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ISISHAYAMTHETHO SAKWAZULU-NATAL KWAZULU-NATAL WETGEWER

KWAZULU-NATAL PROVINCIAL LEGISLATURE

TO: THE CHAIRPERSON,

SELECT COMMITTEE ON LAND AND ENVIRONMENTAL AFFAIRS

NEGOTIATING MANDATE

PROVINCE : KWAZULU-NATAL

BILL : NATIONAL ENVIRONMENTAL MANAGEMENT AMENDMENT BILL [B36B – 2007]

PROVINCIAL PROCESS :

Provincial Portfolio Committee/s	:	Agriculture & Conservation Portfolio Committee
Portfolio Committee meeting date/s	:	Friday, the 5th of SEPTEMBER 2008
Provincial NCOP meeting date/s	:	Friday, the 5th of SEPTEMBER 2008
Consultation	:	Parliamentary Legal Advisors, Special & Permanent Delegates

MANDATE OF THE KWAZULU-NATAL PROVINCIAL LEGISLATURE:

The Provincial Standing Committee on National Council of Provinces Matters met today, Friday, the 5th of SEPTEMBER 2008, to consider the **National Environmental Amendment Bill [B36B-2007]**

The following comments and amendments were proposed and considered on the Bill:

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1. The inclusion of other decision-making tools:
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". It is believed that the Environmental Impact Assessment process is currently the only comprehensive, reliable, valid and scientifically acceptable tool for assessing the potential environmental impacts of a proposed development and for developing recommendations with respect to the mitigation of these anticipated impacts. 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. It is also believed that it would be irresponsible to approve amendments that refer to Norms or Standards prior to there being clarity about these.

In addition, Environmental processes, natural communities and eco-system dynamics are complex and invariably unique in space and time, which is precisely why individual, tailor-made Environmental Impact Assessment processes remain the best tool for assessing potential environmental impacts and establishing mechanisms for measuring performance of specific activities at specific locations. No two Environmental Impact Assessment processes are the same and neither should they be.

2. 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 impacts, consideration of alternatives and disclosure in gaps of knowledge. It is believed 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.

3. The Minister of Minerals and Energy becomes the competent authority in terms of issuing environmental authorizations for mining:
It is believed 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 as referred to in Section 24(1) of the Bill. The Minister of Environmental Affairs and Tourism should be the competent authority in terms of issuing **all** environmental authorizations, 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.

4. 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 authorization is granted. Environmental management programs are discretionary under the proposed NEMA 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 authorization to mine. Section 24N of the Bill allows 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 MEC's (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.

5. Exemptions and appeals

According to Section 24M (4) of 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 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. It is believed that the idea of one Minister ruling on an appeal of a decision taken by another Minister is highly problematical. 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.

6. Payment of fee for appeal

Regarding the prescribed appeal fee proposed under clause 10 of the Bill, although it is noted that the Minister or MEC may refund the said payment in his discretion, it would seem unfair that the public should be required to pay such a fee upfront if such appeal is based on bona fide intentions and within the public's constitutional and statutory rights. In terms of Section 43 (2), there is a concern as to how the Minister or MEC proposes to determine the amount of the upfront payment or deposit to be paid, as well as the administrative process associated therewith, and the basis upon which the Minister or MEC will exercise his discretion to refund such amount Section 43 (6).

The Committee agreed to mandate the KwaZulu-Natal delegation to the National Council of Provinces to support the Bill provided that the above comments and proposed amendments are considered and consolidated in the Bill.

PROVINCIAL ENDORSMENT

Friday, the 5th September 2008

DATE

Ms L F Shabalala
CHAIRPERSON :
KWAZULU-NATAL STANDING COMMITTEE ON NATIONAL COUNCIL OF PROVINCES MATTERS