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**SUBMISSION TO THE PORTFOLIO COMMITTEE ON
ENVIRONMENTAL AFFAIRS AND TOURISM
on the
NATIONAL ENVIRONMENTAL
MANAGEMENT AMENDMENT BILL B36-2007**

This submission is made by the Wildlife and Environment Society of South Africa (WESSA)

Submitted by:
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3 April 2008

This comment on the proposed National Environmental Management Amendment Bill, B36-2007, (the Bill) is by WESSA, a national, membership-based, environmental NGO whose mission is. "To promote public participation in caring for the Earth."

On 27 March 2008, WESSA received, via e-mail, a memorandum from Mr L Zita, Chairperson of the Portfolio Committee on Environmental Affairs and Tourism "Calling for written comments on the National Environmental Management Amendment [B36-2007]". This memorandum briefly outlines an agreement that has been reached on environmental management associated with mining between the Department of Environmental Affairs and Tourism and the Department of Minerals and Energy. The memorandum further invites comment on this agreement. WESSA places on record that it has not been privy to this agreement and the details contained therein. WESSA therefore presumes that Bill B36-2007, in its entirety, constitutes part of this agreement and comments accordingly.

INTRODUCTION

By way of introduction, WESSA wishes to restate the opening paragraph of its earlier submission on Bill B36-2007 (2 November 2007), which consists entirely of text quoted from the 2006 Department of Environmental Affairs and Tourism (DEAT) publication, *South Africa Environment Outlook: A Report on the State of the Environment*.

"Despite a largely adequate and progressive framework for environmental governance having been developed since 1994, the overall condition of the environment is deteriorating. The positive steps in environmental governance have not been met with rigorous implementation, compliance, monitoring, or enforcement. Primary sector activities like mining, agriculture and forestry still contribute substantially to environmental degradation, for example, mining is the largest producer of hazardous and general waste. A suite of constraints hinders progress towards sustainable development, most notably insufficient capacity and skills."

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WESSA is on record as having requested that more time be allowed for consideration of the Bill in its current form. Despite the assertions of DEAT officials and the Minister of Environmental Affairs and Tourism that the current version of Bill B36-2007 does not differ substantively from that which was released for public comment during 2007, WESSA respectfully wishes to differ on this point. The Bill is inextricably and unavoidably tied to the Minerals and Petroleum Resources Development Amendment Bill (B10-2007, B10b-2007, B 2008), in that these Bills seek to articulate a future regulatory framework for mining and its associated activities and how these impact on the environment. It cannot be denied that the process has been confusing, with proposals oscillating between mining activities being excluded from the requirements of NEMA with respect to environmental authorisations, to mining activities falling wholly under NEMA, with the Minister of Minerals and Energy being declared the competent authority with respect to mining environmental authorisations. Documentation concerning the Bills and proposed changes to the Bills has not always been dated, has not necessarily been readily available and there have been long periods of time during which interested and affected parties have been left in the dark as to where matters stand. In the end, Bill B36-2007, which is the substance of this comment, reflects an attempt to merge two different pieces of legislation and to be all things to all people. The result is an often ambiguous and unclear proposal, whose intentions are opaque and which leaves much open to varied interpretation. Since it is the letter and not the spirit of the law which prevails, WESSA believes that the situation is highly unsatisfactory.

Despite the above statements, WESSA acknowledges the substantial effort that DEAT officials and others have put into drafting the proposed legislation. We register our appreciation for the fact that both the Minister for Environmental Affairs and Tourism and the Chair of the Portfolio Committee on Environmental Affairs and Tourism have been prepared to engage with interested and affected parties. This is in stark contrast to the Minister of Minerals and Energy, who has, to date, not once even acknowledged correspondence from WESSA. It is difficult, and sometime messy, to engage in the democratic process of law-making. WESSA trusts that this Portfolio Committee, under the chairmanship of Mr Zita, will continue to show its commitment to the democratic values enshrined in our Constitution.

COMMENT

1. **Section I(e)(b):** WESSA notes its concern that the Minister of Minerals and Energy is defined as the competent authority in respect of the evaluation of environmental impacts and the granting, amending or refusing of an environmental authorisation in respect of mining or a range of mining-related activities. While WESSA acknowledges the important economic role played by mining in South Africa, it must also be acknowledged that mining is inherently unsustainable and has frightening potential to cause irreparable and irreversible environmental damage. In view of this, it is critically important that no slick legislative mechanism be applied whereby mining activities are exempt from the requirements of a stringent process of issuing environmental authorisations. Government notices issued in 2006 (R 386, R 387, R 613 and R 614) are clear in their intention that mining and its associated activities fall under NEMA and the Minister of Environmental Affairs and Tourism. WESSA believes that the interests of the environment and its capacity to sustain development in the future will best be served if the authority to issue environmental authorisations in all cases remains firmly entrenched with the Minister of Environmental Affairs. The functions of the Minister of Minerals and Energy are not primarily related to sound environmental management and WESSA believes that potential conflict of interest should be removed by ensuring that all environmental authorisations in respect of mining activities fall solely under the Minister of Environmental Affairs and Tourism.
2. **Section 24(2)(b) and (c):** WESSA acknowledges the role that spatial development tools have in contributing to the defining of the geographical areas as envisaged in these two clauses and supports the inclusion of using these tools in these particular instances. Nevertheless, we place on record our belief 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 the envisaged spatial development tools have, in the process of being formulated, adequately assessed the potential environmental impacts of suggested development types.

3. **Section 24(2)(d):** WESSA notes that the process of developing prescribed norms or standards will include some level of public participation. Furthermore, WESSA understands that the regulatory framework for the proposed legislation is developed only once the legislation has been approved. The application of norms or standards is a mechanism to fast track "activities which may not commence without environmental authorisation from the competent authority". The legislative process becomes highly unsatisfactory when the extent to which an individual clause may be a strength or a frightening loophole, depends entirely on the regulations that are subsequently promulgated.

Theoretically, norms or standards can be developed for any activity and, in the process, environmental authorisations are replaced by complying with a checklist of norms or standards. WESSA believes this to be a potential "achilles heel" with respect to proposed mining and mining-related activities.

In addition, WESSA 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 individual, tailor-made Environmental Impact Assessment processes remain the best tool for assessing potential environmental impacts and establishing mechanisms for measuring the performance of specific activities at specific locations. No two Environmental Impact Assessment processes are the same and neither should they be.

4. **Section 24(4)(a):** WESSA wishes it to be noted that it is proposed that this is the only section of the Act which may not be subjected to the granting of any exemptions. This matter will be dealt with in more detail later.

The combined effect of the individual amendments to this section result in a subtle, but important change to the law. In essence, what was required previously was an investigation of the environment likely to be affected and an investigation of the potential impacts. Under the amendment, what will be required is a description of the environment likely to be affected and an investigation of the potential impacts. It is not immediately evident how the word "description" will be interpreted (as opposed to the word "investigation"), but WESSA is concerned that this might be used by applicants to avoid detailed baseline specialist studies. This is of particular concern with respect to mining activities which have the potential to impact so significantly on the environment.

The obligation to engage in public participation procedures is noted with pleasure, as is the fact that the Minister of Minerals and Energy may not grant exemption from such procedures.

5. **Section 24(4)(b):** WESSA notes, with dismay, that the Minister of Minerals and Energy may grant exemption from this section of the Act. This matter will be dealt with in more detail later.

WESSA is pleased to note that the word "may" from the previous draft has been replaced with the word "must". The purpose of the inclusion of the words "where applicable" is unclear. If it is intended, subsequently, to propose a regulatory framework in which the words "where applicable" are effected by listing activities that become exempt from the requirements of this clause, WESSA registers its strong objection. WESSA fears that these words have been included specifically to provide for a less

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stringent regulatory framework for mining activities (probably those activities that have been referred to as "specified activities" elsewhere in the Bill)

6. **Section 24(8)(b):** This proposed amendment has the potential to impact seriously on the integrity of South Africa's environmental legislation. In effect, it renders Section 24(4) discretionary and allows for the issuing of environmental authorisations for listed and specified activities without any public participation procedures and without the investigation of any alternatives. The rigorous investigative processes envisaged by Section 24(4) will not necessarily have been upheld with respect to activities authorised under this clause. This is not acceptable.
7. **Section 24(10)(c)(ii):** WESSA presumes that the "comments received" include comments from the public. The law should make it clear that a public process is envisaged in this clause.
8. **Section 24D(1):** WESSA believes that notices must be published in the relevant *Gazette* containing lists of activities and areas identified in terms of section 24(2).
9. **Section 24G:** WESSA understands that there will be commencement of unlawful activities and that the law should provide for such situations. However, this section, in conjunction with section 24F, is not sufficiently punitive to be a very significant deterrent to the commencement of unlawful activity, especially if the would-be applicant stands to profit considerably from the activity that has been commenced unlawfully. WESSA believes that mandatory fines (or imprisonment) should be implemented and that these should serve as significant deterrents. Unless this is the case, sections 24F and 24G may be exploited so as to weaken environmental legislation.
10. **Section 24M:** WESSA objects strongly to the inclusion of this clause which allows for the granting of exemptions from any provision of the Act, except the provisions of section 24(4)(a) by the Minister and the granting of exemptions from any matter contemplated in Section 24(4)(b). Even without the inclusion of this clause, there are a number of worrying opportunities for applicants to escape the rigorous provisions of the law, as already mentioned. WESSA considers this clause to be a significant weakening of the law, especially in view of the fact that mining and mining-related activities are to be included in the law. (No such exemptions for mining were possible previously.) Furthermore, it is difficult to understand how the Minister will, prior to an Environmental Impact Assessment process, be in a position to determine if:
 - the granting of the exemption is unlikely to result in significant detrimental consequences for or impacts on the environment;
 - the exemption is unlikely to adversely affect the rights of interested or affected parties.
 Once again, this proposed amendment leaves much to the Minister's discretion without providing any tools or guidelines for the application of such discretion. Will there be opportunity for public comment on an application for an exemption prior to the exemption being granted, or will the only avenue open to challenging such exemptions be via a difficult appeal process? WESSA strongly opposes this amendment.

CONCLUDING COMMENTS

We have noted previously that NEMA, in combination with various notices published in the *Government Gazette*, already contains adequate provision for the inclusion of environmental authorisations and monitoring in relation mining activities. WESSA 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. WESSA fully supports the inclusion of environmental authorisations and monitoring in relation to mining activities under NEMA, but does not believe that the current legislative proposals achieve this objective satisfactorily.

Thank you, once again, for providing us with this opportunity to comment.

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05 September 2008

Mpumalanga Provincial Legislature
Private Bag X11289
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Dear Sir/Madam

PUBLIC HEARING OF THE PORTFOLIO COMMITTEE ON AGRICULTURE AND LAND ADMINISTRATION; ECONOMIC DEVELOPMENT AND PLANNING

Thank you for the opportunity to make comments on the Environmental management amendment bill. In principle we do not have a major concern in the proposed changes to the current system, as long as it does not entail that the current EMPR, which was approved by the Department of Mineral & Energy, is not valid anymore. If there are some changes that we need to address we would like to suggest that Department Environmental and Tourism would assist as in this regard.

In the past the departments of Department of Water Affairs and Forestry and Department of Mineral & Energy used to organise workshops to discuss and give guidance to the affected parties when new laws were promulgated. It would be appreciated if this can be arranged, not only for this specific amendment bill, but also for the others that were passed recently as they also affect our organisation.

The only negative criticism that we would like to raise is the manner in which the public hearings were organised and the time frame in which they were rushed through. It is not possible to make any meaningful contribution in such a short notice and makes public participation a useless exercise.

Yours faithfully
BARBERTON MINES (PTY) LIMITED

C A STRYDOM
GENERAL MANAGER

Directors: AS Malone (Chairman), CDS Needham, MC Ramaphosa
Alternates: RM Smith, KC Spencer

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UMJINDI ENVIRONMENTAL COMMITTEE

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27 August 2008

Mpumalanga Provincial Legislature
Parliamentary Operations
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ATTENTION: Ms M VARDA

Dear Madam

**PUBLIC HEARING TO BE CONDUCTED BY THE PORTFOLIO COMMITTEE
ON AGRICULTURE AND LAND ADMINISTRATION; ECONOMIC
DEVELOPMENT AND PLANNING: 27 AUGUST 2008**

"We herewith submit our comments on the NEMA Amendment Bill as provided for at the public hearing held in Mpumalanga on 27th August 2008.

"In making this submission we protest strongly at the way in which the provision for public comment has been handled in Mpumalanga. Short notice of less than a week was provided for a hearing in the Provincial Capital, Nelspruit, on 22 August. When our representative Marina Caird, enquired for details she was turned away on the grounds that the meeting was for civil servants only. Only then, providing about 36hrs notice, were new dates and venues for hearings provided by telephone.

No formal or written public notice of these hearings has therefore been provided. No public hearing appears to be provided for in Nelspruit, and these replacement venues are in relatively remote locations and difficult times for the public. In Barberton the meeting has been publicised by loud hailer in the streets of Umjindini. Are we to accept this as a serious attempt by the State to obtain meaningful inputs from the public on a particularly complex, hastily prepared and technical piece of legislation? I don't think so.

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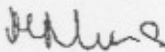
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The so-called attempt at providing for public participation as described above is a sham and a travesty of justice. In a Constitutional Democracy where public participation in law making is guaranteed by our Constitution, this procedural behaviour is unacceptable.

The NEMA Amendment Bill has been changed substantially since it was last made available for public comment, and it is now inextricably linked to mining legislation (MPRDA) that makes it even more difficult to interpret. Due to these constraints please accept this submission from the Umjindi Environmental Committee, to be read together with those submitted by our associates in WESSA and the Legal Resources Centre on WESSA's behalf. WE are in agreement with all aspects referred to in these other documents.

Yours faithfully



A.A. **A A FERRAR**

Chairman

Umjindi Environmental Committee

Encl.