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Submission to Portfolio Committee on Mineral Resources on the MPRDA Amendment Bill: Environment authorities are more appropriately placed to consider, issue and ensure compliance with environmental authorisations for mining activities

1. This submission on the Mineral and Petroleum Resources Development Amendment Bill [B15-2013] (“the Bill”) is made by the following organisations:
 - a. **Centre for Environmental Rights** (www.cer.org.za)
 - b. **Endangered Wildlife Trust** (www.ewt.org.za)
 - c. **Worldwide Fund for Nature South Africa** (www.wwf.org.za)
 - d. **BirdLife South Africa** (www.birdlife.org.za)
 - e. **groundWork** (www.groundwork.org.za)
 - f. **Conservation South Africa** (www.conservation.org)
 - g. **Greenpeace Africa** (<http://www.greenpeace.org/africa/en/>)
 - h. **Prof Tracy Humby**, University of the Witwatersrand School of Law
2. The organisations listed above respectfully request an opportunity to make an oral presentation to the Portfolio Committee at the public hearings scheduled to start 11 September 2013, on the submissions contained in this document to the effect that environment authorities are more appropriately placed to consider, issue and ensure compliance with environmental authorisations for mining activities.
3. In this submission, “mining” should be read to refer to all prospecting, mining, reclamation, reconnaissance and exploration activities regulated by the MPRDA.

4. The organisations listed above support the application of the National Environmental Management Act, 1998 (Act 107 of 1998) (NEMA) to mining and related activities. We believe that this change will standardise the procedure and requirements for environmental authorisations for all industrial activities. NEMA and the 2010 Environmental Impact Assessment Regulations (GN R.543 in GG33306 of 18 June 2010) are also far more comprehensive and appropriate than the environmental impact assessment currently provided for in the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) (MPRDA) and the MPRDA regulations, 2004 (No. R. 527 in GG No. 26275 of 23 April 2004). Furthermore, a number of provisions in NEMA will now also be available to assist the enforcement of environmental laws against non-compliant mines.¹

5. It is important to note that our primary objective is to ensure that the environmental impacts of mining are adequately regulated as required by the Constitution, NEMA, the MPRDA, the National Water Act, 1998 (NWA) and the Promotion of Administrative Justice Act, 2000 (PAJA). To achieve this, what is required is at least the following:
 - a. sufficient numbers of suitably qualified and experienced, incentivised and resourced officials to administer, consider and make recommendations on applications for environmental authorisations for mining;
 - b. sufficient numbers of suitably qualified and experienced, incentivised and resourced officials to monitor compliance with environmental authorisations, and with general obligations for responsible environmental management;
 - c. sufficient numbers of suitably qualified and experienced, incentivised and resourced officials to take both administrative and criminal enforcement action where violations are detected.

6. The capacity described above takes many years to establish and develop. For the reasons set out below, we say that this capacity does not currently exist in the Department of Mineral Resources (DMR). If that is correct, the question then is whether it is:

¹ See the detailed critique of the “separate and unequal environmental rules for mines” in a joint submission made to the Minister by the Centre for Environmental Rights on behalf of thirteen non-government organisations on 6 April 2011. That submission, available at <http://cer.org.za/virtual-library/letters/review-of-the-mprda-2002-and-mprda-amendment-act-2008>, contained detailed comments on the challenges posed by the current Act to communities, community organisations and civil society, and made key recommendations for improvements.

- a. in the interests of the environment;
- b. a better use of public funds;
- c. constitutionally acceptable; and
- d. effective and efficient,

to give the statutory mandate for the administration, consideration, compliance monitoring and enforcement of environmental authorisations for mining activities under NEMA to the DMR, thereby requiring the establishment of new, duplicate capacity within the DMR, instead of enhancing existing capacity within environmental authorities to do so.

7. It is our submission that it would be a far more cost-effective use of public funds, and a far more efficient approach, to enhance the capacity within those authorities that at least already have the experience and most of the systems in place to undertake this work. We also submit that doing so is in the interests of the environment, the realisation of Constitutional rights and of sustainable development, and of the sustainable development of mineral resources.

Reason 1: The DMR does not currently have anywhere near the human resource capacity to implement NEMA and the EIA regulations effectively, and we have not seen any feasible plans to address this capacity deficit

Known current capacity for environmental regulation in the DMR

8. Very little information is publicly available on the DMR's environmental regulation capacity as it stands in 2013. Furthermore, very little information is available on actual results achieved to date by these officers at the DMR (see **Reason 2: No track record** below). We know, from our case work and from anecdotal evidence, that there are frequently not more than one or two officials in a region reporting to the regional manager about the processing, amendment, compliance monitoring and enforcement of environmental management plans (EMPs) and environmental management programmes (EMPRs).
9. In 2009, the Minister of Mineral Resources advised Parliament that 78 of the DMR's officials were "dedicated to environmental protection and monitoring". 13 of these 78 positions (16%) were vacant at the time. It was also reported that there was no dedicated budget for environmental protection and monitoring. It is noted that these

“dedicated” posts included everything to do with “environmental protection and monitoring”, which presumably included processing of applications for environmental management plans or programmes, monitoring of compliance and taking enforcement action in the case of non-compliance.² We do not know at what level these “environmental protection officers” were employed.

10. On 17 October 2012, the DMR advised the Portfolio Committee on Mineral Resources that its “approved enforcement and compliance structure for 114 personnel remains entirely unfunded”, but that there was “continuous engagement of National Treasury to fund approved personnel structure”.³
11. In the 2014 Budget, the National Treasury reported that it has allocated R59 million to the DMR for the implementation of the NEMA, an activity that has been “transferred” to the department from the DEA, and the enhancement of the South African mineral resources administration system (SAMRAD).
12. Even ignoring the allocation of an amount to SAMRAD (a huge project in itself), this amount would be wholly insufficient for enhancing existing capacity. We say this for the following reasons: in 2011-12, the DEA spent R41,294 million on their environmental impact management sub-programme, and a further R28,996 million on regulatory services, i.e. compliance monitoring and enforcement – a total of more than R70 million. Bearing in mind that the DEA processes just over 10% of all EIA applications, which means that almost 90% of EIA processing and compliance and enforcement is done at provincial level (and is therefore funded outside of the DEA’s budget⁴), this will give a basic indication of potentially how inadequate an annual allocation of R59 million to the DMR is for:
 - a. implementing new systems and procedures and engaging new staff members to process NEMA EIA applications for prospecting and mining;
 - b. compliance monitoring of those authorisations;
 - c. taking enforcement action in cases of non-compliance; and
 - d. enhancement of SAMRAD.

² National Assembly Question Number 1797, Internal Question Paper Number 22, 16 October 2009

³ Presentation to Portfolio Committee on the DMR’s 2011/12 Annual Report, 17 October 2012

⁴ We have not had the opportunity to do a complete assessment of resources available at provincial level for environmental regulation, but on a conservative assessment, collectively it should significantly exceed the resources available to the DEA.

13. On 31 May 2013, the Minister of Mineral Resources responded to questions in Parliament about the exact scope of capacity available within the DMR for, inter alia, the processing and consideration of environmental management plans and programmes (under NEMA, this would be a far more comprehensive function than under the MPRDA). The Minister responded in a terse statement on 25 June 2013, stating: "There is a review of the organisational structure including the MPRDA amendments."⁵ This reply only came to our attention on 29 July 2013.
14. In August 2013, we wrote to the DMR Chief Director: Mining and Mineral Policy requesting a copy of this review, but we were asked to submit our request to the Director-General, which we did on 26 August 2013. We were also asked to liaise with the DMR's Parliamentary Liaison Officer, who advised that the reply was obtained through Parliamentary privilege, that the public does not enjoy these privileges and that the Minister is not required to respond to us in that forum.
15. Given the fact that capacity was apparently also considered by the Inter-departmental Project Implementation Committee (IPIC) for the alignment of mining and environment legislation, we also requested a copy of the IPIC report from the Chairperson on 27 August 2013.
16. As at date hereof, we have received none of these documents. However, we have no reason to believe that there has been a drastic improvement in the capacity for environmental regulation within the DMR and its regional offices. If there is a group of environmental authorisation, compliance and enforcement officers, they have no public profile and report no results, save for compliance inspections (see **Reason 2: No track record** for more details on these inspections).
17. To give an indication of the scope of the task faced by the DMR should the proposal in the Bill be passed, whereas the DMR had approximately 65 environmental protection officers in 2009:
- a. by 2010-11 its own Mine Health & Safety Inspectorate had 233 filled positions.⁶
 - b. In February 2011, there were 341 posts for environmental impact management alone (i.e. no compliance monitoring or enforcement) in the DEA and provincial environment authorities. The DEA alone had 45 of those posts.⁷

⁵ National Assembly Question Number 1300, Internal Question Paper Number 19, 31 May 2013

⁶ DMR Annual Report 2010-11, p.60

c. By February 2013, the DEA reported the following staff numbers for 2012-13:⁸

i. Integrated environmental authorisations: 67

ii. Compliance monitoring: 22

iii. Enforcement: 30,

in other words, a total of 119 officials just in the DEA (still bearing in mind that almost 90% of EIAs are processed, monitored and enforced by provincial environment departments).

18. For the reasons set out above, we respectfully request the Portfolio Committee vigorously to interrogate the capacity implications of the MPRDA Amendment Bill. If there are no comprehensive plans, with supporting funding, to achieve appropriate resourcing of the responsibility for environmental authorisations under NEMA, then we argue that the proposal in the MPRDA Amendment Bill is flawed, and – subject to a similar assessment for the DEA and provincial environment authorities, that this function is more appropriately placed with environment authorities.

**Reason 2: The DMR has a poor track record on environmental regulation:
environmental impact assessment, compliance monitoring and enforcement**

“South Africa has sound laws and regulations for coal mining, but the implementation is fraught with complications ranging from lack of institutional capacity, power differences among players and government departments and an imbalanced approach to honouring the multiple national responsibilities of addressing historical inequalities and sustainable practices. The number of prospecting licenses issued in South Africa and the frequent accounts of malpractice and disregard of the environment and IAPs suggests that coal mining governance at present is poorly practiced. Regulatory processes are insufficient and good practice often depends on the decision of individual mines to adhere to internal or industry guidelines on good practice.” Coal and Water Futures in South Africa: The case for protecting headwaters in the Enkangala grasslands, WWF-SA 2011, p. 34

Poor track record in relation to environmental impact assessment

Expertise and experience of the DEA and provincial environment authorities in implementing the NEMA EIA Regime

⁷ National Assembly Question 477 in Internal Question Paper NW519E, 25 February 2011

⁸ National Treasury Estimate of National Expenditure for 2013 for the DEA

19. The DEA (together with the provincial environment departments) has been implementing NEMA and the EIA Regulations since those were first promulgated in 1997.

- a. The EIA regulations are now in their third stage of development (the 2010 Environmental Impact Assessment Regulations (GN R.543 in GG33306 of 18 June 2010)). The DEA has undertaken several evaluation and improvement processes to respond to challenges in the EIA regime, including a “Ten Years of EIA” assessment in 2008, as well as the Environmental Impact Assessment and Management Strategy process currently underway.
- b. The DEA has established a National Environmental Assessment System (NEAS) & Public Portal that records all applications for environmental authorisations in an online database. As a result, it can provide detailed statistics for all EIAs received and processed by the DEA itself and by nine provincial environment departments. For example:

Competent Authority	Total No. of applications received	No. of applications finalised	No. of applications pending	No. of applications pending in time frames (Authorities) to respond)	No. of applications pending out of time frames (Authorities) to respond)	No. of applications pending within time frames (Awaiting information from the EAP/Applicant)	No. of applications pending out of time frames (Awaiting information from the EAP/Applicant)
DEA	2552	1912	640	95	14	451	80
EC	2165	1959	206	30	7	153	16
FS	637	545	92	9	0	81	2
GP	4528	4522	6	3	2	1	0
KZN	3229	2770	459	134	2	204	119
LP	2539	2321	218	40	8	127	43
MP	1958	1733	225	46	4	157	18
NC*	238	132	106	10	0	96	0
NW	1973	1845	128	16	0	101	11
WC	4017	3553	464	102	10	332	20
TOTALS	23836	21292	2544	485	47	1703	309

Figure 1: Table of all EIAs received and reviewed per competent authority since 2006, as at July 2013

- c. As is apparent from the above, environment authorities have finalised more than 21,000 EIA applications since 2006.
- d. The DEA has provided support to provincial competent authorities, where required, through implementation of the Occupation Specific Dispensation

structures;⁹ by providing computer hardware and software; by providing administration staff to capture data on the NEAS system.

- e. Where needed, the DEA provides spatial data through a Geographic Information System (GIS) intranet and internet to Case Officers and Applicants.
- f. The DEA has developed a screening tool developed to do pre-screening of issues to assist Case Officers.
- g. The DEA and provinces have developed standards for various particular types of activities.
- h. The DEA and nine provincial competent authorities meet on a quarterly basis through the working group structure to share information, and where possible agree consistent approaches to interpretation of the EIA Regulations.¹⁰

20. This is a significant body of experience and expertise within environment authorities that must be taken into account.

21. The processing timeframes for EIAs by environmental authorities have improved through practice and through amendments to the regulations. In this regard, it is important to recognise that much of the popular political discourse around EIA as “slowing down” or “holding back” economic development is not based in fact. The July 2010 Study *Review of the effectiveness and efficiency of EIA in South Africa* commissioned by the DEA, which evaluated more than 500 EIA case files, found that the average time it took to complete an EIA process from start to finish was 284 days (i.e. just under 9.5 months). On average, authorities took 158 days (i.e. just over 5 months) to evaluate the EIA and to make a decision.¹¹ In comparison, in answer to a Parliamentary question in 2012, Minister Shabangu reported that it took the Department of Mineral Resources approximately 9 months to make a decision on a mining right application.¹² Note that, under the MPRDA, the approval of the EMPR takes place separately from the approval of the mining right.

⁹ Occupation Specific Dispensation structures means revised salary structures that are unique to each identified occupation in the public service.

¹⁰ Information provided by the DEA in their submission to the Portfolio Committee on Water and Environmental Affairs during hearings on the Efficacy of the EIA Regime, 30 July 2013

¹¹ DEAT Study at p.26.

¹² <http://www.miningmx.com/page/news/markets/1453474-SAs-mining-permit-slippages-widen-in-2012#.UWgAobWnrcB>

22. It is also important for the Portfolio Committee to recognise the lengths to which the DEA and environment authorities have gone to streamline and expedite the EIA process. The DEA Strategic Plan 2012-17 contains the following performance indicators and targets:
- a. Percentage of applications for environmental authorisations finalised within prescribed timeframes provided that no more than 400 applications per annum are received (target for 2016-17 is 91%);
 - b. Number of environmental management instruments developed and implemented to assist provinces and municipalities in environmental impact management and aid spatial planning (target for 2016-17 is 1 Environmental Management Framework (EMF) (5 EMFs));
 - c. Environmental Assessment and Management Strategy finalised and implemented (target for 2016-17 is Phase III (long term action plan) implemented);
 - d. Number of tools for mitigation of negative impacts of development to biodiversity developed (targets for 2016-17 are: 4 tools finalised; Minimum requirements for biodiversity management in land-use planning and IEM; Mining and Biodiversity Good Practice Guidelines for South Africa; Conditions prescribed for existing mining activities in protected areas; GIS based spatial land use; Planning tool); and
 - e. Number of tools on mining in sensitive areas developed and implemented (target for 2016-17 is 1 tool developed and implemented).

Expertise and experience of the DMR in implementing any EIA Regime

23. It goes without saying that the DMR has no existing experience in processing EIAs under NEMA, a significantly different and more comprehensive legal regime to the EIA provisions in the MPRDA and its regulations. This means a complete overhaul of the staff structures, implementation strategy, training, standard operating procedures and templates, and performance indicators of the DMR's environmental regulation function. There can be no doubt that this constitutes a complete duplication of the body of work that has been developed by environment authorities over 16 years of implementation.
24. With regard to the DMR's track record in implementing its existing EIA regime under the MPRDA, in its Annual Report for 2011-12, the DMR reported that more than 3,500 applications have successfully been lodged on SAMRAD since April 2011.¹³ The same

¹³ P.63

Annual Report states that 100% of rights issued also had their EMPRs approved, which raises questions about how the adequacy of the assessment of these EMPRs.¹⁴

25. We mention above the information provided by the Minister in 2012 regarding the average 9 months it took to process a mining right application (which does not necessarily include the approval of the EMPR).
26. Because so little information is published about the DMR's experience and expertise in EIA, we request the Portfolio Committee to interrogate the DMR on its expertise in this regard, and to compare that to the experience and expertise of environment authorities described in brief above.

History of poor decision-making when it comes to environmental impacts

27. As organisations concerned with the realisation of section 24 of the Constitution, we believe that the DMR makes poor decisions in its authorisation of prospecting and mining rights applications, particularly in areas:
 - a. of environmental sensitivity or areas of biodiversity and hydrological importance – see the example of Luneburg/Wakkerstroom case below;
 - b. recognised and/or protected under the National Environmental Management: Protected Areas Act, 2004 (which is unlawful);
 - c. despite express prior opposition to the granting of those rights from environmental and water authorities – this was the case with the Vele colliery near the Mapungubwe World Heritage Site in Limpopo authorised by the DMR in 2010, which was opposed by the DEA.
28. We are able to give many examples of such cases, particularly in Mpumalanga and Limpopo, and will present some of these examples to the Portfolio Committee if given the opportunity. In these submissions, we just refer to the following example described in WWF-SA's *Coal and Water Futures in South Africa: The case for protecting headwaters in the Enkangala grasslands*, WWF-SA 2011, p. 34:

"The Luneburg/Wakkerstroom case (southern Mpumalanga) is a useful example of the authorisation of prospecting rights in inappropriate locations. Over a 2.5 year period, a high court application to overturn prospecting rights awarded in one of the

¹⁴ P. 66

most biologically and hydrologically important areas resulted in the rights holder withdrawing, settling out of court and conceding the sensitivity of the area targeted for prospecting. Despite this, the DMR has maintained its stance of objecting to the high court appeal and has therefore not withdrawn. The matter is due to be set down and finalised via the high court shortly and raises the issue of how the DMR can maintain its stance given the obvious environmental sensitivity of the area in question. The situation is further exacerbated in that rights were awarded over two provincial nature reserves (which is illegal). The affected area was proclaimed in 2010 as Mpumalanga's first protected environment (The 23600ha Kwamandlangampisi Protected Environment) further confirming its significant biodiversity value. Many questions about the manner and method of scrutinizing applications in sensitive areas are raised as well as the DMR's response to valid objections. This case clearly brings into question the notion of good governance within the Department."

A slippery slope: risks of handing over powers under NEMA to the DMR, and other authorities

29. We also need to point out that the proposal in the Bill needs to be read in view of the proposed amendment to the definition of "mining area" in the Bill. This amendment makes unclear exactly where the mandate of the DMR would end in authorising adjacent, related, but not necessarily mining activities. This means that the DMR will be expected to consider applications not only for environmental authorisations for prospecting and mining activities, but potentially also for non-mining activities like underground fuel storage, power transmissions lines and roads. There are many technical aspects of these types of activities in respect of which many years of expertise have developed within environmental authorities, all of which knowledge would now potentially have to be transferred to officials in the DMR. Additionally, this does not accord with the concepts of alignment and integration – purportedly objectives of the amendments.

30. Moreover, the National Environmental Management Laws Amendment Bill [B26-2013] (NEMLAB3) currently before the Portfolio Committee on Water and Environmental Affairs purports to give the Minister of Mineral Resources licensing powers under the National Environmental Management: Waste Act, 2008. While we will address that issue in our comments on NEMLAB3, it illustrates the slippery slope created by the proposed in the

Bill. Is the Minister of Water Affairs next going to hand over powers to issue water use licences under the NWA for mines to the Minister of Mineral Resources? These proposals contradict basic principles of departmental mandates, and require unnecessary and expensive duplication of human resource capacity and expertise to implement. Inevitably, this will result in diluted and suboptimal performance that undermines the state's obligation to realise the rights contained in section 24 of the Constitution.

Poor track record in relation to compliance monitoring

31. The DMR has a negligible track record in compliance monitoring of environmental obligations of mines. While more information about environmental compliance inspections by the DMR is available than in relation to any other aspect of regulation, we present this information in comparison to the comprehensive statistics available about health and safety compliance inspections. The discrepancies that this demonstrates may go a long way to explaining why the environmental record of South Africa's mining industry is so much worse than its health and safety record.

32. In 2010, the DMR's predecessor the Department of Minerals and Energy reported in its Annual Report for 2009-10 that its Mineral Regulation branch conducted 3,449 inspections "in the area of environmental management".¹⁵ If it is correct that the Department then had about 65 "environmental protection" officials, that would equate to 53 inspections per official, which means a compliance inspection undertaken by one official every 5 working days. Proper compliance inspections of large industrial facilities like mines should take several officials and be multi-day inspections; writing up inspection reports also is a significant task in itself.¹⁶ Considering that these same officials were responsible for the assessment of EMPs and EMPRs, for compliance monitoring and enforcement, the most favourable conclusion that can be drawn from this is that these 3,449 inspections were not in-depth inspections. It is not clear whether any of these inspections resulted in enforcement action.

¹⁵ Department of Minerals and Energy Annual Report 2009-10, p.76

¹⁶ The Centre for Environmental Rights has on a number of occasions in our case work attempted to get copies of any reports of compliance inspections carried out by the DMR, without success.

33. In 2011-12, the number of environmental inspections apparently dropped to 1898¹⁷. In the same year, 8161¹⁸ health and safety inspections were conducted, meaning that environmental inspections were less than a quarter of health and safety inspections.

Selected performance indicators

Table 32.1 Mineral Resources

Indicator	Programme	Past			Current	Projections		
		2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Number of occupational health and safety inspections and mine audits conducted per year	Promotion of Mine Safety and Health	12 700	7 164 ¹	7 566	8 396	8 396	8 396	8 396
Number of mining rights granted to historically disadvantaged South Africans per year ²	Mineral Regulation	152	300	198	27	90	90	90
Number of industry workshops on compliance issues per year	Mineral Regulation	9	9	32 ³	27	27	27	27
Number of mining charter inspections per year	Mineral Regulation	140	171	100	160	180	200	220
Number of environment inspections per year	Mineral Regulation	1 742	1 907	2 853 ⁴	1 740	1 800	1 900	2 000
Number of planned promotional activities (exhibitions, conferences, workshops) per year	Mineral Policy and Promotion	11	11	15	12	12	12	12
Number of policies developed or reviewed per year	Mineral Policy and Promotion	3	3	1	2	4	2	2
Number of derelict and ownerless mines rehabilitated per year	Mineral Policy and Promotion	0	0	5	10	12	12	13
Number of sustainable	Mineral Policy and	45	40	80	54	67	67	60

Figure 2: Table of selected performance indicators from National Treasury's Estimate of National Expenditure for the 2013 Budget for the DMR

34. Figure 2 above illustrates the discrepancy referred to above in the number of occupational health and safety inspections versus the number of environmental inspections undertaken by the DMR since 2008-9. This table clearly shows us that the DMR regards environmental compliance as fractionally as important as health and safety compliance.

35. It is interesting to note that, in the quarterly report for July-September 2012 against Outcome 10, the participating departments – including the DMR – report on the audit of 21 mines monitored for non-compliance with water licence conditions (against a target of 100).¹⁹ In this report it is noted that “The auditing of mines is a complex procedure that requires highly technical skills and resources. This may negatively impact on achieving the sector target for 2013. DWA, DEA and DMR are investigating a joint approach on the auditing of mines.” This acknowledgement of the complexity of the compliance

¹⁷ DMR Annual Report 2011-12, p.68

¹⁸ DMR Annual Report 2011-12, p.57

¹⁹ Output 1, Sub-output 1.3.5

monitoring of mining sites, and the drastic drop in performance, raises serious questions about the 1898 environmental inspections apparently undertaken in 2011-12.²⁰

Poor track record in relation to enforcement

36. Even less information is available on enforcement action taken by the DMR against violators of environmental provisions in the MPRDA or obligations in EMPs and EMPRs. The DMR publishes no annual compliance and enforcement report like the DEA, and the Minister is extremely vague when she talks about actual enforcement action and results. We know from our case work and from anecdotal evidence that there are numerous examples all over the country of non-compliance by mines with environmental obligations which have been brought to the attention of the DMR, where the DMR has taken no enforcement action at all. In those few cases where the DMR has issued directives, compliance with these directives was rarely monitored and no further action was taken against mines that continue to operate unlawfully. Examples of this can be provided to the Portfolio Committee.
37. In October 2009, the Minister of Mineral Resources advised Parliament that the DMR had found 215 cases of “transgression of environmental management requirements” in the 2008-9 financial year. In response to the question what action the DMR took in response, the Minister said “Action was taken by the Department in accordance with the provisions of the [MPRDA].”
38. In August 2010, in response to another Parliamentary question, the Minister of Mineral Resources refused to provide the names and locations of mines against which action had been taken by her Department for deviations from their respective Environmental Management Plans and Programmes on the basis that “the information is sensitive and may affect the share prices of listed companies if revealed”.²¹
39. In its Annual Report 2010-11, the DMR reported that “a total of 713 Section 93 statutory orders were issued to prospecting rights holders who were found to be operating outside of their approved environmental management plans and prospecting work programmes; who did not review or make adequate financial provision to remedy environmental degradation; who had not submitted annual performance information; or who had not

²⁰ DMR Annual Report 2011-12, p.68

²¹ National Assembly Internal Question Paper 18, Question number 2022, 30 July 2010

paid prospecting fees.”²² No breakdown of the statistics was provided to indicate what portion of those 713 orders related to contraventions of EMPs. The Annual Report also does not indicate whether the rights holders complied with these section 93 statutory orders.

40. The Parliamentary question answered by the Minister on 31 May 2013 included two questions about directives and notices issued; dockets opened with the SAPS for criminal contraventions; dockets handed over to the NPA; guilty verdicts and sentences handed down. The Minister ignored these questions entirely in her response.²³

41. Instead, the information that we do have demonstrates a DMR that either actively neglects complaints of violations, refuses to get involved in any enforcement action despite reports of non-compliance, and even actively resists enforcement action against mining companies in violation.

42. In the past two years, we have seen four cases of criminal prosecution for violations of environmental laws by mines reported in the media. These are:

- a. **S v Anker Coal and Mineral Holdings SA (Pty) Ltd** (unreported) case number ESH 8/11, Ermelo Regional Court²⁴: Plea and sentence agreement concluded. The accused company pleaded guilty for contraventions of section 28(14)(a) of NEMA as well as sections 98(a)(iv) and 98(b) of the MPRDA in that it conducted prospecting in an environmentally sensitive area, failed to rehabilitate the prospecting sites and submitted inaccurate information to the DMR, for which it sentenced to a combined fine of R180 000 (suspended for 5 years) as well as ordered to pay the owner of the farm on which prospecting was conducted an amount of R144 000 in compensation
- b. **S v Golfview Mining (Pty) Ltd** (unreported) case number ESH 82/22, Ermelo Regional Court:²⁵ Plea and sentence agreement concluded. The accused company pleaded guilty to contraventions of sections 28(14) and 24F(1)(a) of NEMA and section 151(1)(a) of the National Water Act, 1998 (NWA) for commencing listed activities without environmental authorisation, causing

²² DMR Annual Report 2010-11, p.10

²³ Note 5 above.

²⁴ Available at <http://cer.org.za/virtual-library/plea-and-sentence-agreements/s-v-anker-coal-and-mineral-holdings-s-a-pty-ltd> (last viewed on 5 September 2013)

²⁵ Available at <http://cer.org.za/virtual-library/plea-and-sentence-agreements/s-v-golfview-mining-pty-ltd> (last viewed on 5 September 2013)

significant and unmitigated pollution to water sources and diverting a water course without authorisation to do so. The company was sentenced to a fine of R1 million (suspended for 5 years) and ordered to rehabilitate its mine and to pay R1 million to the Water Research Council, R1 million to the Mpumalanga Tourism and Parks Agency and R1 million to the Mpumalanga Department of Economic Development, Environment and Tourism.

- c. **S v Nkomati Anthracite (Pty) Ltd** (unreported), case number SH 412/13, Nelspruit Regional Court (28 August 2013)²⁶: Plea and sentence agreement concluded. The accused companies pleaded guilty to contraventions of section 24F(1)(a) of NEMA and section 151(1)(a) of the NWA for commencing listed activities without environmental authorisation, diverting the flow of watercourses, mining in a wetland and polluting water resources without a water use licence, for which the company was sentenced to a R1 million fine and ordered to pay R4 million to the Environmental Management Inspectorate.
- d. **S v Blue Platinum Ventures 16 (Pty) Ltd** (unreported): Directors of the company charged Naphuno Regional Court in Limpopo on 27 August 2013 with various contraventions of mining legislation.

43. In three of the four cases mentioned above, the complaints were initiated by communities (c. and d.) or civil society organisations (a. and b.). As far as we are aware, the DMR made no voluntary attempts to assist the National Prosecuting Authority in the prosecution of these cases, leaving this work to the DEA and DWA.²⁷

44. Perhaps the DMR has declined to give any publicity to other criminal prosecutions of environmental violations by mining companies investigated by the DMR and handed to the NPA for prosecution. If this is the case, we call on the DMR to disclose such information to the Portfolio Committee. The reality is that developing an effective enforcement programme is a serious endeavor that requires time and resources. If the DMR has not done this until now, using its powers under the MPRDA, it is not at all clear why it will do so when given the mandate to enforce compliance with environmental authorisations under NEMA.

²⁶ Available at <http://cer.org.za/virtual-library/plea-and-sentence-agreements/s-v-nkomati-anthracite-pty-ltd> (last viewed on 5 September 2013)

²⁷ <http://cer.org.za/news/media-release-response-recent-cases-enforcement-action-mining-companies-environmental-violations>

Reason 3: The DMR has an inherent conflict between its obligations to promote mining, and its obligations under NEMA

45. As things stand under the MPRDA, DMR officials are expected to encourage and facilitate the exploitation of mineral resources by granting prospecting and mining rights (including in particular to historically disadvantaged South Africans). At the same time, they also have to assess and ensure that the granting of those rights does not cause unacceptable pollution or degradation of the environment. This conflict causes impossible situations for the DMR and its officials, giving it a reputation for failure to cooperate with and recognise the mandate, expertise and positions of departments and agencies responsible for the protection of water resources, biodiversity resources, and sensitive and protected areas. It is also, in our view, the primary reason for the pitiful state of environmental compliance by the mining industry. The proposal in the Bill does nothing to resolve this inherent conflict.

46. This dilemma is well-illustrated by the following statement:

“The full control of DMR over environmental authorisations creates a conflict of interest, as it is the responsibility of the DEA to take care of the sustainable development and conservation of the country’s natural resources. This disempowers government departments that are entrusted with protecting natural resources and leaves room for DMR to exploit natural resources at the expense of sustainable practices.” *Coal and Water Futures in South Africa: The case for protecting headwaters in the Enkangala grasslands*, WWF-SA 2011

Reason 4: The proposal may be unconstitutional due to the impingement on the mandate of provinces

47. While mining is an exclusive national competency under the Constitution, environment is a functional competency shared between national and provincial government.²⁸ This shared function is given effect to in NEMA, particularly in relation to environmental impact management.

48. With NEMA and its EIA regime applicable to environmental impacts of mining, it could well be argued that provinces at least share the function of the regulation of the

²⁸ The Constitution of the Republic of South Africa, 1996 Schedule 4 Part A

environmental impacts of mining with national government. If this is correct, giving the DMR the sole mandate over these functions may be in violation of the Constitution.

49. We also point out that provinces continue to have an interest in and Constitutional mandate over the regulation of many activities closely related to mining. These include the impacts of mining on provincial roads, and land available for development. Excluding provincial competent authorities entirely from decision-making on the integrated environmental impact management of mining, as is proposed in the Bill, may well not pass Constitutional muster.

Reason 5: The proposal is inappropriate because it continues special treatment for the mining industry over other industrial sectors

50. The Bill's proposal would perpetuate the ongoing special treatment given to the mining sector by giving the DMR the mandate to administer, consider, monitor and enforce compliance with environmental authorisations.
51. The Department of Agriculture, Forestry and Fisheries does not administer EIAs for farmers, and the Department of Transport does not issue environmental authorisations to the South African National Roads Agency. There is no justification for the DMR to be the one "tenth competent authority" in these circumstances. Instead, it is a Constitutional imperative to strengthen our environmental authorities to fulfill their Constitutional mandates. This proposal does nothing to achieve that, and instead undermines environmental authorities' power to ensure realisation of section 24 of the Constitution.

Reason 6: The proposal in the Bill is not an efficient use of public funds

52. The Explanatory Memorandum for the Bill states that "Processes are under way to give effect to this arrangement between the two departments regarding the mine environmental management function which include further refinement of both pieces of legislation to ensure that there is no duplication of mandates." With respect, it is quite clear that there will be duplication of mandates and an extraordinary amount of new work required to implement NEMA in a department entirely unfamiliar with its requirements.
53. The Bill itself is coy about the financial implications of its implementation. In the explanatory memorandum attached to the Bill, it is stated that "Financial implications for the entire Draft Amendment Bill will be finalised in consultation with National Treasury."

The explanatory memorandum attached to the National Environmental Management Laws Amendment Bill [B26-2013] which addresses a number of related matters states that “The Bill does not create further financial liabilities to the Department of Environmental Affairs, however the Department of Mineral Resources must create capacity to implement environmental impact management as well as compliance monitoring and enforcement provisions under NEMA” – a clear signal by the Minister of Environmental Affairs of concerns about the DMR’s ability to fund its commitments.

54. As mentioned above, in the Estimates of National Expenditure for 2013 for the DMR it was reported that an amount of R59 million was allocated for “the implementation of the National Environmental Management Act (1998), an activity that has been transferred to the department from the Department of Environmental Affairs, and the enhancement of the South African mineral resources administration system in the Management Mineral Regulation subprogramme. R10.5 million has been reprioritised to this programme over the medium term to cater for increased spending on compensation of employees due to lack of capacity in the programme.”²⁹ We have argued above that R59 million was significantly inadequate for the required capacity. Other than this, we have no indication of how the DMR plans to fund the significant enhancement particularly of human resources.
55. In this regard, it is important to understand that it is challenging, expensive and time-consuming to find the correctly qualified and experienced staff to implement NEMA to the extent required for the implementation of the proposal in the Bill, but implementation will also involve also external costs like:
- a. training of existing and new employees in NEMA EIA procedures, and training for Environmental Management Inspectors, a statutory requirement. EMI Basic Training currently costs approximately R16,000 per official, and does not cover specialised training on issues like crime scene management;
 - b. securing access to geographic information systems that will provide the information required for appropriate decision-making on EIAs;
 - c. external legal advice and representation (including counsel’s fees), particularly necessary when applying new legal requirements;
 - d. establishing databases for environmental authorisations, complaints, compliance monitoring, and enforcement activities;

²⁹ P.12

- e. costs of scientific testing and advice on environmental impacts during compliance inspections and enforcement action;
- f. travel and accommodation expenses for new environmental staff;
- g. compilation and publication of an annual compliance and enforcement report;
- h. procuring office space and equipment required for additional EIA, compliance and enforcement staff (including computer equipment, digital cameras, GPS equipment, personal protection equipment (PPE)).

56. In addition, there are also the additional costs to be incurred in relation to the processing of appeals by the Minister of Environmental Affairs, which we anticipate will increase significantly in the first 5-10 years due to inappropriately granted environmental authorisations for mining activities on the basis of both procedural and substantive flaws. We also anticipate increased litigation against the Minister of Environmental Affairs in respect of appeal and suspension decisions.

57. Conservatively, and assuming that there is appropriate commitment within the DMR to achieve this, it will take a minimum of five years for the DMR to establish a staff structure appropriately skilled and experienced to process applications for environmental authorisations. Then there is the entirely different project of recruiting, training and designating officials able to monitor compliance with those authorisations, to conduct criminal investigations and to take administrative enforcement action. That expertise has already been developed in the DEA and provincial environment authorities through the Environmental Management Inspectorate over the past 9 years.

58. We submit that it is a far better proposition to allocate these funds to expand the existing capacity and expertise in the DEA and provincial environmental authorities, who are already familiar with NEMA and the EIA Regulations, and who have systems in place for the processing, compliance monitoring and enforcement of environmental authorisations.

Reason 7: The proposal in the Bill would perpetuate inadequate protection of the environment and an unsustainable development of mineral resources.

59. We have argued above that the DMR has a woeful track record in the environmental regulation of mining. This is particularly evident in the large-scale impacts of mining on water resources. Some of these issues in relation to the coal mining industry are described in *Coal and Water Futures in South Africa: The case for protecting headwaters in the Enkangala grasslands*, WWF-SA 2011 and the sources cited therein, but there is a

wealth of literature in South Africa, including by the Water Research Commission, that deals with the impacts of mining on the environment in South Africa.³⁰

60. Even assuming adequate resourcing and political commitment in the DMR, the delay in establishing an appropriate staff structure within the DMR that can demonstrate adequate implementation of NEMA through EIAs, compliance monitoring and enforcement will have devastating consequences for the environment and sustainable development of mineral resources. These consequences will be in addition to the consequences that we already face as a result of decades of neglect of the environmental impacts of mining.

Conclusion

61. As environmental organisations, we favour the mainstreaming of the environment into decision-making by all public bodies. However, we also believe that the authorities with the correct mandate, incentive and experience should exercise the function of securing sustainable development as is required by the Constitution. We have argued for many years that giving the function of environmental regulation of mining to the same department mandated to promote mining means that it is fundamentally not in the interests of that department to be the strong regulator that is required to manage the impacts of mining on the environment. This is also why South Africa is now spending billions of rands in attempts to halt the detrimental impacts of acid mine drainage, and why our public health system is bearing the costs of the impacts of air pollution from mine dumps and mining activities on the health of South African citizens.

62. In view of the tragic history of the environmental regulation of mining in South Africa, one cannot come to any other conclusion but that the proposal as contained in the Bill is a political outcome that has been translated into an impossibly complicated, ill-conceived regulatory morass. A far simpler solution exists, which is to treat mines like all industrial facilities that need to obtain their environmental authorisation from the environmental authorities with the mandate, expertise and experience to ensure the realisation of section 24 of the Constitution.

³⁰ www.wrc.org.za

Changes to the Bill recommended:

63. Amendments to the Bill and the MPRDA as amended by the 2008 Amendment Act; and amendments to NEMA to the effect that the Minister of Environmental Affairs and Members of provincial Executive Councils responsible for the environment are the only authorities that can issue, monitor compliance and enforce environmental authorisations, and that can hear appeals against decisions under NEMA.

Signed on behalf of

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