Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

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Your ref: N Nkotsoe
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Dear Ms Ngcaba

WRITTEN COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS

1. In this document, the Centre for Environmental Rights submits its written comments on the Draft Environmental Impact Assessment Regulations published for comment in Government Gazette No. 37951 of 29 August 2014 under Notice 733 of 2014 (Draft Regulations).

2. The Centre's mission is to advance environmental rights in South Africa, and its vision is stronger civil society participation in environmental governance. The CER makes submissions on the Draft Regulations based on our experience in applying the legislation in question, both in our own name and on behalf of numerous civil society and community clients.

3. We have four broad concerns about the Draft Regulations as published:

    a. the timeframes proposed in the Draft Regulations;
    b. the absence of adequate climate change impact screening in the Draft Regulations;
    c. the inappropriateness of the basic assessment process as provided for in the Draft Regulations; and
    d. the failure of the Draft Regulations adequately to provide for "no net loss" initiatives, such as biodiversity offsets. These issues will be addressed in this letter.

4. In addition, we have concerns about specific regulations, paragraphs and listing notices in the Draft Regulations. These concerns are listed in the Excel spreadsheet attached hereto, together with specific recommendations for amendments.

The proposed timeframes

5. While we acknowledge that the timeframes proposed for the completion of basic assessment reports, environmental impact assessment reports and scoping reports in the Draft Regulations originate from an inter-ministerial agreement on the so-called "One Environmental System," we are advised that these timeframes are woefully insufficient for scientifically sound impact assessment, and believe that they are impractically rigid. The timeframes afforded to decision-makers to consider applications and make decisions and to interested and

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affected parties to make comments to competent authorities on reports prepared by applicants are similarly insufficient. We will argue below that these timeframes may well limit the right to have the environment protected for future and present generations and the right to administrative justice in sections 24 and 33 of the Constitution of the Republic of South Africa, 1996 respectively.

Proposed timeframes for applicants

6. The proposed timeframes do not allow applicants sufficient time to fulfil all of their obligations in terms of the Draft Regulations. In the short timeframes provided, applicants are required to:

    a. collect sufficient information to underpin baseline studies;
    b. scope a proposed project;
    c. conduct the environmental impact assessment study;
    d. commission and conduct specialist reports;
    e. diligently identify alternatives;
    f. determine the best practicable environmental option; and
    g. design and implement an adaptive environmental management system for a proposed project.

7. Also within these short timeframes, applicants must diligently and meaningfully engage in public participation around the impacts of the proposed activity. Scoping reports, basic assessment reports and environmental impact assessment reports must, if they are to be scientifically sound, take into account natural cycles in affected areas induced by changes in seasons, weather, rainfall, evaporation, the seasonal presence of species in the area, etcetera. It is not uncontroversial to say that this will be impossible to accomplish within the proposed timeframes.

8. Moreover, different projects will necessitate different timeframes for the completion of the reports referred to above. Longer periods of study may for instance be required to gauge the impact of a proposed project on sensitive, vulnerable, highly dynamic or stressed ecosystems. In addition, periods of study longer than those prescribed in the Draft Regulations may well be necessary to better understand the likely impacts of the project on climate change and the likely impact of climate change on the project. Standard and largely rigid timeframes are thus also inappropriate for this reason.

9. The insufficient timeframes will furthermore disincentivise environmental assessment practitioners (EAPs) from properly performing their duties in terms of draft regulation 13.

10. The short timeframes may well also result in incomplete or inadequate environmental impact assessment studies that then inform erroneous decisions on granting or refusing environmental authorisations. This, in turn, could lead to inadequate or vague mitigation and management conditions in environmental authorisations that are un-auditable and unenforceable. Those responsible for the pollution or environmental degradation caused by the project would not bear the costs of remediation, leaving the public to shoulder that burden.

11. Most importantly, inadequate timeframes for assessment will simply lead to poor quality decisions, more appeals, and more litigation – all with costs implications for the fiscus.

12. It is therefore submitted that these timeframes violate at least the following National Environmental Management Principles in section 2 of the National Environmental Management Act, 1998 (NEMA) (own emphasis):

    a. *"(4)(a)(viii) that negative impacts on the environment and people's environmental rights be **anticipated** and prevented, and where they cannot be altogether prevented, are minimised and remedied;"*

    b. *"(4)(b) [e]nvironmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must **take into account the effects of a decision on all***

aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option;"

c. *"(4)(i) [t]he 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;"*

d. *(4)(p) "[t]he costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse helath effects must be paid for by those responsible for harming the environment; and*

e. *"(4)(r) [s]ensitive, vulnerable, highly dynamic and 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."*

13. As a violation of section 2 of NEMA could be argued to be a limitation of section 24 of the Constitution, we strongly urge the Department to reconsider the timeframes prescribed in the Draft Regulations and the "One Environmental System."

14. To the extent that these timeframes are a fait accompli, we request the Department to give consideration to the possibility of limiting the application of the timeframes in the Draft Regulations to activities related to mining, prospecting, exploration, and production as contemplated in the Mineral and Petroleum Resources Development Act, 2002 and strategic integrated projects as contemplated in the Infrastructure Development Act, 2014.

Proposed timeframes for public participation

15. 30 to 60 days is allotted for public participation in the basic assessment and environmental impact assessment procedures proposed by the Draft Regulations. The additional 30 days for public participation where the "initial public participation process… resulted in significant changes or new information being added to the [draft] basic assessment report, [environmental impact assessment report] or EMPr or closure plan and that the revised basic assessment report or EMPr or closure plan will be subjected to another public participation process of at least 30 days" is welcomed. It is however submitted that this timeframe is still too rigid and for this reason limits the right of interested and affected parties to participate in the decision-making process.

16. The right to participate in administrative decision-making is entrenched in section 33 of the Constitution, which provides for the right to procedural fairness in administrative decision-making, and in sections 3 and 4 of the Promotion of Administrative Justice Act, 2002 (PAJA), which gives effect to this right. In terms of section 3(2)(a) of PAJA, "a fair administrative procedure depends on the circumstances of each case." It is submitted that public participation in administrative decision-making related to environmental matters cannot be constrained by rigid timeframes if it is to be meaningful and that these inflexible timeframes for public participation consequently constitute a limitation of the right to participation and the right to procedural fairness in administrative decision-making.

Proposed timeframes for decision-making

17. The short timeframes afforded to decision-makers are also inappropriate and arguably unlawful. Decision-makers are afforded a mere 44 days to consider scoping reports and 107 days to consider basic assessment reports and environmental assessment reports before making decisions on applications for environmental authorisation. Taking into account the limited capacity of competent authorities (including, in particular, the Department of Mineral Resources, expecting decision-makers to apply their minds properly to draft reports, request additional information, conduct site inspections, cause a peer review of the draft reports to be done, draft necessary conditions for environmental authorisations and make decisions that comply with the Constitutional standards for

decision-making, is simply not reasonable or advisable. It is submitted that the short timeframes will lead to bad decision-making, resulting in a flood of appeals and litigation.

18. The short timeframes for the finalisation of decisions furthermore violate National Environmental Management Principle 2(4)(i), which provides that "*[t]he 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***" (own emphasis). As already mentioned, a violation of the national environmental management principles constitutes a limitation to section 24 of the Constitution, which may well be found to unreasonable and unjustifiable and therefore unconstitutional.

19. International experience shows that the strongest laws do not include a set timeframe for decision-making, or at least provide for more flexible timeframes. In British Columbia for example, the Environmental Assessment Act, 2002 provides that an administrator has 30 days to decide to accept an application for review. If an application has been accepted by the administrator, a recommendation to grant or refuse the application must be made to the decision-maker within 180 days of the decision to accept the application. The decision-maker is then granted a further 30 days to make a decision to grant or refuse an application. However, if the decision-maker requests further information, the project proponent has three years to provide the information. Moreover, and most significantly, the decision-maker has the authority to suspend the prescribed time limits. An approach similar to this one would most certainly pass Constitutional muster.

Addressing climate change impacts and risks

20. The extent and severity of climate change impacts is recognised to have severe implications for all future development. With EIA being the only legislated tool in South Africa for assessing suitability of development proposals (projects, plans and programmes), inclusion of climate change impacts into EIA assessments and authorisations is essential.

21. Broadly, this dictates expanding the scope of existing EIA requirements to explicitly include climate change considerations in full as part of the assessment and authorisation processes. Such screening must include both mitigation - potential contribution to further greenhouse gas (GHG) emissions - as well as adaptation to the climate change mitigation measures we are already committed to. Every development decision must be based on its contribution to both mitigation and adaptation.

22. Assessments will need to cover both key generic components of all proposed developments for assessing for GHG emissions (both direct and indirect e.g. direct fossil fuel use versus land clearing, cement-use etc.) and all and any further climate change mitigation and adaptation potential, and secondly specific sector and/or listed activity considerations. A further vitally important aspect is to incorporate direct cumulative impacts in the assessments as well as indirect cumulative effects. This is obviously critically important in terms of cumulative GHG contributions, within a framework of national remaining available "GHG-space", which is rapidly diminishing. Indirect cumulative effects are often missed, for example, the rising vulnerability of communities and infrastructure to the increasing prevalence, magnitude and speed of fires due to hotter temperatures, more dry days and increased wind speeds working together.

23. Further, extreme event defences cannot simply divert the impacts elsewhere where perhaps inhabitants are unable to afford a similar level of infrastructure, e.g. in hard coastal defences which lead to significant erosion elsewhere. Further, river systems which contain multiple large dams will need to look at the likely impact of failure of upstream dams on those lower down which might otherwise not have been impacted by an extreme event to the same extent. Finally, future developments must be designed for contributing to restoration of *ecological infrastructures*, whereby natural systems are maintained, enhanced and restored to better enable adaptation based on *Ecosystem-based Adaptation (EbA)*.

24. Assessment of development design for climate change must encompass:

a. maximising reduction in direct and indirect GHG emissions;

b. maximising potential for further mitigation, including 'sequestration offsets', ideally seeking a negative GHG balance between a. and b.;

c. optimising adaptation to impacts over the full life of the development, using best available knowledge and modelling projections of future impacts, which will become more extreme over time;

d. ensuring that such adaptations are not misdirected 'mal-adaptations' which will fail and/or exacerbate impacts/increase vulnerability over time;

e. contributing to restoration of ecological infrastructures to better enable EbA (building improved resilience people, ecosystems, etc.).

25. The objective of any development in an uncertain world must be to obtain a net positive gain in overall contribution to sustainability targets and not just short-term economic "gains" which will cost more in the long-term. We cannot afford expensive and damaging development failures or worse, activities which are mal-adaptations and which increase vulnerabilities through inadequate consideration of climate change impacts. Therefore both risk assessment and the precautionary principle must predominate in the assessments in order to reduce vulnerability to climate impacts whilst at the same time continually improving the resilience of people, communities, built infrastructure and natural systems.

26. The pace, extent and uncertainty of magnitude of climate change impacts, in particular extreme events, requires a transformation in developmental mind-sets and approaches in several aspects. As such, it is critical to understand that the process of incorporating climate change adaptation into project planning is *as much a social process as a technical one*. It requires significant training and awareness raising as to the science and seriousness of climate change and the need for its fullest consideration going forward. Most importantly is a shift from designing for "fail-safe", which is impossible under undefinable climate extremes to designing for "safe-fail" whereby in the likely eventuality of failure, all repercussions are catered for and the path of "least regret" chosen. This is especially important for developments which would have dire knock-on effects in the event of failure, for example, nuclear power facilities (as per Fukushima in Japan), large dams and hazardous waste facilities.

The Basic Assessment

27. Although the basic assessment process is already part of the existing 2010 EIA Regulations, we are of the view that it is important to raise a fundamental concern with the basic assessment as a "fast track" EIA for activities with less significant impacts in these comments.

28. The objectives of the BAR are the same as the EIR. If a BAR is triggered, the tasks required are essentially the same as the tasks required to satisfy the EIR process. The BAR and specialist reports must be submitted after a public participation process. Likewise, the Scoping report plus comments after public participation must be submitted, and then the EIR after public participation. The report contents for the BAR (Appendix 1) are essentially identical to the EIR in scope.

29. The key difference between the BAR and S&EIR process is the additional round of public participation required – which may give the impression that BARs are a "faster track", less expensive, less onerous process. However, the current BAR requirements in fact simply tantamount to an EIA anyway, without the benefits of having focused the study through proper scoping. Even worse, in small projects with insignificant impacts, completion of the current BAR process is inappropriately long-winded and costly.

30. In essence, and in terms of international best practice, one wants to identify the potentially significant impacts and key risks as early as possible through some form of scoping process which need not be onerous, but which involves stakeholder engagement to home in on those key issues that might need to be investigated further if

ready answers are not available, and/or for those impacts or risks that cannot be avoided. By doing this scoping exercise as a first step it becomes possible to refine the scope of further work to focus on the real problem areas and/or to end the EIA process immediately if all issues can be satisfactorily addressed.

31. We are advised by members of our CER expert panel that the approach of undertaking scoping first to identify the key issues, alternatives and scope of any additional work (if relevant), and then undertaking only the work needed to assess and evaluate the key issues or impacts, is a far better and efficient system. Decisions could be taken based on the findings of the scoping report – i.e. where it was not necessary or appropriate to "do everything"; only those extra steps required (in some cases one specialist study only). A decision could then be taken on the basis of a scoping report, provided that there were no significant negative impacts and proposals to mitigate, manage negative impacts through EMP were adequate and sufficient. We are advised that the introduction fo the basic assessment has compounded problems of inefficiency rather than streamlining EIAs.

Net gains for the environment though appropriate remediation and offset measures

32. Section 2(4)(a) of NEMA, in relevant part, provides as follows (own emphasis):

"(4)(a) 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 avoided, are minimised ***and remedied****…"*

33. Arguably, this section demands that an activity which impacts on the environment must not result in a net loss for the environment, or formulated in the reverse, must result in a net gain for the environment. This can be achieved by appropriate remediation and offset measures. It is therefore disappointing that the Draft Regulations do not provide specific guidance to applicants and decision-makers on identifying and formulating conditions related to remediation of and compensation for negative impacts on water, air and biodiversity that will be caused by a proposed project and offsetting such damage. By way of example, we cursorily illustrate the difficulties caused by the lack of guidance for biodiversity offsets below.

34. Despite not being explicitly provided for in NEMA or the current EIA Regulations, biodiversity offsets are increasingly being utilised as a tool to compensate for the negative impacts of developments on the natural environment. The failure to explicitly provide for biodiversity offsets in legislative instruments has meant that decision-makers are afforded an extraordinarily wide discretion with regards to selecting biodiversity offsets as appropriate conditions to environmental authorisations and formulating the wording of biodiversity offset conditions. This, in turn, has led to bad decision-making and vague formulations of biodiversity offset conditions. We therefore strongly suggest that the Draft Regulations provide applicants and decision-makers with better clarity regarding the use of biodiversity offset conditions.

35. Biodiversity offsets, moreover, do not fit comfortably into the current national environmental management system, which is comprised of Chapter 5 of NEMA and the current EIA Regulations. This is so for several reasons.

    a. Biodiversity offset sites are often located on properties outside of the cadastral unit or cadastral units in respect of which an environmental authorisation was granted. In these circumstances, there is no guarantee that the offset condition would be implementable as the holder of the environmental authorisation would not necessarily have the right to enter upon the area identified as the offset area and carry out the measures prescribed in the environmental authorisation. Furthermore, a biodiversity offset measure pertaining to offsite land may also be found to be unlawful on account of it not being authorised by national environmental management system.

b. Biodiversity offset management plans can often only be prepared after an applicant has been granted environmental authorisation and once the site for a particular biodiversity offset has been secured. It is therefore often not possible to submit biodiversity offset management plans to inform decision-making.

c. Areas set aside for biodiversity offsets may well be overlooked by environmental management inspectors as the emphasis is on conservation management and ecosystem restoration, not impact on the environment. Compliance monitoring and enforcement of biodiversity offset conditions may well therefore be neglected.

36. We appreciate the opportunity to make submissions on the Draft Regulations. Please advise if you require more information on any of our submissions.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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