to become stranded assets with high economic costs for the country.

18. Essentially, calculating the external costs of exploiting fossil fuels would, in all likelihood show that, if the Gas Bill had to absorb the external costs of the resultant GHG emissions, it would not be financially feasible to operate. The science of attributing climate impacts to particular GHG emission sources is well-established and accepted.[16]

19. The only role for legislation regulating petroleum resources in the era of climate emergency is to regulate existing operations and facilitate a just transition away from fossil fuel extraction and transportation.

SPECIFIC COMMENTS ON THE BILL

Clause 9 (consultation)

20. This clause provides for the manner in which an applicant for a licence may publish a notice of an application for a licence. We submit that the process provided for in this clause is insufficient as it does not provide adequate provision for public participation. The aim of a notice of application process is not to notify interested and affected parties of possible developments. The notification process must be to ensure that all potential Interested Affected Parties (IAPs) are made aware, and they are afforded sufficient time to participate, in order to ensure the process is fair. We submit that this Bill should draw on the consultation process in the National Environmental Management Act, 1998 and the Environmental Impact Assessment (EIA) Regulations. The EIA Regulations provide a detailed description of what adequate notice entails aiming to ensure that barriers to participation including disability or literacy are lifted. Furthermore, notice entails, *inter alia*, affixing a notice board on the site for exploration, construction and an alternative site; personal notification of parties such as landowners, lawful occupiers, holders of informal land rights; placing advertisements in government gazettes or local newspapers; publishing advertisements in both provincial and national newspapers where the activity might have an impact beyond municipality and alternative forms of notice to overcome barriers to participation including but not limited to illiteracy or disability.[17]

Clause 10

21. We note Clause 10 provides for the manner in which the Energy Regulator may consider an application for a licence, which must be in accordance with directions and criteria from the Minister of Energy (''the Minister''), reflecting the objects of the Act, national interests, regional growth or social objectives.

22. We are concerned that the undefined use of the phase 'national interest' could justify the licencing of the construction of certain gas infrastructure that might not be in the interest of South Africa. Thus we submit that it is important to include a definition of what is meant by national interests as this will provide clear guidance regarding how it is to be understood in the context of the Bill. This will be especially important to Interested and Affected Parties when assessing whether the "additional criteria specified by the Minister" is just and aligned with our Constitutional values – the starting point in determining the interests of South Africa as a nation. A further concern is how potentially conflicting national interests will be assessed or does the Minster have the discretion in this regard? We suggest the inclusion of a set of principles that will avert the possibility of having potentially conflicting national interests.

[16] See, for example, "The Law and Science of Climate Change Attribution" at https://journals.library.columbia.edu/index.php/cjel/article/view/4730; https://www.politico.com/agenda/story/2019/10/22/attribution-science-fossil-fuels-climate-change-001290 and refer to the work of the Climate Accountability Institute https://climateaccountability.org/.

[17] Regulation 41 of the Environmental Impact Assessment Regulations, 2014 as amended.

23. It is also uncertain what process will be followed by the Energy Regulator when it required to publish the criteria contemplated in section 19(2). We assume that it will be published in the government gazette which allow interested and affected parties to know which additional criteria was used. We submit that criteria should not only be communicated to the applicant to allow them an opportunity to amend their application as this will hamper the principles of transparency and accountability and fair administrative action.

Clause 11 and 12 (public participation during the application and objection process)

24. We note the clause provides for the objection process for application for licences and the process for the finalisation of an application by the Energy Regulator, we submit the time period prescribed of 60 days is insufficient to allow for adequate public participation and consideration of an application. Clause 11 of the Bill provides for this objection process to be conducted in a manner provided for by the Energy Regulator. We submit that this clause is vague and should be extended to provide for the manner in which the objection process should be conducted. The Bill fails to provide for a process of meaningful consultation in the way that the draft amendments to MPRDA Regulations, 2019[18] and the draft Mine Community Resettlement Guidelines[19] for instance, appear to be attempting to do. We submit that this Bill should draw from these and incorporate a definition of meaningful consultation into the Gas legislation framework. These failures are set out below.

25. The Bill does not properly advance the principles of administrative justice as set out above from the outset in that it limits the instances of when consultation is prescribed to the applications for licences by putting a time limit of 60 days in which the energy regulator must consider for an application. There is no provision for consultation, notification, or public participation in relation to how the energy regulator would conduct this process. The lack of adequate time allocation does not allow for consultation or public participation in the objection and application process which, we submit, would allow companies to operate or launch reviews and appeals against refusals, without interested and affected parties knowing.

26. Furthermore, the timeframes within which the energy regulator receives the application and objections allows the applicant to respond but does not accord opportunities for consultation processes which we submit are required to take place and are still woefully inadequate and are not catered for in the National Energy Regulator Act 40 of 2004 (NERA). Under the NERA there are no timeframes for consultation, which in our experiences is often one of the reasons given by companies for not conducting proper consultation. In consequence, interested and affected parties are not afforded an adequate opportunity to consider and comment on complex, detailed applications.

27. For example, there is no time period afforded to interested and affected parties to subject their comments and objections to applications for licences. We reiterate our comments here, as those in relation to the MPRDA[20], including that such a consultation would almost certainly necessitate a number of meetings and facilitation of independent technical advice on what is applied for, and, should an application be accepted as contemplated in clause 11, the terms of that agreement would have to be negotiated between the parties, a time-consuming exercise under any circumstances.

28. By not allowing sufficient time and resources to determine the range of interests and conflicts relating to land and petroleum resources, this violates the rights of interested and affected parties to fair administrative action and increases the need for decisions to be appealed or reviewed.

[18] CER's comments on the draft Amendments to the Mineral and Petroleum Resources Development Regulations, 2019 can be accessed here: https://cer.org.za/programmes/mining/submissions/draft-amendments-to-the-mineral-and-petroleum-resources-development-regulations-2019

[19] CER's comments on the draft Mine Community Resettlement Guidelines can be accessed here: https://cer.org.za/programmes/mining/submissions/submission-on-draft-mine-community-resettlement-guidelines-2019

[20] See CER's and coalition members submissions on consultation and administrative justice in terms of the MPRDA Amendment Bill https://cer.org.za/wp-content/uploads/2016/08/Consultation-and-Administrative-Justice.pdf

29. We recommend that the overall application and objection process be reviewed and included in the Bill to ensure that the constitutional right to administrative action that is lawful, reasonable and procedurally fair be given effect to. During this process, we recommend that the principles of meaningful consultation be incorporated, including that:

    29.1. meaningful consultation be defined and include an obligation that the applicant has taken all measures reasonably possible and appropriate in the specific circumstances of its application to engage all interested and affected parties;
    29.2. applicants take all reasonable measures possible to ensure that interested and affected parties understand the information provided and how it affects them specifically, in order for them to make an informed decision. This should include translations of text into the language used predominantly in the area, and the translation into plain language of scientific or otherwise technical language;
    29.3. a revised process of meaningful consultation also take into account an obligation on applicants to collaborate with interested and affected parties.

30. In line with our comment above, we recommend that meaningful consultation should be included in the application for licences particularly those applications that would have an impact on rural or otherwise marginalised communities. This process should be included to allow for all notices provided for to interested and affected parties (including landowners and lawful occupiers to also be published in all accessible media platforms, including notices in the Magistrate's Court in the magisterial district applicable to the land in question, advertisements in local or national newspapers circulating in the area where the land or offshore area to which the application relates, is situated; and notices on community radio stations, in community halls, municipal offices, or traditional offices in English and at least one other official language that is dominantly used in the relevant area.

Clause 14 (rehabilitation)

31. We welcome the acknowledgement of provisions relating to decommissioning of gas facilities, termination, abandonment or lapse of a licenses. We however note that failure of the Bill to reference NEMA provisions on financial provisions as well as NEMA provisions regulating environmental rehabilitation. We submit that this clause must be read in a manner capable of advancing the section 24 environmental right, which protects the right to an environment 'not harmful to health or wellbeing', embodies principles including sustainable development, environmental justice and intergenerational equity, and which requires the legislature and executive to undertake 'reasonable legislative and other measures' to realise this right. Further Section 2 of NEMA ('national environmental management principles') expands on the principles in the environmental right. These principles are of particular importance to understanding the rehabilitation obligations of mineral rights holders and the rights of mining-affected communities. The extent of managing this process of rehabilitation, decommissioning and lapsing of licences in the draft Bill should be conducted through NEMA and not through the Energy Regulator as this encroaches on the powers of the Minister responsible for environmental affairs. We submit that the financial provision constitutes an important part of a statutory schema to incentivize the sound management of environmental impacts and encourage thorough rehabilitation and only the enabling legislation and the relevant state department should do so.

Clause 17(duration of licence)

32. We welcome the removal of licences being granted for gas facilities for a duration of 25 years. We are however concerned by the discretion granted to the Energy Regulator to determine the duration for which licences are granted and how they are terminated. We are of the view that licenses should be terminated based on relevant factors including the public interest, repeated non-compliance and consideration of the impact gas has on the climate. Research has shown that the full lifecycle of gas includes production, processing, transportation, and end use, and there are several forms that each of these stages might take depending on the source of the gas, the

location of end use, and the end use purpose. [21]Each of these stages of the gas lifecycle releases methane, carbon dioxide, and other greenhouse gases. Taken in sum, the latest science on gas suggests that the greenhouse gas footprint of gas is worse than that of either coal or oil, particularly when considered in the 20-year timescale most relevant to our climate future. In the past, conventional natural gas and shale gas were promoted as bridge fuels to an eventual fossil-free future.[22] The argument was that for the same amount of energy produced, carbon dioxide emissions were less for gas than for oil or coal. This is certainly true. However, the best available evidence shows that methane emissions are greater for shale gas and conventional natural gas than for oil products or coal, per unit of energy produced.[23]

Clause 20

33. We are concerned that this clause seeks to regulate an area already regulated by NEMA, as proposed this clause aims to provide for instances where the Energy Regulator may issue a compliance notice, the validity of a compliance notice and matters connected therewith. We are concerned that the Minister by extending these powers to the Energy Regulator has irregularly sought to violate the One Environmental System in the Bill. The Supreme Court of Appeal (SCA) has confirmed that "*the implementation of the One Environmental System would establish NEMA as the only environmental statute and the Environment Minister as the 'lead' minister."*[24]

34. Notwithstanding this SCA decision, in the Bill the Minister again encroaches into the sphere of environmental regulation, thereby encroaching into the territory of the Minister of Forestry, Fisheries and Environment. The following provisions are only some of the instances where the Minister has exceeded his powers in attempting to legislate on environmental matters which are reserved for the Minister of Forestry, Fisheries and Environment:

    34.1. Proposing the process of issuing compliance notices;
    34.2. Provisions relating to the inspection, representations and appeals which seeks to depart from the position established under the OES that the Minister responsible for Environment is the appeal authority;
    34.3. Financial Guarantees and issuing of fines.

Clause 25 (access to information and just administrative justice)

35. We submit that the Bill does not make adequate provision for consultation with parties interested in and affected by the activities contemplated by the Bill, or for access to information by those parties as the Energy regulator determines what information can be deemed confidential, therefore fails to give effect to the constitutional rights to fair administrative action and access to information.

36. The principles of administrative justice, are encompassed, at a minimum, in the following:

    36.1. Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair;
    36.2. Section 3(1) of the Promotion of Administrative Justice Act, 2000 ("PAJA") which provides that "*administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair*." The minimum standards for procedural fairness of administrative action in terms of PAJA are found in section 3(2)(b), which provides that:

"*[i]n order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-*

[21] https://naturaljustice.org/wp-content/uploads/2021/05/FA-12-Howarth-RichardsBayReview.pdf. Page 7
[22] Ibid page 9
[23] Ibid page 15
[24] *Minister of Mineral Resources v Stern and Others; Treasure the Karoo Action Group and Another v Department of Mineral Resources and Others* (1369/2017; 790/2018) [2019] ZASCA 99 at para 21.

(i) adequate notice of the nature and the purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(iv) adequate notice of the right to request reasons in terms of section (5).”

37. The importance of consultation and access to information in relation to mining was recognised by the Constitutional Court in *Bengwenyama*,[25] where the Court held that “*[t]he exercise of prospecting rights is highly invasive of the use by owners of their land, even if only restricted to surface use of the land” (at paragraph 40) and, at paragraph 63, “the granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen*”.

38. Like mining, the activities contemplated under the Bill have, and will have, an enormously disruptive and distressing impact on the lives of those affected by it. As such, the requirements of administrative justice must be reflected in the consultation and access to information provisions of the Bill. As the Constitutional Court stated in *Bengwenyama* (at paragraphs 65 and 66, our emphasis):

“*Under the common law a prospecting right could only be acquired by concluding a prospecting contract with the landowner, something which presupposed negotiation and reaching agreement on the terms of the prospecting contract. The Act’s equivalent is consultation, the purpose of which should be to ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner’s right to use his land. Of course the Act does not impose agreement on these issues as a requirement for granting the prospecting right, but that does not mean that consultation under the Act’s provisions does not require engaging in good faith to attempt to reach accommodation in that regard.*”

“*Another* ***more general purpose of the consultation is to provide landowners or occupiers with the necessary information on everything that is to be done so that they can make an informed decision*** *in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review.* ***The consultation process and its result is an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair***.”

39. Clause 25 of the Bill inserts a new section 29A into the Act which; *addresses the manner in which the Energy Regulator may deal with any confidential information at its disposal, obtained in terms of the Act, in accordance with the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)*.

40. In our experience, in exercising its decision-making powers the Department of Mineral Resources and Energy frequently does not give effect to section 33 of the Constitution and the provisions of PAJA. This is evidenced through legal challenges of inappropriate and irrational decisions, where interested and affected parties have the resources; other forms of challenge, such as protest, where those resources are scarce or absent; and the violation of a range of human rights where even the resources to protest are scarce or absent. The latter is tragically common in our country where inequality, poverty and marginalisation are unacceptably high. This would be applicable to the Energy Regulator.

41. These challenges come at enormous cost to all affected: those suffering the effects of poor decision-making, those frustrated in their attempts to operate under poorly authorised licences; and the State must allocate considerable additional resources to these challenges. It is therefore imperative that the Bill expressly endorses the principles of administrative justice to ensure that the right to just administrative action is promoted and not hampered and the State, as it must, is actively protecting those members of society who need that protection most.

[25] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC).

42. Firstly, clause 11 and 12 should be dealing with consultations with interested and affected parties provide that these parties are expected to submit objections and comments on applications without having seen the applications or been provided with the information contained in the applications themselves, effectively expecting interested and affected parties to make these submissions "blindfolded".

43. Interested and affected parties who have a right to be consulted about applications and granting of licences, including communities, community-based organisations and non-governmental organisations, face enormous obstacles in obtaining access to the information they require in order for that consultation to be meaningful. Such obstacles are the direct result of companies' refusal/failure/neglect to make available key documents to interested and affected parties.

44. We submit that, with respect to disclosure of information across the Bill, the following should be provided for:

    44.1. an obligation on all applicants for rights and licences under the Bill to make available the full application to interested and affected parties, automatically (i.e., without a specific request through PAIA or otherwise). Without key documents, it is not possible for interested and affected parties to assess whether the application complies with the Bill or how the operation will affect them;
    44.2. include as a condition to all permits, rights and licences granted by the Minister or the Energy Regulator to the disclosure of the right or licence, and particularly the conditions attached thereto, to the public automatically (i.e. without a specific request through PAIA or otherwise) and swiftly;
    44.3. a public, online database of permits, rights or licences issued by the Minister, hosted by the Energy Regulator/the Department; and
    44.4. an obligation on the Energy Regulator/the Department to make all delegations of power by the Minister available to the public automatically, i.e. without a specific request through PAIA or otherwise.

Free, prior and informed consent

45. While reconsidering the consultation provisions (or lack thereof) in the Bill, we urge the Minister to consider other appropriate standards for public participation, specifically the internationally accepted principle of free prior and informed consent ("FPIC"). The application of FPIC would, among other things, facilitate the realisation of a range of human rights - socio-economic rights in particular - and empower communities to be better informed and be able to address how the provision of permits and rights affect them.

46. In doing so, we recommend that the implications of the provisions of the Interim Protection of Informal Land Rights Act, 1996 as confirmed by the Constitutional Court in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*[26] and the High Court in *Baleni and Others v Minister of Mineral Resources and Others*[27] be applied. We highlight that as of June 2021, applications for conducting activities[28] listed under the NEMA Environmental Impact Assessment Regulations Listing Notices on land owned by another person now require the consent of that person (Regulation 39).

Conclusion

[26] 2019 (1) BCLR 53 (CC).
[27] 2019 (2) SA 453 (GP).
[28] All listed activities except for linear activities and strategic integrated projects as contemplated in the Infrastructure Development Act, 2014.

47. As a final comment, we wish to highlight the global trend which is seeing the gas industry on the decline.[29] The challenges to the gas industry include an excess of supply of gas for export, a decrease demand and an overall recognition that there is no need for gas when investing in a cleaner energy future. This boom and bust phenomenon cannot be ignored given the significant environmental and health impacts of the gas industry which will be borne, without compensation or redress, in the first instance by affected communities and in the second instance those living in South Africa and the state more broadly.

48. We are willing to make more detailed submissions to the Committee on any of the issues raised above should this be useful. We thank you for the opportunity to comment on the Bill and trust that our comments will be addressed.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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[29] Michael Mazengarb 'Gas plans under threat due to emissions reality, oversupply and public opposition' *Renew Economy: Clean Energy News and Analysis* (9 July 2020). Accessible here: https://reneweconomy.com.au/gas-plans-under-threat-due-to-emissions-reality-oversupply-and-public-opposition-88901/