LRC

LEGAL RESOURCES CENTRE

NPO No. 023-004 PBO No. 930001175

Your Ref:

14 August 2008

The Hon. Mr Jacobus Brynard
The Chairman: Select Committee
Western Cape Legislature
Cape Town

and to:

Ms Lindiwe Ntsab
Fax:

Dear Sir/Madam

Proposed Bills to Amend the National Environmental Management Act (NEMA) B36B 2007
Concerns regarding the future of environmental impact assessments ("eia"s)

1. In this matter we represent the Habitat Council, the Cape Environmental Trust (Captrust), Geashpere and the Wildlife and Environmenal Society of SA (WESSA). Our clients have instructed us to make the following submissions. We regret that due to a misunderstanding that arose as a result of the short notice of Provincial Parliamentary hearings in this matter we were unable to present these submissions in person at the hearing in the Provincial Parliament on 13 August 2008. We also understand that our submission on behalf of our clients on the Bill, made to Parliament's Select Committee on Land and Environmental Affairs on 29 July 2008, was not forwarded to the Western Cape Provincial Parliament.

   We therefore request that you distribute this submission to all members so that they can fully consider them before the mandate is decided next week.

Concerns as to the short notice for making submissions to the Provincial Parliament

2. Our clients object to the short notice given of public hearings in this matter. The public was not given sufficient notice in order to be able to prepare submission on the complex and far reaching matters which form the subject of these amendments to NEMA. Notification on 6th August is insufficient time for preparation for the meeting on 13 August. Insufficient explanatory material was circulated which would have assisted the general public in order to prepare for this hearing. Our clients request further public hearings and at least one month's notice thereof as they regard the matter as a failure of the Provinical Parliament to comply

with the constitutional requirement of facilitation of public involvement in lawmaking. This has been fleshed out by the Constitutional Court.[1] The Court has stated that the legislative process must include steps by the legislature to ensure that the public was made aware of the legislation, and could actively participate in the legislative process. The legislature must create conditions that are conducive to the effective exercise of the right to participate in the lawmaking process. It was pointed out that this can be realised in various ways, including through roadshows, regional workshops, radio programmes and publications aimed at educating and informing the public of their right to bring their concerns about proposed legislation to the attention of Parliament. None of these have taken place. The Memorandum which accompanies the Bill does not provide sufficient explanation of the changes to adequately address these requirements.

Concerns regarding the watering down of statutory provisions that protect the environment.

3. Poor communities have borne the brunt of the environmental impacts of pollution from industrial facilities due to apartheid planning and poor regulation in the past. In the last ten years however, this situation began to change for the better, after the promulgation of NEMA. Such communities have been greatly assisted by section 24 of the current version of NEMA, in terms of which the mitigation of adverse impacts has been a mandatory requirement for applications involving listed activities.

   In accordance with the principles of NEMA and sections 23 and 24, polluting industries have been required to minimise their impacts through mitigation measures. This has significantly contributed to a reduction of pollution in South Africa without the promulgation of other norms and standards. However these protections are being seriously eroded by proposed amendments to NEMA under Bill B36B of 2007. The risk therefore exists that polluting industries will be established in the future with less than adequate levels of pollution control and that the greatest harm caused by this will be felt by poor communities who are normally located adjacent to the industrial areas. In short, the amendment flies in the face of the constitutional duty[2] of the state to take reasonable measures to prevent pollution and promote sustainable development, and the most vulnerable sectors of society are likely to be adversely affected.

Mandatory provisions to become discretionary in section 24.

4. The amended bill B36B of 2007 changes a number of important requirements for impact assessments, that are mandatory under the present NEMA, to discretionary provisions for all activities listed in terms of the act, (under the new section 24(4)(b).[3] These previously mandatory requirements include mitigation of impacts to keep adverse impacts to a minimum, the consideration of alternatives and disclosure of gaps in knowledge. Thus the Minister can exercise his discretion in future to allow any environmental impact assessments

[1] Matatiele Municipality & Others v President of South Africa: February judgment, 2006(5) BCLR 622 (CC)
Matatiele Municipality & Others v President of South Africa: August judgment, 2007(1) BCLR 47 (CC)
Doctors for Life International v Speaker of National Assembly and others: 2006 (12) BCLR 1399 (CC)

[2] Section 24

[3] The proposed section 24(8) has similar provisions meaning that even without mitigation, activities which may significantly impact on the environment can be authorized.

to merely consist of assessments of impacts with public input, by amending the regulations in terms of the Act. In these circumstances, there will be no obligation on the competent authority to take measures to consider alternatives, mitigate and minimize impacts and ensure that these mitigation measures are monitored. As the bill currently stands it will entitle the Minister to never require the mitigation of impacts, provided he/she applies his mind in reaching a decision to a set of criteria contained in the proposed section 24O which are in themselves discretionary and ambiguously worded as to the duties that they create. It should be noted that this regime applies to listed activities, which are those activities that the Minister has recognized as having a potential significant effect on the environment under NEMA currently.[4] The result in many cases will be an expensive academic exercise in analyzing impacts to which the public will be invited to contribute at their own expense with no guarantee of an outcome that protects the environment, as envisaged by clause 24 of the Constitution. This will place an unreasonable burden on poor and vulnerable communities.

5. NEMA is framework legislation designed to give effect to the Constitution, in particular clause 24 which states that everyone has the right to have the environment protected through reasonable legislative and other measures that prevent pollution, promote conservation and secure ecologically sustainable development. The system of environmental impact assessment of activities which could significantly affect the environment under NEMA is an important measure designed to give effect to that constitutional imperative. It is submitted that in proposing the amended B36B - 2007, the legislature intends to pass a law which creates a weaker duty to protect the environment than is currently provided for by the Constitution. As such the amended NEMA will not constitute a reasonable measure which will protect the environment when activities are authorized.

Why the mitigation of impacts is an important provision for the protection of public health

6. The purpose of Section 24 of the NEMA amendment Bill is explicitly stated to be "to give effect to the general objectives of integrated environmental managment". Section 23, states that the general objective of integrated environmental management is to:-

"identify, predict and evaluate the actual and potential impact on the environment, social economic conditions and cultural heritage, the risks and consequences and alternatives and options for ***mitigation of activities*** *with a view to minimising negative impacts, maximising benefits and promoting compliance with the principles of environment or management set out in section 2"*

In order to achieve this objective we submit that the tool of environmental impact assessment will only be effective if the investigation of mitigation measures is a mandatory requirement. Without this requirement the Bill contains a regulatory legal loophole which may allow regulations to be passed permitting the authorisation of certain listed activities without there being a requirement of an evaluation of options for the mitigation of impacts. Pollution from listed activities can seriously impact on public health and the minimisation of pollutant emissions and waste streams through mitigation of impacts is therefore essential to the protection of public health. The discretion to not require mitigation measures undermines the entire system of integrated environmental management contemplated in section 23. The requirement to mitigate harm balances the need for protection of health against the need to promote development and is an accepted and essential feature of properly regulated environments all over the world. The NEMA amendment bill should make it clear that for eia's mitigation is a mandatory requirement.

[4] Section 24(2) NEMA.

Although mitigation of impacts in eia's has become accepted practice in many jurisdictions there is no formal internationally recognised standard that requires environmental impact assessments to consider this measure. Citizens who seek to protect their constitutional right to reasonable measures in order to protect the environment[5] will not be able to draw on such standard to argue that the Minister, when drafting regulations for eia's should include mitigation as a requirement for eia's, if the empowering statute NEMA says it is not mandatory. The words "where applicable" are left up to the official applying them to interpret and there are no mandatory guidelines for interpreting the meaning of these words set out in the Bill. The existence of current regulations to this effect does not change the position.

7. B36B - 2007 removes the requirement that procedures for the assessment of impacts should disclose gaps in knowledge. This requirement is little more than that duty to place all relevant considerations before a decision maker under PAJA[6]. Yet its repeal suggests that something less than this will suffice in environmental impact assessments under NEMA.

No impact assessment where there are norms and standards

8. Section 24(2)(d) of the Bill allows activities which would otherwise require assessment, to commence without an environmental authorisation provided they *"comply with prescribed norms or standards"*. However it is not stated that these norms and standards must be protective of health, and that they should cover all issues comprehensively which pose a threat to public health. This provision is therefore not a reasonable measure which will ensure the protection of the constitutional right to an environment which is not detrimental to health.

   Even if a polluting industry complies with norms and standards, the cumulative effect of a number of industries in the same area may result in harm to health. This is true of a number of "hotspots" under the National Environmental Management Air-Quality Act as regards air pollution emissions, for example Sasolberg and South Durban where large communities of indigent persons are affected by pollution from concentrations of heavy industry in the area. Environmental impact assessments are a tool for assessing cumulative impacts and ensuring that impacts are minimised. In some instances this might mean that future industries must meet standards which are lower than the prevailing norms and standards.

   A further concern arises in regard to when will be the effective date on which a norm and standard becomes operative. Under current initiatives to create emission standards under the NEMA Air Quality Act, existing industries will have eight years in order to come into compliance, and industries built in the next three years will be treated as existing rather than new industries and subject to weaker standards. Is the norm and standard regarded as applicable as soon as it is promulgated or rather when it becomes effective?

   The same reasoning applies to the proposed amendment to section 24F(1) by the addition of the words

   "(b) commence and continue.....unless it is done in terms of an applicable norm or standard"

Watering down of environmental protections contained in the MPRDA

9. B 36 B 2007 brings the assessment of impacts of mining activities under the NEMA where they were previously regulated by the provisions sections 37, 38 and 39 of the Mineral and

[5] Constitution section 24
[6] Promotion of Administrative Justice Act 6(2)(e)

Petroleum Resources Development Act ("MPRDA") no 28 of 2002. However this process has also resulted in a number of the current mandatory provisions relating to environmental assessment under the MPRDA[7] being replaced by a set of far weaker provisions under the NEMA[8] due to the fact that most of these provisions are discretionary. For example:

8.1 The MPRDA has mandatory provisions requiring an environmental management program before mining authorizations are granted.[9] Environmental management programs are discretionary under the proposed amended B36B - 2007[10]

8.2 The MPRDA has mandatory provisions requiring the mitigation of environmental impacts which arise as a result of mining.[11] The proposed NEMA amendments make the management of impacts discretionary in terms of section 24N. The requirement of management and motoring of impacts is mandatory in terms of section 24E of NEMA but is made discretionary by the addition of the words "as may be prescribed" in the proposed section 24Q. This creates confusion between these sections.

8.3 The MPRDA does not contain provisions for exemption from the mitigation of environmental impacts as it does not permit exemption[12] from the requirement that an environmental management program be required in an authorization to mine. However under the proposed amendments to NEMA, mining activities will be capable of being exempted from certain provisions of the act relating to impact assessments in terms of the proposed section 24 M.

8.4 It will also be possible for the competent authority to rule that an environmental impact assessment for mining is not required at all in terms of section 24(8) and 24L of the NEMA amendment Bill B36B-2007 provided there is substantial compliance with Chapter 5. As we have seen, mitigation of impacts is discretionary in terms of Chapter 5 in terms of section 24(4) whereas it is mandatory in terms of the MPRDA s 38(d) and (e) and 39(c)and (d). As such the certainty created by the mandatory clauses of the MPRDA regarding mining environment impact assessments will be replaced by uncertainty as to whether mitigation of impacts will be required at all. This it is submitted is a significant change in our law.

8.5 Listed activities which are related to mining will fall under the authority of the Minister of Minerals and Energy in terms of the new amended B36B - 2007 by virtue of the proposed definition of a "mining area". Under the current MPRDA and NEMA such activities are governed by the Department of Environmental Affairs and Tourism at a provincial level. The consequence of this change will be a significant reduction in the oversight role of the provincial ministries of environmental affairs in regard to matters which are related to mining. This will affect the administration of laws and the jurisdiction of departments and provinces. The competence and capacity of the regional administration to deal effectively and consistently with these additional mandates has been raised as a concern by our clients. The amended Bill 36 thus seeks a far broader objective namely to bring the regulation of mining and all related activities, including those which were previously regulated by the DEAT, under the authority of the Minister

[7] Sections 37, 38 and 39 of the MPRDA
[8] including the proposed amended sections 24(4)(b) and 24(8)(b)
[9] MPRDA section 39
[10] Section 24 N
[11] section 38(a) to (c) and 39(3) (c) and (d)
[12] section 106

of Minerals and Energy under NEMA, thus removing certain powers of the provincial departments of environmental affairs in regard to matters of environmental regulation.

8.6 MPRDA Section 23 (d) currently provides that the Minister must grant a mining right if the mining will not result in unacceptable pollution, ecological degradation or damage the environment. However this clause is proposed to be amended to read that the Minister must grant a mining right if an environmental authorisation is issued. Given that the requirements for environmental authorisation will be watered down to a set of requirements where mitigation of impacts and the consideration of alternatives is discretionary, this constitutes a significant shift in the obligation to ensure that mining does not pollute and degrade the environment.

8.7 Rectification of unlawful commencement or continuation of a listed activity (proposed section 24G): The MPRDA does not have a similar provision. This means that the proposed amendment bill will further slacken the mandatory requirements in regard to environmental protection provided by the MPRDA.

Environmental Impact Assessment should be distinguished from other regulatory tools

10. The argument that all environmental management tools should afford the Minister the same level of discretion is flawed in that these tools are fundamentally different, and in that section 23 specifically envisages that the mitigation of impacts is required in order to achieve integrated environmental management.

Exemptions: the standard set by the state is too high

11. The proposed amendment contained in section 24 M, sets an unrealistically high standard before an exemption application may be refused, placing a regulatory constraint on the state. The test is that 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.*" What is meant by significant detrimental consequences? Most applicants are likely to argue that although their activities may cause detrimental consequences to the environment these would not be significant and therefore they should get exemption. As stated elsewhere in this submission the cumulative impact of a number of industries with minor impacts may indeed be significant. It is submitted that test should be reworded to reflect the appropriate test eg
" the Minister or MEC may only grant an exemption if the exemption is unlikely to result in more than insignificant detrimental consequences for or impacts on the environment both on its own or cumulatively with other impact sources."

Other concerns

12. The DEAT has pointed out in submissions to Parliament that NEMA section 24E makes provision for the "ongoing management and monitoring of activities though the life cycle of the project." It is submitted that the words "manage and monitor" do not mean the same as "mitigate and monitor". "Manage" contemplates controlling environmental impacts, without setting a standard for the level of control. "Mitigate" contemplates managing impacts to bring them within the principle of minimisation expounded in the NEMA[13] principles and with the purpose of not compromising sustainability.

[13] Section 2(4)(a)

Appeals

12 The Bill creates the anomaly of allowing appeals from the decisions in respect of environmental management programs or authorisations of the Minister of Minerals and Energy, (proposed section 43(1)(1A)), but not from decisions of the Minister of Environmental Affairs and Tourism. This removes a level of protection in respect of general environmental authorisations.

The removal of the right to appeal against exemptions (by the deletion of section 43 (3)) will remove an important level of protection in the statute for vulnerable and disadvantaged communities affected by the actions of powerful and potentially polluting industries.

It is unclear whether exemptions by the Minister of Minerals and Energy will in be appealable to the Minister of Environmental Affairs and Tourism under section 43(1A) and if so this creates an anomaly that mining exemptions will be appealable but not exemptions in regard to other activities regulated under the Act.

Definitions

The definition of "community" in section 1(d) has the effect of defining "community" for mining as exclusively persons who are historically disadvantaged. This is due to the use of the word "and" rather than "or" between (a) and (b) in the definition of community. In other matters " community" means any group of persons who share common interests. The sections of NEMA pertaining to environmental management cooperation agreements, as well as the principles of NEMA are applicable to communities and there should be consistency in regard to all activities in this regard.

The definition of "Minister" in section 1(k) is too broad and vague for there to be clarity as to the respective roles of the Minister of Environmental Affairs and Tourism and the Minister of Minerals and Energy. This arises due to the use of the words *"and related activities within a mining, prospecting, exploration or production area"*. The extent of such area and the nature of such "related" activities is not given any definition which would guide the determination of the roles of the respective ministers.

Section 24F allows the continuation of unlawful activities

The section is proposed to be amended by the deletion in section 24F(1)of the words:

" and no person may continue an existing activity listed in terms of section 24(2)(d) if an application for an environmental authorisation section is refused".

The effect of this proposed amendment is that will be no provision to prevent a person from *continuing to carry on* with an existing listed activity for which they do not have authorisation in terms of section 24. This situation could arise for example if the activity commenced prior to the promulgation of the NEMA amendments, or continues after an authorisation has lapsed.

Another concern is that only once an application for the rectification of unlawful commencement is brought by such a person in terms of section 24G and after the Minister or MEC has considered reports submitted, is the provision triggered that allows the Minister/MEC to direct the person to cease the activity (24G(2)). This appears to have created a legal loophole where a person who has committed an offence in terms of section 24F2(a) can continue with the activity, indefinitely.

This section should be changed by making provision for the service of a notice on any person if there is, in the opinion of the authority, a contravention of section 24, and directing that such activity should cease on a date no more than 10 days after the date of the notice.

Amendments to section 24 G will encourage violations of section 24

Section 24G is proposed to be amended to allow the Minister/MEC to direct the applicant (who has committed an offence by starting a listed activity without authority), to compile a report containing one or more of the following: an impact assessment, a description of mitigation measures, a description of the public participation or environmental management plan. This provision gives the Minister/MEC a discretion to dispense with the requirements of section 24(4)(a), and to not require public participation or an assessment of impacts. This conflicts with section 24M which does not allow exemption from section 24(4)(a).

It is submitted that this provision will encourage persons to flout the law as the standard of assessment might be lower, depending on how the Minister/MEC exercises his/her discretion. The applicant will in effect be able to commence the activity immediately and the fine to be paid might be cheaper than going through an environmental impact assessment, which usually entails a degree of delay and expense. This will undermine NEMA and operate to the disadvantage of those who comply with the law.

Conclusion

It is submitted that the above deficiencies in the legislation should be corrected in order to ensure that the legislation is consistent with section 24 of the Constitution. In particular.

a) the requirement of mitigation of environmental impacts should remain mandatory in all environmental impacts;
b) section 24(2)(d) should be removed from the proposed legislation;
c) appeals should be allowed in respect of exemptions;
d) sections 24 F and G should not create loopholes allowing the continuation of unlawful activities, and a weakening of the mandatory requirements of section 24(4)(a);
e) mining activities should be clearly defined.

Yours faithfully

LEGAL RESOURCES CENTRE
Per: ANGELA ANDREWS

cc *The Director General*

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Department of Environmental Affairs and Tourism
Pretoria

Att: Ms Joanne Yawitch

Acknowledgement of receipt

To:
The Chairperson,
The Hon. Mr Jacobus Brynard
The Chairman: Select Committee
Western Cape Legislature

to:

Ms Lindiwe Ntsabo

and to:

The Committee Secretary, Mr Bawa
Select Committee on Land and Environmental Affairs

ESCARPMENT ENVIRONMENT PROTECTION GROUP (EEPOG)

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REF 20080828 NEMA AMENDMENTS PROV HEARINGS PP

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The Chairperson
Portfolio Committee: Agriculture & Land Administration; Economic Development & Planning,

I wish to make the following comments after last night's consultative meeting in Chrissies Meer.

1) When we arrived at the meeting we asked the other people attending if they knew what the meeting was about. We were told that they did not know and that they were just told that there will be a meeting with supper served thereafter.
2) We also could not find any advertisement in any regional or local newspaper that advertised the meeting, the purpose of the meeting, what was going to be decided, or any other relevant information.

3) At the meeting a copy of the Amendment Bill was distributed, but nobody was informed that the words between brackets in bold are what is removed, and the words underlined are what is added into the bill. No other documentation was given, although I did briefly see a document in which DEAT had explained each and every amendment in detail. I wish to ask that we be supplied with this document since it obviously contains relevant and important information for the consultative process.
4) The Chairperson then went on to explain that there was not enough time to go through all of the amendments , since that would take at least one day, and therefore only certain amendments were summarised. She did this in 35 minutes.
5) The above is of importance since we, the public, were barred from being present when DEAT did their presentation t the Committee last Friday 22 August 2008. This would have been the perfect opportunity for us to learn first hand what the amendments are all about.
6) It was made clear by the attendees that they felt that there was not sufficient time or information in order to give informed comment or consent.

It is our contention that the process described above is clearly not a consultative process. We believe that an effective and meaningful consultation process has, *inter alia*, the following characteristics:

1. The essence of consultation is a communication of ideas on a reciprocal basis;
2. The consultative procedure (dictated by the Committee) must allow reasonable opportunity to all sides to communicate effectively;
3. Consultation must be seen as more than a mere opportunity that you give to us, as interested and affected parties, to make ineffective representations;
4. The right to be consulted is valuable and should be implemented:
   1.1. by giving us an opportunity to be heard, and
   1.2. must take place at the formative stage and before the executive's mind become unduly fixed.
5. Sufficient information must be provided to us in order to enable us to tender helpful advice.
6. Sufficient time must be given to us to enable us to give the advice and sufficient time must be available to you to consider the advice tendered.

It is very clear that in neither this rushed process (everything completed within a week in the province from the DEAT briefing to the final report to the NCOP) nor the meetings, as arranged in Chrissies Meer, meet the standard of effective and meaningful consultation.

In light of the above we ask that arrangements be made, after we have had time to study the detailed DEAT document referred to above, for another series of widely advertised meetings in which both DEAT and DME can make their representations and we then consult on an informed basis.

Regards

Dr JP Pretorius
Chair EEPOG
Project leader: MLDPG
Director of the FSE