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Advancing Environmental Rights in South Africa

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Dear Ms Minyuku

COMMENTS ON THE DRAFT INFRASTRUCTURE DEVELOPMENT BILL, 2013

"The environment plays an essential role in determining future opportunities and constraints for growth and development. The past development has emphasised exploitation and optimisation of South Africa's mineral and natural resources with little concern for long-term environmental impacts and sustainability. It has largely ignored constraints arising from the finite character of non-renewable natural resources and the ecological cycles that sustain renewable natural resources." (Outcome 10 Delivery Agreement, at p.12)

1. In this document, the Centre for Environmental Rights (CER)[1] submits comments on the Infrastructure Development Bill, 2013 published for comment on 8 February 2013 (Notice 99 of 2013, Government Gazette No. 36143, 8 February 2013) ("the Bill").

[1] The Centre's vision is a South Africa where every person's Constitutional right to an environment that is not harmful to health or well-being, and to have the environment protected for future generations, is fully realised. Our mission is to advance the realisation of environmental rights as guaranteed in the South African Constitution by providing support and legal representation to civil society organisations and communities who wish to protect their environmental rights, and by engaging in legal research, advocacy and litigation to achieve strategic change.

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INTRODUCTION

2. The CER has supported and continues to support the principle of streamlined and integrated processes of approval for environmental and related authorisations for development. We believe that such processes promote integrated environmental management and planning, and reduce the burden communities and civil society organisations who participate in such processes on their own behalf and in the public interest. The CER also supports sustainable and responsible infrastructure development in general.

3. However, the Bill effectively disregards decades of national policy development in relation to environmental management and sustainable development, and existing government commitments to sustainable development and environmental management.

4. Furthermore, the CER is of the view that the Bill, as it is currently drafted, is in violation of a number of Constitutional rights and obligations, and therefore vulnerable to Constitutional challenge. Many of the Bill's provisions are fundamentally in conflict with other national legislation, including legislation promulgated to give effect to the rights entrenched in sections 24, 33 and 34 of the Constitution.

5. We recognise the dire need to improve infrastructure and access to essential services. However, we also assert that suitable strategic and impact assessment processes, with their attendant expert input and public consultation phases, are crucial to determining the type of infrastructure that is best suited to the region and service. Instead of delaying infrastructure roll-out, these processes can serve to minimise the impacts, environmental risks and long-term maintenance costs of the infrastructure project. The CER would be happy to provide a series of cases where lack of environmental assessment has resulted in the wrong choice of infrastructure, unnecessary impacts, and significantly increased costs to the fiscus and affected communities.

APPLICABLE LEGAL PRINCIPLES AND REQUIREMENTS

6. In these comments, we set out key legal principles and requirements applicable to environmental decision-making and the assessment and authorisation of infrastructure development. The Bill envisions the roll-out of large scale infrastructure much of which will have significant, long-term environmental impacts, and the principles and requirements set out below are therefore directly applicable to the Bill. These binding principles and legal requirements cannot be ignored or overridden (as the Bill seeks to do).

7. Section 33 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") guarantees the right to **just administrative action**: administrative action that is lawful, reasonable and procedurally fair and obliges the state to enact national legislation to give effect to this right.[2] Enacted national legislation to give effect to this right is the Promotion of Administrative Justice Act, 2000 (PAJA). The right to just administrative action is one of the cornerstones of South Africa's constitutional democracy. It gives to every person whose rights or legitimate expectations are materially and adversely affected the right to both adequate notice of the nature and purpose of the proposed administrative action, as well as a reasonable opportunity to make representations before that action is taken.

[2] S.33(1) of the Constitution

8. Furthermore, section 34 of the Constitution guarantees the right of **access to courts**, in this instance the right to have a dispute decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

9. The Constitution (in section 24) also guarantees the right to an **environment that is not harmful to health or well-being**; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
    (i) prevent pollution and ecological degradation;
    (ii) promote conservation; and
    (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

10. The right to an environment not harmful to health or well-being is a human right that must be respected, protected, promoted and fulfilled by the State in terms of section 7 of the Constitution. The State must realise this right for all living in South Africa - it is not required merely to progressively realise the right. In addition, everyone has the right to have the environment protected. This is a further obligation on the State, part of - but also additional to - the obligation to realise the right to an environment not harmful to health or well-being. The State must protect the environment through reasonable legislative and other measures. Such "reasonable legislative measures" indisputably include the National Environmental Management Act, 1998 (Act 107 of 1998) (which is the framework legislation for the protection of the environment), the specific environmental management Acts as defined in s.1 of NEMA, and the regulations promulgated under NEMA, which include the Environmental Impact Assessment Regulations, 2010 (GN R543 in GG 33306 of 18 June 2010) (2010 EIA Regulations).

11. NEMA defines "**sustainable development**" in section 1 as "the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations".

12. Section 2 of NEMA lists **environmental management principles** that "apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and-
    a. shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;
    b. serve as the general framework within which environmental management and implementation plans must be formulated;
    c. serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;
    d. serve as principles by reference to which a conciliator appointed under this Act must make recommendations; and
    e. guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment."

13. These principles therefore expressly apply to the Bill and any infrastructure development contemplated under the Bill. The principles include:
    a. Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.
    b. Development must be socially, environmentally and economically sustainable.

c. Sustainable development requires the consideration of all relevant factors including the following:
    i. that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
    ii. that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
    iii. that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;
    iv. that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
    v. that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;
    vi. that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
    vii. that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.
d. Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.
e. Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.
f. Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.
g. Responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle.
h. The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.
i. Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.
j. Community wellbeing and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.
k. The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.
l. Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.
m. There must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment.
n. Actual or potential conflicts of interest between organs of state should be resolved through conflict resolution procedures.

o. The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.
p. The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.
q. The vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted.
r. Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.

14. The Bill unavoidably affects environmental decision-making and has radical implications for integrated environmental management. S.23(2) of NEMA records that "the general objective **of integrated environmental management** is to-
    a. promote the integration of the principles of environmental management set out in section 2 of NEMA into the making of all decisions which may have a significant effect on the environment;
    b. identify, predict and evaluate the actual and potential impact on the environment, socio-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 environmental management;
    c. ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;
    d. ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;
    e. ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and
    f. identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management.

15. While the Bill acknowledges in section 18 that environmental assessments will be required, and that these are governed by NEMA, it seeks radically to curtail the State's capacity and ability to conduct such an assessment and accordingly undermines the objectives of integrated environmental management. Section 24(1) of NEMA provides that, "in order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority…".

16. The listed activities under NEMA and the 2010 EIA Regulations are a detailed set of activities and procedures designed to ensure compliance not only with the principles and requirements of NEMA itself, but also within the requirements of PAJA and the Constitutional rights to just administrative action (section 33) and the rights to an environment that is not harmful to health and well-being, and to have the environment protected for the benefit of present and future generations (section 24). The Bill, on the other hand, ignores these requirements, requiring instead that the decision to roll out a project is effectively taken before the project is considered and assessed in accordance with environmental and Constitutional standards. This also potentially exposes a project to a range of environmental risks and impose long-term operational cost implications that could otherwise have been avoided through effective planning, design and assessment. Should the Bill be adopted in its current form, it also exposes decisions taken in accordance therewith to unnecessary legal challenges.

17. The Constitution determines that "**environment**" is a competency shared between national and provincial government (Schedule 4), and extensive institutional arrangements are in place between the Department of Environmental Affairs (DEA) and provincial environment departments to manage this shared function. The Bill seeks to usurp provincial functions and undermine this shared competency.

18. The Constitution expressly also allocates the function of **municipal planning**[3] to local government in Schedule 4, Part B of the Constitution, and the scope and extent of the functions and powers of local government in relation to both municipal planning and environmental planning have been the subject of a series of High Court, Supreme Court of Appeal and Constitutional Court decisions, including:
    a. *Wary Holdings Pty Ltd v Stalwo Pty Ltd & Another* (CCT78/07) [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC);
    b. *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC) ; 2010 (9) BCLR 859 (CC);
    c. *Maccsand (Pty) Ltd v City of Cape Town and Others* (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC);
    d. *Le Sueur and Another v Ethekwini Municipality and Others* (9714/11) [2013] ZAKZNHC 6; and
    e. *Lagoonbay Lifestyle Estate Pty Ltd v the Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape and others* (320/12) [2013] ZASCA 13.

19. Section 41(1) of the Constitution provides that:

    "All spheres of government and all organs of state within each sphere must –
    …
    (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
    (d) be loyal to the Constitution, the Republic and its people;
    (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
    (f) not assume any power or function except those conferred on them in terms of the Constitution;
    (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
    (h) co-operate with one another in mutual trust and good faith by -
        …
        (iv) co-ordinating their actions and legislation with one another;
        (v) adhering to agreed procedures"; and
        (vi) avoiding legal proceedings against one another."

20. While the Constitution therefore expressly promotes and requires coordination between spheres of government and organs of state, it also requires spheres and organs to respect the functions of other

[3] The term "municipal planning" was defined in the Constitutional Court decision of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC) ; 2010 (9) BCLR 859 (CC): "Returning to the meaning of "municipal planning", the term is not defined in the Constitution. But "planning", in the context of Municipal affairs is a term which has assumed a particular, well established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control of regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose the word to use "planning" in the Municipal context, they were aware of its common meaning. Therefore I agree with the Supreme Court of Appeal that in relation to municipal matters the Constitution employs "planning" in its commonly understood sense…". (At 55)

spheres and organs. Within this framework, setting up structures and legislating procedures that pre-empt and compromise the independent exercise of functions by those spheres is in conflict with the Constitution. For clarity, it is not our submission that coordination and strategic alignment is impermissible – on the contrary, that is exactly what section 41 of the Constitution requires. Instead, it is our submission that the Bill needs to acknowledge and make provision for the independent exercise of Constitutional functions by different spheres of government and organs of state.

21. In the case of *Premier, Western Cape v President of the Republic of South Africa and Another*,[4] the Constitutional Court considered a dispute between the Western Cape provincial government and the national government about the constitutional validity of proposed amendments to the Public Service Act, aimed at the structural transformation of the public service. This is not a dissimilar situation to that posed by the Bill in relation to the national legislature's relationship with provincial and municipal functions under the Constitution. The Constitutional Court held the following:

> *"The Constitution provides that provinces shall have exclusive functions as well as functions shared concurrently with the national legislature. The Constitution also requires the establishment of a single public service and gives the power to structure that public service to the national legislature. This power given to the national legislature is one which needs to be exercised carefully in the context of the demands of section 41(1)(g) to ensure that in exercising its power, the national legislature does not encroach on the ability of the provinces to carry out the functions entrusted to them by the Constitution."* (at 60)[5]

POLICY FRAMEWORK AND EXISTING GOVERNMENT COMMITMENTS TO SUSTAINABLE DEVELOPMENT

22. The Bill not only fails to incorporate Constitutional and environmental principles and requirements, it also fails to consider strategies and plans already approved by Cabinet.

23. The National Strategy on Sustainable Development (NSSD1) and Action Plan was approved by Cabinet on 23 November 2011. The vision of this Strategy is that:

> *"South Africa aspires to be a sustainable, economically prosperous and self-reliant nation state that safeguards its democracy by meeting the fundamental human needs of its people, by managing its limited ecological resources responsibly for current and future generations, and by advancing efficient and effective integrated planning and governance through national, regional and global collaboration."*

24. This vision is based on a number of key principles:

Fundamental principles	**Substantive principles**	**Process principles**
Human dignity and social equity	Natural resources must be used sustainably.	Integration and innovation
Justice and fairness	Socioeconomic systems are embedded in and are dependent on ecosystems.	Consultation and participation
Democratic governance	Basic human needs must be met to ensure that the resources that are necessary for long-term survival are not destroyed for short-term gain.	Implementation in a phased manner
A healthy and safe environment		

[4] 1999 (3) SA 657 (CC)
[5] Also see Woolman et al, Constitutional Law of South Africa, 2nd Edition, Volume 1, p.14-17

25. Strategic priorities of the NSSD1 are:
    - "Enhancing systems for integrated planning and implementation;
    - Sustaining our ecosystems and using natural resources efficiently;
    - Moving towards a green economy;
    - Building sustainable communities; and
    - Responding effectively to climate change".

26. We highlight the immediate goals under Priority 1: "Enhancing systems for integrated planning and implementation", because that relates strongly to the contents of the Bill:

    - Ensure integration of sustainable development into the national vision and strategic planning processes of government;
    - Establish a monitoring and evaluation system to facilitate the ongoing assessment of progress towards sustainability;
    - Ensure effective planning and implementation of sustainable development;
    - Build capacity to enhance the effectiveness of government agencies to empower communities; and
    - Enforce normative criteria (values, attitudes and aptitudes) as a suitable base for effective and efficient public service delivery to the public or communities.

27. In September 2010, the Outcome 10 Delivery Agreement was signed as part of government's agreed 12 outcomes as key focuses of work between 2010 and 2014. Outcome 10 is defined as "Environmental assets and natural resources are well protected and continually enhanced", and the four key outputs of this Delivery Agreement are:
    1. Enhanced quality and quantity of water resources;
    2. Reduced greenhouse gas emissions, climate change & improved air/atmospheric quality;
    3. Sustainable environmental management; and
    4. Protected biodiversity.

28. Output 3, "Sustainable environmental management", is introduced as follows:

    "The environment plays an essential role in determining future opportunities and constraints for growth and development. The past development has emphasised exploitation and optimisation of South Africa's mineral and natural resources with little concern for long-term environmental impacts and sustainability. It has largely ignored constraints arising from the finite character of non-renewable natural resources and the ecological cycles that sustain renewable natural resources." (p.12)

29. Under Output 3, the Delivery Agreement identifies "sustainable land use management" as a sub-output, and states that: "*Integration of environmental considerations with spatial planning remains a major challenge to achieving sustainable development. Ensure greater alignment of sustainability criteria in all levels of integrated and spatial planning, as well as in project formulation*."

30. The National Development Plan 2030 states "*South Africa faces urgent developmental challenges in terms of poverty, unemployment and inequality, and will need to find ways to "decouple" the economy from the environment, to break the links between economic activity, environmental degradation and carbon-intensive energy consumption. In the past, resources were exploited in a way that was deeply unjust and left many communities excluded from economic opportunities and benefits while the natural environment was degraded. The country must now find a way to use its environmental resources to support an economy that enables it to remain competitive, while also meeting the needs of society.*

Thus, sustainable development is not only economically and socially sustainable, but environmentally sustainable as well."

31. The National Development Plan's vision states: "*By 2030, South Africa's transition to an environmentally sustainable, climate-change resilient, low-carbon economy and just society will be well under way: Coordinated planning and investment in infrastructure and services that take account of climate change and other environmental pressures, provide South Africans with access to secure housing, clean water and decent sanitation, and affordable and safe energy, making communities more resilient to the impacts of climate change and less socioeconomically vulnerable*."

CONFLICTS WITH LEGAL AND CONSTITUTIONAL REQUIREMENTS, POLICY FRAMEWORK AND EXISTING GOVERNMENT COMMITMENTS

32. Against the legal requirements, policy framework and existing government commitments set out above, our concerns with the Bill are set out below.

The absence of any reference to sustainable development

33. It is disappointing that a Bill such as this can be drafted, published and approved for gazetting by Cabinet without a single reference to, or acknowledgement of, our existing commitments to sustainable development. In addition to being the international norm which underpins environmental law, sustainable development is required by our Constitution, and underpins the NEMA Principles.

34. In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC), the Constitutional Court highlighted the crucial importance of sustainable development:

> "*The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.*[6]
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> *….*
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> *NEMA, which was enacted to give effect to s 24 of the Constitution, embraces the concept of sustainable development. Sustainable development is defined to mean 'the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations' (footnote omitted). This broad definition of sustainable development incorporates two of the internationally recognised elements of the concept of sustainable development, namely, the principle of integration of environmental protection and socio-economic development, and the principle of inter-generational and intra-generational equity.*[7]

35. In essence, other than the single reference to NEMA in section 18(1) of the Bill, the Bill fails to recognise years of legislation, case law, scientific research and international legal developments.

[6] 22B-22D.
[7] 26D-26F.

Shortcutting EIA timeframes and conflicts with other national legislation

36. While recognising that, as the Bill stands, special infrastructure projects (SIPs) must still follow the EIA process where listed activities are triggered (section 18(1) of the Bill), the Bill fails to resolve the contradictions between the time-frames available for scoping, EIA, public participation and appeal in the 2010 EIA Regulations, and those provided for in Schedules 2 and 3 as read with sections 17(2) and 18(1) of the Bill. Instead, the Bill baldly states that "the time-frames in Schedule 3 may not be exceeded", with no provision for the consequence of non-compliance with those timeframes. There is also no provision for catering for consecutive assessments that cannot run concurrently, as one must depart from the final outcome of another.

37. Other than a reference in Schedule 2 to "consultation, public hearings, appeals", there is no recognition of the fact that appeals may lie against a number of authorisation decisions envisaged by the Bill, and that such appeals will take time to adjudicate, even if prioritised. The Bill cannot deprive anyone of the Constitutionally-protected right to appeal against administrative action that violates the principles of administrative justice.

38. Over and above the procedural aspects of the fast-tracking proposed in this Bill, it is important to understand the potentially radical consequences of shortcutting established time-frames for EIA, public participation and appeal. In simple terms, poor or inadequate assessments of risks posed to water quantity and quality, particularly in the drier and more variable climatic zones of the country, can expose entire communities to loss of access to drinking water. South African taxpayers are already bearing the cost of poor planning and inadequate regulation of environmental impacts; ultimately, though, it is poor and vulnerable communities who cannot afford to relocate to avoid environmental pressures – the very communities the SIPs are supposed to assist - who bear the brunt of poor planning and inadequate regulation of environmental impacts.

39. It is internationally recognised, and firmly established in South Africa's own policy frameworks, that identifying and addressing environmental issues as early as possible in planning processes is the most efficient and effective way of minimising later costs, delays and re-work, and costly and slow legal challenges. A cornerstone of environmental impact assessment (NEMA EIA Regulations, 2010) is the need to consider reasonable and feasible alternatives,[8] and their impacts on the environment and affected communities. The earliest possible engagement with environmental authorities and stewards of our natural resources base in seeking the "best practicable environmental option" to achieve strategic projects, simultaneously minimising environmental risks, should therefore both expedite national objectives and ensure sustainable development. Environmental concerns need to be properly considered from the beginning of the project and not simply when raised in reaction to detailed plans "on the table". South Africa has world-leading strategic spatial environmental information to aid in development planning (both to avoid unnecessary environmental impacts and to reduce the environmental risk faced by projects), yet the Bill provides for no added impetus to use such information to facilitate and expedite appropriate infrastructure projects.

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[8] R1 of R543: *"alternatives"*, in relation to a proposed activity, means different means of meeting the general purpose and requirements of the activity, which may include alternatives to—

(a) the property on which or location where it is proposed to undertake the activity;
(b) the type of activity to be undertaken;
(c) the design or layout of the activity;
(d) the technology to be used in the activity;
(e) the operational aspects of the activity; and
(f) the option of not implementing the activity.

Compromising competent authorities and exposing authorisations to unnecessary legal challenges

40. Section 15(6) of the Bill provides for "negotiation" with an authority "with a view to obtaining the necessary approval… and [making] every reasonable effort to avoid an intergovernmental dispute". As potential interference with a discretion to take administrative action, such "negotiation" could create potential grounds of review for any subsequent decision under PAJA's section 6, particularly section 6(2)(e) and (f).

41. Moreover, such "negotiation" seems to be contemplated even after an authority has exercised the discretion to refuse an application for approval – apparently aimed at reversing such decision. It is a well-established principle of administrative law that, once an administrator (as defined in PAJA) has exercised its discretion under legislation, it is *functus officio* and unable to reverse that decision, except in exceptional circumstances (typically where the decision has been induced by fraud or based on non-existent jurisdiction). Individuals should be entitled to rely on government decisions, and the *functus officio* doctrine promotes certainty, fairness and legality.[9]

42. Furthermore, placing obligations on representatives of competent authorities - such as those placed on the members of multidisciplinary steering committees in sections 13, 14 and 15 of the Bill - exposes any decision taken by those competent authorities to various legal challenges on the review grounds set out in section 6(2) of PAJA.

Failure to recognise provincial and municipal powers, and relying on statutory dispute resolution instead of complying with cooperative governance requirements

43. "Environment" is a functional area of concurrent national and provincial legislative competence (Schedule 4, Part A of the Constitution). The Constitution requires provinces to implement all national legislation within the functional areas listed in Schedule 4 (section 125(2)(b)). The Bill fails to recognise provincial powers in relation to the environment. For instance, section 18 of the Bill requires that an environmental assessment for an integrated strategic project be considered by the DEA.

44. However, NEMA and the 2010 EIA Regulations provide for the relevant MEC to be the competent authority for all environmental authorisations, save for in specific circumstances, which prescribed circumstances are not aligned with the requirements for designation of SIPs.[10] The existing provision for agreements between the Minister and MEC for the other to be the competent authority for a certain application or class of applications in Section 24C(3) of NEMA is not acknowledged. In this way, section 18 and other provisions in the Bill undermine provincial powers in relation to the environment.

[9] Hoexter C Administrative Law in South Africa (2007) 246-251.

[10] Section 24C(2) of NEMA (as read with EIA Regulation 4(1)) provides that the DEA will only administer applications if the activity: (a) has implications for international environmental commitments or relations; (b) will take place within an area protected by means of an international environmental instrument, other than- (i) any area falling within the sea-shore or within 150 meters seawards from the high-water mark, whichever is the greater; (ii) a conservancy; (iii) a protected natural environment; (iv) a proclaimed private nature reserve; (v) a natural heritage site; (vi) the buffer zone or transitional area of a biosphere reserve; or (vii) the buffer zone or transitional area of a world heritage site; (c) a development footprint that falls within the boundaries of more than one province or traverses international boundaries; (d) is undertaken, or is to be undertaken, by- (i) a national department; (ii) a provincial department responsible for environmental affairs or any other organ of state performing a regulatory function and reporting to the MEC; or (iii) a statutory body, excluding any municipality, performing an exclusive competence of the national sphere of government; or (e) will take place within a national proclaimed protected area or other conservation area under control of a national authority.

45. Section 8(4)(a) of the Bill requires "any state owned entity or other organ of state" to "ensure that its planning or implementation of infrastructure or its spatial planning and land use is not in conflict with any strategic integrated project implemented in terms of this Act or envisaged in such national infrastructure development plan". This provision effectively constitutes interference in the exercise of local authorities' Constitutional powers to regulate local land use planning without consultation with those local authorities, and without public consultation. This undermines the Constitutional obligation on all spheres of government to exercise their functions in a manner that does not encroach on government in another sphere (section 41(1)(f)), and is unlikely to withstand Constitutional challenge.

46. Moreover, instead of recognising and providing for compliance with cooperative governance requirements in the Constitution, section 8(4)(b) of the Bill simply defers any conflict arising from section 4(a) to resolution in terms of the Intergovernmental Relations Framework Act, 2005.

CONCLUSION

47. For the reasons set out above, we are respectfully of the view that, in its current form, the Bill is misaligned with existing national government policy and commitments, and vulnerable to Constitutional challenge. To address this, the Bill will require at least the following changes:
    a. Express recognition of the Constitutional obligation to ensure ecologically sustainable development and ensure that environmental issues, and reasonable and feasible alternatives that would meet the requirements of section 2 of NEMA, are properly considered upfront;
    b. Resolution of the contradictions between statutory EIA time-frames for scoping, environmental impact assessment and public participation and the timeframes proposed in the Bill;
    c. Resolution of existing conflicts with the requirements of PAJA;
    d. Recognition of and provision for compliance with cooperative governance requirements, consultation with local government authorities and support for the exercise of their Constitutional functions of planning.

48. We reserve all rights to make further or improved comments at future occasions in the legislative process.

49. The Centre for Environmental Rights is willing and able to make detailed submissions to the Department on any of the issues raised above.

50. We thank the Department for the opportunity to comment on the Bill and hope that our concerns can be addressed. Kindly keep us updated on the progress of the Bill.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

Per: 

Melissa Fourie
Executive Director