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GAUTENG
LEGISLATURE

AGRICULTURE, CONSERVATION AND ENVIRONMENT PORTFOLIO COMMITTEE

NEGOTIATING MANDATE

OF THE NATIONAL ENVIRONMENTAL MANAGEMENT AMENDMENT BILL [B36B-2007]

(Section 76)

28 August 2008

1. **INTRODUCTION**

The Acting Chairperson of the Agriculture, Conservation and Environment Portfolio Committee, Mr J H Boers tables the Committee's Negotiating Mandate on National Environmental Management Amendment Bill [B36B-2007], a Section 76 Bill as follows

2 **PROCESS FOLLOWED**

The Speaker formally referred the National Environmental Management Amendment Bill [B36B-2007], a Section 76 Bill to the Agriculture, Conservation and Environment Portfolio Committee for formal consideration and report in terms of Rule 232 (1)(a) read with Rule 235(7) on Thursday 24 July 2008 The Acting Chairperson, Mr J H Boers tables the Negotiating Mandate on the above-mentioned Bill as follows

The NCOP Permanent Delegate, Member A Mzizi together with the Department of Environmental Affairs and Tourism gave a briefing on the content of the Bill on Thursday, 14 August 2008 Furthermore the Gauteng Department of Agriculture, Conservation and Environment made its submission on the Bill on Thursday, 14 August 2008 during a Committee meeting

In keeping with Legislature's constitutional mandate of promoting and facilitating public participation in the law making process, the Portfolio Committee invited stakeholders from Environmental Organisations, Municipalities and Community based organisations, to a Public Hearing on the referred Bill at Gauteng Legislature, Johannesburg on Monday, 25 August 2008

The Committee deliberated on the Bill and adopted the Negotiating Mandate on National Environmental Management Amendment Bill [B36B-2007], Section 76 Bill on Thursday, 28 August 2008

3. OBJECTS OF THE BILL

- To amend the National Environmental Management Act, 1998, so as to insert certain definitions and to substitute others
- To further regulate environmental authorizations
- To empower the Minister of Minerals and Energy to implement environmental matters in terms of the National Environmental Management Act 1998 in so far as it relates to prospecting, mining, exploration, production or related activities on a prospecting, mining, exploration or production area
- To align environmental requirements in the Mineral and Petroleum Resources Development Act 2002 with the National Environmental Management Act, 1998, by providing for the use of one environmental system and by providing for environmental management programmes, consultation with State departments, exemptions from certain provisions of the National Environmental Management Act, 1998, financial provision for the remediation of environmental damage, the management of residue stockpiles and residue deposits the recovering of cost in the event of urgent remedial measures and the issuing of closing certificates as it relates to the conditions of the environmental authorization
- To effect certain textual alterations
- To provide for matters connected therewith

4. OVERVIEW OF PUBLIC HEARING'S VERBAL & WRITTEN SUBMISSIONS

➢ <u>The inclusion of other decision-making tools</u>

- **Sections 24(2)(b) and 24(2)(d):** In essence, these sections allow for the use of decision-making tools other than an Environmental Impact Assessment process, specifically Integrated Development Plans, Spatial Development Frameworks, Risk Assessments, Environmental Management Frameworks and what the Bill refers to as "Norms or Standards" Stakeholder believes this is laudable if these tools (including Strategic Environmental Assessments) are used in conjunction with the Environmental Impact Assessment process However, there is no guarantee that Integrated Development Plans and Spatial Development Frameworks have, in the process of being formulated adequately assessed the potential environmental impacts of suggested development types The "Norms or Standards" referred to in **Section 24(1)(d)** have not yet been developed
- **Section 24(10)** refers to the development of these Norms or Standards for activities listed in terms of **Section 24(2)(d)**, but it is impossible to anticipate the real substance of these Norms or Standards Stakeholder believes that it would be irresponsible to approve amendments that refer to Norms or Standards prior to there being clarity about these In addition, Stakeholder is sceptical about such Norms or Standards, which inherently imply a "one size fits all" approach Norms or Standards which may "commonly and repeatedly" be used and "against which the performance of activities or the results of those activities may be assessed" will inevitably, by their general nature, be reduced to the lowest common denominator Environmental processes, natural communities and eco-system dynamics are complex and invariably unique in space and time which is precisely why Environmental Impact Assessment processes, together with other IEM tools, should be used to assess potential environmental impacts at specific locations
- **Section 24(4)(a)(i):** The approach to co-ordination and co-operation should not be addressed separately for every application As proposed above a formal arrangement must be concluded with each organ of state where concurrent jurisdiction exists The Bill should make provision for these formal arrangements to be concluded.

- **Sections 24(5); 24(10); s24J:** From the above it is clear that certain functions remain unaccounted for in relation to mining activities etc. These relate to the drawing up of regulations [s24(5)], norms and standards [s24(10)] and guidelines [s24J] Only the Minister has power to exercise these functions under the Bill However, in terms of the definition of 'Minister' this power would exclude mining activities etc The outcome is that these regulations, norms and standards and guidelines will not be applicable to mining activities etc The MPRDA Bill repeals the section relating to environmental management in the MPRDA Act and the MME's power to draw up regulations relating to the impact on the environment of mining activities etc Therefore, the MME does not have the power to draw up regulations (nor set norms and standards or guidelines) in respect of mining (etc) activities' impact on the environment in terms of that legislation nor in terms of the NEMA This is problematic as it creates uncertainty as to how these activities will be addressed

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- **Mandatory provisions that will become discretionary**

  A number of important requirements for environmental impact assessments that are currently mandatory, become discretionary via the inclusion of the words 'where applicable' **section 24(4)(b)** These include mitigation of imparts, consideration of alternatives and disclosure in gaps of knowledge Stakeholder believes that the proposed amendment to this section of the Act results in a considerable weakening of NEMA as the framework legislation that gives effect to **section 24** of the constitution

- **The Minister of Minerals and Energy becomes the competent authority in terms of issuing environmental authorisations for mining**

  Stakeholder believes that the primary mandate of the Minister of Minerals and Energy is in direct conflict with the primary mandate of the Minister of Environmental Affairs and Tourism The Minister of Environmental Affairs and Tourism should be the competent authority in terms of issuing all environmental authorisations, including mining. If the argument is that there is a lack of capacity in DEAT, then the capacity for assessing environmental impacts that currently resides in DME should simply be transferred to DEAT rather than this unhappy attempt to marry two departments that are inherently at odds with each other

- **Environmental protection contained in the Minerals and Petroleum Resources Development Act has been weakened in the process of being included in NEMA**

  a) MPRDA mandates an environmental management program before a mining authorisation is granted Environmental management programs are discretionary under the proposed NEM Amendment Bill.
  b) MPRDA has mandatory provisions concerning the mitigation of environmental impacts Section 24N of the Bill makes these discretionary.
  c) MPRDA does not make provision for exemptions from the requirement of an environmental management plan prior to an authorisation to mine Section 24N of the Bill allow for mining activities to be exempted from certain provisions that relate to environmental impact assessments
  d) Currently listed activities which fall under mining are governed by the relevant provincial MECs (in terms of NEMA and the MPRDA) The Bill provides for these activities to fall under the Minister of Minerals and Energy so removing certain powers from provincial departments

➢ **Exemptions and appeals**

These are very confusing and unclear sections of the Bill Previously exemptions were allowed for under the Regulations, but will now be included in the principle Act According to the proposals in the Bill, the 'Minister or MEC may only grant an exemption if the granting of the exemption is unlikely to result in significant detrimental consequences for or impacts on the environment" Those applying for exemptions are probably going to argue that their activities will have a detrimental effect on the environment, but not a significant one Who decides when the consequences are significantly detrimental? The proposed regulations do not allay any fears with regard to exemptions and do not serve to clarify any grey areas Exemption can be granted from looking at mitigation measures, alternatives, etc Exemptions may be granted by a Minister or MEC only and thus the decisions are not appealable – there is no higher authority to which the decision can be taken on appeal and the only recourse will be a court of law The Bill does state that certain decisions made by the Minister of Minerals and Energy may be taken on appeal to the Minister of Environmental Affairs Stakeholder believes that the idea of one Minister ruling on an appeal of a decision taken by another Minister is highly problematic

There is no public participation allowed for with regard to exemptions This is highly unsatisfactory in view of the limited appeal opportunities with respect to exemptions stakeholder is concerned that the current process is unnecessarily complex, has many possible pitfalls and that the period of transition from one regulatory framework to another will result in an unprecedented number of applications in terms of mining activities Stakeholder fully supports the inclusion of environmental authorizations and monitoring in relation to mining activities under NEMA but does not believe that the current legislative proposals achieve this objective satisfactorily

➢ **Questionable Provisions**

- Mitigation of impacts is no longer mandatory section 24(4)(b)
- No impact assessment needed where there are norms and standards 24(2)(g)
- EXEMPTIONS – no appeal section 24M
- Merger of NEMA and MPRDA provides weaker protection for the environment than the MPRDA
- S 24F allows unlawful activities to continue
- S 24 G (rectification) undermines the EIA system of regulation

➢ **SECTION 24- Minimum requirements for EIA's**

- In terms of the current environmental legislation, public participation, consideration of alternatives and mitigation measures are mandatory hence creates certainty about minimising pollution in new developments
- However, in terms of the NEM Amendment Bill the consideration of alternatives and mitigation measures is not discretionary that is, "*must and where applicable.*"

There remain the following perceived inadequacies in the NEM Amendment Bill

- Inadequate or no guidance for the exercise of discretion as to which minimum requirements should still apply
- No assurance of even standards for impact assessment
- Uncertainty as to levels of monitoring and enforcements of findings hence subject to inevitable and involuntary misconstruction
- Lack of protection of environment from future impacts
- Indigent communities most at risk of increased pollution
- No impact assessment needed where there are norms and standards

- **Section 24(2)(d)**

  In view of the fact that South Africa historically lacked strong norms and standards inclusive of norms and standards to protect the general public's health the proposed amendment that activities contemplated in paragraph *(a)* may commence without an environmental authorisation, but must comply with prescribed norms or standards may have long term pernicious societal and environmental consequences

  Furthermore, the accumulative impacts of an activity, process or development are not addressed in this section of the Bill under consideration

- **Mining**
  Watering down of MPRDA provisions for impact assessment

  Of particular concern is the watering down of the MPRDA by the introduction of the amendments to the said Bill
  The current MPRDA calls for mandatory environmental management programs mitigation and monitoring of impacts No provision is made for exemptions or rectification of unlawful activities In terms of the NEM Amendment Bill, these provisions are discretionary, and exemption and rectification are allowed The amendments will furthermore result in the loss of oversight of mining related activities by the Provinces

- **Exemptions**

  There is a perceived lack of criteria for the exercise of the discretion to grant exemptions in terms of the Bill There is furthermore no provision for appeal against exemptions

- **Section 24F allows continuation of unlawful activities**

  In terms of the above provision, the Minister may direct a person to stop the activity but only after rectification is sought It is respectfully proposed that provision should be made for notification to cease unlawful activities

- Section 24G
  Rectification of unlawful commencement or continuation of [listed] activity

  In terms of the above provision, allowance is made for unlawful conduct to be rectified It is our opinion that inadequate provision is made to cease with unlawful conduct This provision only applies once the application is made for rectification It can therefore be inferred that the provisions for rectification are weaker in comparison to the provisions of an EIA It can be argued that it may be cheaper for the proponent to start an unlawful activity than to do an EIA

- **Foreseeable Consequences of Amendments**

  - There will be no guarantee of uniform procedural fairness levels provided in the NEMA in particular public participation.
  - The Applicants or Proponents may shop for authorisations using exemptions assessments under other laws, or applications under NFMA.
  - Decision makers may be subject to greater pressures to grant authorisation to questionable developments without adequate assessment, mitigation and monitoring

In addition stakeholders raised more concerns as follows

- Excessive delays cause and reduce investor confidence, which also leads to loss of foreign investment
- Significant production losses for the chemical industry
- Capacity to implement
- Meet policy objectives
- Flexible approach
- The NEMA Bill should be amended clearly to state who has authority to draw up regulations, set norms and standard and guidelines in relation to mining activities etc
- Section 24L(1) should be clarified
- It is suggested that the Bill be amended to make the provisions in s24(4)(b) peremptory as is currently the case in the principal Act
- The NEMA Bill be amended to ensure that all relevant protections are listed as mandatory under s24(5)
- It is suggested that it should be mandatory to consider all the factors which are listed in s24(O) when considering the granting of an application for an environmental authorisation
- The requirement for an EMP in s24N should be mandatory for certain activities and this should be stated explicitly in the Act
- Where mandatory provisions are set down as in s24(4), other authorisations should only be granted where they accord strictly with those mandatory provisions Section 24(8)(b) should be amended accordingly
- Where processes under another law are to be authorised in terms of NEMA, this should require that the standards set in section 24(4) of NEMA should be met in full Section 24K should be amended accordingly.
- If authorisations under other legislation are to be recognised as environmental authorisations under NEMA they must meet all mandatory requirement contained in s24(4)
- Sections 24(4), 24(N), 24(O) be amended so as to contain mandatory requirements for the rehabilitation of the environment prior to the granting of an environmental authorisation and the granting of a certificate of closure
- Both s24F(a) and (d) should prohibit the commencement of activities
- The requirements in s24G(a) for the granting of an application for an environmental authorisation where the applicant has committed an offence should be the same as for environmental applications in terms of section 24(4)
- All exemptions should be regarded as environment authorisations and the procedures in s24(4) should apply to all applications for exemptions
- Section 24O should be amended to make it mandatory that the competent authority ensure that there is a public participation process, which is required by s24(4)(a)
- A new fully independent body should be established to consider mining matters and give recommendations to the MMC
- These amendments did not form part of the versions of the NEMA bill and MPRDA bill which were published for public comment
- There is a fundamental difference in approach under the provisions of the NEMA to which the mining industry will, at stroke, become subject
- Non-alignment of NEMA and MPRDA
- Duplication and overlapping requirements on the mine closure and financial provision
- The requirement by NEMA to identify and conduct assessment on alternative site is problematic to mining
- Financial provision contained in MPRDA has now been moved to NEMA without considering the impact this will have on non-mining activities and regulations promulgated in terms of MPRDA
- Actions done, applications and regulations made under MPRDA, not covered in transitional arrangements

- The concept of an appeal from one Minister to another is fundamentally abhorrent, and therefore should be deleted and replaced by a provision indicating that normal appeal procedures in the MPRDA would apply
- In the MPRDA bill, the Minister of mineral and energy's authority endures in perpetuity. while NEMA Bill Minister of Minerals and Energy s authority lapses after 18 months

5. **SOCIO-ECONOMIC AND FINANCIAL IMPLICATIONS**

The Committee notes that the insertion of certain definitions and substitution of others have no socio-economic implications, but can have maximum constitutional implications as the bill is mainly on redesigning sentences and phrases The memorandum on the objects of the National Management Amendment Bill, 2007 notes that there will be no financial implications for the Province

6 **COMMITTEE RECOMMENDATIONS**

The Portfolio Committee on Agriculture, Conversation and Environment supports the National Environment Management Amendment Bill [B36B-2007] – Section 76 with no proposed amendments

7 **NEGOTIATING POSITION ADOPTED BY COMMITTEE**

The Agriculture, Conservation and Environment Portfolio Committee support the principle and details of the National Environmental Management Amendment Bill [B36B-2007]

Mr Joggie Boers
Acting Chairperson: Agriculture, Conservation and Environment
Portfolio Committee