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An ASSOCIATION
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REF: 20110404 GROENVLEI WPB MR OBJECTION.

Date: 4 April 2011

The Regional Manager
Department of Minerals and Energy
Mpumalanga Province
Private Bag X7279
Witbank
1035
Fax 013 690 2390 / 656 6238

Objection in terms of the Mineral and Petroleum Resources Development Act , 2002 (Act 28 of 2002) ("MPRDA") to the application for a mining right by: *William Patrick Bower Propriety Limited*
on the Farm: *Portions 6 and 23 of Groenvlei 353 JT and Portion 12 of Lakenvlei 355 JT*
District of: *Belfast*
DME reference number:*MP30/5/1/2/2/505 MR*

Sir,

We object to the granting of the mining right to *William Patrick Bower Propriety Limited* on the following grounds:

1. A scoping report has not been made available to us for ommnet prior to

submission. The consultants stated in an email to us that

-----Original Message-----
From: Johan Maré [mailto:johan@menco.co.za]
Sent: 18 March 2011 07:04 AM
To: 'Koos Pretorius'
Subject: Acceptance letter: WPB Colliery

Hi Koos,

Herewith the copy of the first page of the acceptance letter as provided by William. The Scoping Report will be circulated after the public meeting and will be discussed at a future meeting still to be scheduled. Given the timeframes provided by the DMR it will not be possible to meet with the expectations of all stakeholders pertaining to commenting on the Scoping Report prior to submission. At best issues as raised by stakeholders on 30 March will be incorporated into the Scoping document as part of the extent of work to be covered by specialist investigations.

Regards

JM
083 389 6617

2. The implication of the above non compliance is that the Minister MUST NOT GRANT the right in terms of section 23 of the MPRDA which reads as follows:

*"23. (1) Subject to subsection (4), the Minister **must** grant a mining right if—*

(g) the applicant is not in contravention of any provision of this Act;

*…(3) The Minister **must refuse** to grant a mining right if the application **does not meet all** the requirements referred to in subsection (1).”*

It is thus clear that the applicant is in contravention of regulation 49(1)(f) which states that the views and concerns of the IAP’s have to be taken upin the scoping report. Without seeing the scoping report it is not possible to consult and expres our views and concerns.

3. In terms of section 10 of the MPRDA the regional manager must:-

    i. make known that the application for the prospecting right had been accepted in respect of the land in question and;

    ii. call upon interested and affected persons (“IAP’s”) to submit their comments regarding the application;

    iii. if an objection is received from the IAP’s it must be referred to RMDEC.

4. We submit that:

    i. The Minister of Minerals and Energy (“the Minister”), acting through you, has failed to give any of the Interested and Affected Parties (whose interests are materially and adversely affected by the proposed decision) **adequate** notice of the nature and purpose of the proposed administrative action, namely the

intention by the Minister to decide whether to grant or refuse the application for a mining right and whether to consider the scoping report and approve the EMPR (as required by section 3(2) of the Promotion of Administrative justice Act, no 3 of 2000 [“PAJA”]);

a. The addresses of the IAP’s should have been available in the application form and it would have been a simple matter for you to notify the IAP’s, including EEPOG, directly.

b. We have an agreement with the DME of Witbank that they would notify EEPOG of all applications in this area. Notwithstanding the aforesaid agreement, EEPOG did not receive any notification from the Witbank Regional office. EEPOG is also well known to you as an IAP for the Belfast area and we have had numerous interactions in the past 4 years, including meetings with the previous regional managers, attending RMDEC meetings, as well as meeting other officials.

ii. The Minister, acting through you, has failed to give the IAP’s a reasonable opportunity (including sufficient information and sufficient time) to make representations. Your failure to supply IAP’s and the EEPOG with at least the written application on the applicable prescribed form including the annexures thereto (*inter alia* the Mining Works Programme, the Social and Labour Plan) clearly precludes the members of EEPOG and other IAP’s from

partaking in an informed and effective consultation process. In addition, your failure to supply IAP's with sufficient information constitutes procedurally unfair, unlawful and unreasonable administrative action as provided for in section 33 of the Constitution of the Republic of South Africa (Act 108 of 1996).

iii. We have not even been provided with a draft Scoping Report. Accordingly, the EEPOG and IAP's are not in a position to provide substantive comments on the application based on the Scoping Report and the proposed mining operations. We are thus confronted by a situation whereby it is expected of us to consult, yet we are not provided with the necessary information in order to make an informed decision and/or provide substantive comments.

iv. Could you please supply us with the following information in order for us to have sufficient information to consult meaningfully, take an informed decision and provide substantive and constructive comments to you as representative of the Minister:

a. All and any documentation of any nature whatsoever which pertain to the application for mining right referred to above, to include but not limited to the following:

- all and any correspondence between the DME and the Applicants / Consultant;

- all and any correspondence which bears any reference to, is ancillary to or refers in any way to the

abovementioned application;

- The application form D of annexure I referred to in the MPRDA regulation 10 including the appendages;
- all file notes, memoranda or internal documentation pertaining to any decision made in respect of the application;
- the draft Environmental Management Programme and all annexures, including but not limited to the mining works programme, and ancillary documentation pertaining thereto as referred to in the MPRDA regulation 11;
- all and any notices, publications or advertisements to include but not limited to those published in any Gazette, placed at any Magistrates' Court and any local or national newspaper circulated in the relevant area by the DME or the applicant;
- all and any notices, publications or advertisements informing all interested and affected persons of the public meetings to be held in terms of section 10, 16 or 22 of the MPRDA and the minutes of all public meetings held in terms of the aforementioned section.

b. All and any documents and/or correspondence relating to any request or enquiry received by any person or entity

pertaining to the submission of the abovementioned application.

c. All and any documentation indicating whether any application for a prospecting or mining right has been granted or refused in respect of the above mentioned properties.

v. The above information and/or documentation is necessary in order for IAP's and the EEPOG to partake effectively and meaningfully in the consultative process which we believe has, *inter alia*, the following characteristics:

a. The essence of consultation is a communication of ideas on a reciprocal basis;

b. The consultative procedure must allow reasonable opportunity to both sides to communicate effectively;

c. Consultation must be seen as more than a mere opportunity that you give to us, as interested and affected parties, to make ineffective representations;

d. The right to be consulted is valuable and should be implemented:

e. By giving us an opportunity to be heard, and

f. Must take place at the formative stage of the application process and before the DME and or your executive minds become unduly fixed.

g. Sufficient information must be provided to us in order to enable us tender helpful advice.

h. 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.

5. It is further submitted that the consultation process with IAP's prescribed in Section 10 read with Regulation 3 of the MPRDA does not comply with the requirement of PAJA to give:

   a. Adequate notice of the nature and purpose of the proposed administrative action;

   b. It does not provide a reasonable opportunity to make representations.

   c. The Minister has failed to give the IAP's a clear statement of the administrative action;

   d. The Minister has also failed to give the IAP's adequate notice of any right of review or internal appeal, where applicable, as well as any adequate notice of the right to request reasons in terms of Section 5 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

6. We submit that the procedure laid down in Section 10, read with Regulation 3 of the MPRDA is an unreasonable and unjustifiable departure from the

requirements referred to in Section 3(2)(b) of PAJA as contemplated in Section 3(4) of PAJA. Alternatively, on the assumption that such departure is not unreasonable and unjustifiable, on a proper interpretation of Section 10(1) read with regulation 3(1) you should have provided the aforesaid information or made same available to IAP's in terms of those provisions of the MPRDA. We furthermore submit that the Department's failure to comply with section 3 of the PAJA constitutes procedurally unfair, unlawful and unreasonable administrative action as provided for in section 33 of the Constitution of the Republic of South Africa (Act 108 of 1996).

7. We are thus now in a position where we are expected to make representations in terms of section 10 of the MPRDA, yet we have not been provided with and/or are not in possession of the information needed in order to do so in an informed manner and the 30 day period will expire today. In this regard, the EEPOG reserves its rights. According to your correspondence with Langkloof Environmental Committee (LEC) dated 13 March 2007 this is the only opportunity we, as IAP's, have under the MPRDA to object and to have the objection referred to RMDEC. Our failure to object, in respect of the mine on Langkloof portion 14, during this specific time period set out in section 10 of the MPRDA was the reason why the objection could not be entertained. We can supply you with this letter if you so require.

8. In terms of the Constitution IAP's and the members of EEPOG have the right to administrative action that is lawful, reasonable and procedurally fair. In terms of the aforesaid fundamental right we therefore call on you to provide us, as a matter of urgency, with the information to enable us to consult meaningfully.

9. In addition, in view of the above absence of information and the expiry of the 30 days after acceptance of the application, we request that you inform us of the procedure you wish us to follow, and also in terms of which sections of the MPRDA you wish us to consult further as more information comes available during the investigative process. ***We do wish to consult with you as representative of the Minister***.

10. The two farms are located in the catchment and at the origin of the Elands River that is one of the economically and environmentally most important rivers in the Mpumalanga Province.

    a. The Elands River supports a number of Industries that are directly dependant on an assured supply of good quality water from the river. Due to the nature of coal mining there is an almost definite probability of the source of the river and adjoining wetland areas that feed into the Elands River system being contaminated by amongst other things, acid mine drainage that will have a devastating effect on down-stream users.

    b. The area in which the mining activity is proposed is also extremely rich in wetlands. Wetlands are one of the most significantly threatened ecological systems and if destroyed will not only have a dreadful impact on biodiversity in the area but also on the water quality of the Elands River.

    c. It is part of the Steenkamps Berg area that was zoned for conservation in the EMF of the Emakhazeni municipality. It is irreplaceable and highly significant in aquatic and terrestrial biodiversity according to the MTPA C-plan.

d. It makes absolutely no sense in comparing impacts of an activity like open cast mining that causes an almost 100% transformation in the physical and ecological environment to other activities like farming where the impacts are reversible in most cases. To date there is no meaningful evidence that even suggests that an area that has been subjected to open cast mining can be properly rehabilitated, especially as far as restoring hydrological systems such as wetland functions in such disturbed areas.

e. South Africa is a water scarce country and the people of this country cannot afford that a single drop of water is almost permanently polluted and rendered unfit for use by a short term and unsustainable practice such as coal mining.

11. We also request to be present at the RMDEC meeting where this matter will be dealt with in order to make representations as provided for in section 3(2) of PAJA. If there is a decision to exclude us, we require the written reasons for such decision as provided for in section 3(2) of PAJA and section 6 of the MPRDA . In any event, it is apparent that not all of the members of RMDEC are in possession of all the information and our presence will ensure that they have all of the relevant information in order to reach an informed decision. We are of the opinion that it will be procedurally unfair and unreasonable to make us rely on you and your officials to make our case on behalf of us at the RMDEC meeting. In this regard I refer you to the judgement in Earthlife Africa v Director-General: DEAT 2005(3) SA 156 (C) (emphasis added)

- (para 37): *Granting of the necessary authorisation by the DG in terms of ECA is a* ***necessary prerequisite to the further steps in the***

***process**. It is, at the same time, a **final step** as far as ECA is concerned. It follows that any procedural unfairness affecting a decision in terms of s 22 of ECA may render such decision susceptible to review.*

- *(para 60): I find this approach to be fundamentally unsound. The regulations*

  provide for full public participation in 'all the relevant procedures contemplated in these regulations. The respondents seek to limit such participation to the 'investigation phase' of the process (as contemplated by regs 5, 6 and 7). After submission of the EIR, however, the 'adjudicative phase' of the process commences, involving the DG's consideration and evaluation, not only of the EIR, but also – more broadly – of all other facts and circumstances that may be relevant to his decision. There is nothing in the Act(ECA) or the regulations that expressly excludes public participation or application of the audi rule during this 'second stage' of the process. In line with settled authority,(20) therefore, it follows that procedural fairness demands application of the audi rule also at this stage.

*[*20 See eg *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 662G–I.

- *(para 72): In support of its argument, the applicant submitted that the very purpose of the audi rule is to give an interested party an opportunity to influence the way in which the decision-maker – in this case the DG – exercises his discretionary power. To deny interested parties an opportunity of making representations to him and to confine*

them instead to representations made to someone else did not serve the purpose of the audi rule at all and was particularly invidious in the circumstances of the present case. This is so because, although Eskom's consultants were notionally 'independent' in the sense that they were not institutionally part of Eskom, they were employed by Eskom to act as its agent and the purpose of their engagement was to obtain the authorisation Eskom sought. Eskom employed them, both to prepare the application for authorisation and to perform the functions of its consultants under the EIA Regulations. The consultants were, in other words, clearly aligned on Eskom's side and were not independent consultants employed by the decision-maker to assist him in making his decision. It meant that the only 'hearing' afforded to the applicant, was an opportunity to make submissions to the consultants for 'the other side', as it was put. Moreover, it meant that the consultants were allowed an opportunity to adjust the final EIR and to comment on and rebut the applicant's submissions without giving the applicant a corresponding opportunity.

12. Failure to supply the EEPOG timeously with adequate reasons, if applicable, of why we will not be invited to or be excluded from the RMDEC meeting concerned will, in our opinion be presumed to be without good reason, in accordance with the provisions of section 5(3) of PAJA.

Regards

Dr Koos Pretorius