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

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Your ref: Ms Nomsa Mahlale
Our ref: MF/MT/RH/TD/CH/LC/SK/AM
Date: 22 September 2014

Dear Ms Ngcaba

WRITTEN COMMENTS ON THE DRAFT NATIONAL APPEAL REGULATIONS

1. In this document, the Centre for Environmental Rights submits its written comments on the Draft National Appeal Regulations published for comment in Government Gazette No. 37937 of 22 August 2014 under Notice 709 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 strongly oppose the timeframes proposed by the Draft Regulations, in particular the 20 calendar days afforded to appellants for the submission of an appeal, as well as the 20 days from the administrator's recommendation given to appeal authorities to make decisions on appeal, on the basis that it violates the principles of administrative justice as contained in the Constitution of the Republic of South Africa, 1996 (Constitution) and the Promotion of Administrative Justice Act, 2000 (PAJA). These truncated timeframes also violate numerous environmental management principles in the National Environmental Management Act, 1998 (NEMA) aimed at promoting sustainable development, environmental management that places people and their needs at the forefront and serves their physical, psychological, developmental, cultural and social interests equitably, and public participation in environmental governance.

4. While we acknowledge that these timeframes are proposed pursuant to an inter-ministerial agreement, the need for efficient and expedited decision-making must be balanced against the right to administrative justice as enshrined in the Constitution and PAJA. We submit that the Draft Regulations fail to achieve this balance.

5. Furthermore, we have concerns about specific regulations that we set out in these submissions. We also recommend the re-formulation of certain regulations to ensure compliance of the Draft Regulations with just administrative action.

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Regulations 1 and 6: Definition of "independent"

6. The definition of "independent" is only applicable to members of an appeal panel contemplated in draft regulation 6. This draft regulation provides that an appeal authority may source expert advice or constitute an appeal panel to make a recommendation on an appeal. We suggest that the scope of the definition of "independent" is widened to include an expert giving expert advice on appeal. Moreover, it is imperative that the requirements in the definition not be in the alternative, but that both requirements be met.

7. We therefore recommend the following amendment to the definition of "independent":

> **"independent"**, in relation to a person appointed as a member of an appeal panel, or a person providing an appeal authority with expert advice as contemplated in regulation 6, means…
>
> (a) that such a person has no business, financial, personal or other interest in the appeal in respect of which that person is appointed in terms of these Regulations other than fair remuneration for work performed in connection with that appeal; **[or]** **and**
> (b) ….

8. The Draft Regulations do not use the word "independent" anywhere other than in Regulation 1 (the "Interpretation" section). We therefore recommend that Regulation 6(1) be amended as follows:

> "6(1) If the appeal authority is of the view that expert advice must be sought or that an appeal panel must be appointed, the appeal administrator must source an independent expert for advice or constitute an independent appeal panel within 10 days from the date of receipt of an instruction from the appeal authority".

Regulation 3: Application of Regulations

9. Given the short timeframes proposed by the Draft Regulations, with significant legal and capacity implications for both the Minister and Department of Environmental Affairs and interested and affected parties (IAPs), and noting that there are other specific environmental management Acts that could benefit from prescribed appeal procedures, it is not clear why the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) (NEMBA) is included in the application of the Draft Regulations.

10. Furthermore, given the rationale for the "One Environmental System" for mining, it appears to us that it should also be permissible to limit the application of the Draft Regulations to appeals in terms of NEMA and the National Environmental Management: Waste Act, 2008 (NEMWA) that are related to exploration, prospecting, mining or production as contemplated in the Mineral and Petroleum Resources Development Act, 2002 (MPRDA). That would at least limit the scope of the problems and potential challenges described in this submission to mining-related matters.

11. We therefore suggest a re-formulation of draft regulation 3(1) as follows – a proposal that is also in line with the approach followed in relation to mining-related appeals under the National Water Amendment Act, 2014:

> (1) These Regulations are only applicable to a decision related to prospecting, exploration, mining or production as contemplated in the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) that is subject to an appeal to the Minister or MEC in terms of the:
>
> (a) National Environmental Management Act, 1998 (Act No. 107 of 1998); **or**
> **[(b) National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004;]**
> (b) National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008).

12. Given that the regulations in the 2010 EIA Regulations dealing with appeals have been excised from the draft 2014 EIA Regulations currently available for comment, this would require a separate set of appeal regulations applicable to other decisions made in terms of NEMA and NEMWA, as well as decisions made in terms of other specific environmental management acts, which currently do not have prescribed appeal procedures, including the National Environmental Management: Protected Areas Act, 2003; NEMBA; the National Environmental Management: Air Quality Act, 2004; and the National Environmental Management: Integrated Coastal Management Act, 2008.

Regulation 4: Appeal submission

20 day period violates PAJA and NEMA principles

13. As mentioned at the outset, we oppose the timeframes proposed by the Draft Regulations, particularly the 20 calendar days afforded to appellants for the submission of appeals. For the many IAPs (particularly affected communities) who have limited resources, it is already enormously difficult to meet existing timeframes. Further shortening the timeframes makes their ability access appeals simply more difficult. This is exacerbated by the fact that no explicit provision is made for condonation of appeals (or responses) made outside of the prescribed period. To (a) decide whether an appeal is appropriate, and (b) prepare an appeal submission (noting the technical nature of most environmental authorisations), IAPs frequently require legal advice, as well as other expert input. It is simply not feasible for IAPs to secure such services and assessments and prepare appeals in a 20 day period.

14. The Environmental Law Association (ELA) has circulated comments[1] on the draft Appeal Regulations, and make a similar point: "*Within 20 days, the appellant is required to obtain copies of all the relevant environmental reports; appoint environmental specialists to review the relevant documents and determine the nature and extent of the impact; depending on the expert findings, prepare and submit an appeal which may require significant resources and may prejudice the appellant as the time period in which to conduct all of these actions is not sufficient*."

15. We contend that this inadequate period for submitting the appeal violates the principles of administrative justice as contained in the Constitution and PAJA; it also violates numerous environmental management principles in NEMA - aimed at promoting sustainable development, environmental management that places people and their needs at the forefront and serves their physical, psychological, developmental, cultural and social interests equitably, and public participation in environmental governance.

Calculation of 20 day period

16. The Draft Regulations propose that the 20 day timeframe within which the appellant is required to submit his or her appeal submission be calculated from the day on which the notice of the decision ***was sent*** to the registered IAPs. This is an extremely unreasonable and impractical proposal that will disproportionately prejudice IAPs.

17. Firstly, it places the burden on IAPs to ascertain from the applicant or the authority the day on which the decision was in fact sent to registered IAPs. Such enquiries will inevitably take time, shortening the already extremely short period within which appeals must be submitted, and making it extremely difficult to calculate the deadline for submission.

18. Secondly, given that decisions may be communicated to stakeholders by registered or ordinary post in terms of section 47D of the NEMA, the time that it takes the decision to reach applicants and IAPs by post will be deducted from the already extremely short time frame for submission of appeals. It is furthermore possible that IAPs would

[1] The ELA comments appear to suggest that "decision" always means "copy of the authorisation". This is not our experience, particularly in mining cases, and should be clarified in the EIA Regulations. Moreover, we do not believe that current notice requirements of the decision are adequate. We will raise that point in our submissions on the draft EIA Regulations currently available for comment.

only receive notice of the decision after 20 days – or more - have passed from the date that the decision was sent, i.e. that by the time they receive the decision their time period for submitting an appeal will already have expired.

19. Thirdly, this proposal creates a perverse incentive for applicants keen to avoid any appeals to use the slowest form of communication allowed under section 47D of NEMA.

20. The ELA also argues that the 20 day period "*may be impractical in the circumstances*"… *"[f]or example, in a situation where an appellant [who] may have not been notified of a proposed development only becomes aware of the application once the authorisation is sent to him or her*."

21. The potential implications of Regulation 4(1)(a) - as currently worded – are that this regulation does not comply with the principles of administrative justice, and is vulnerable to legal challenge. We therefore recommend that the following proviso be included in draft regulation 4(1):

22. We therefore recommend the following re-formulation of draft regulation 4(1)(a):

    "(a) the date that the decision for an application for an environmental authorisation, a permit, or a waste management licence was **[sent to]** received by, or reasonably should have been received by, the registered interested and affected parties…"

    (b)…

    provided that an appeal authority may condone the late filing of an appeal submission if there is good cause to do so."

23. Further support for our recommendation lies in the following:
    a. The fact that responding statements are required to be submitted within 20 days of **receipt** of the appeal submission – there is no reasonable justification for different procedures at different stages of the process.
    b. The fact that the MPRDA's section 96 also provides for appeal "within 30 days (sic) becoming aware of such administrative decision"; and the MPRDA Regulations provides for "30 days after he or she has become aware of or should reasonably have become aware of the administrative decision concerned".[2] This position has not changed in the Mineral and Petroleum Resources Development Amendment Bill [B15B-2013], which also provides for appeal within a "prescribed period of becoming aware of such administrative decision".[3]

24. If it is decided to disregard our comments in paragraphs 9 to 12 above, we point out there is no reference in draft regulation 4(1)(a) to a permit issued in terms of NEMBA. As the Draft Regulations are applicable to decisions taken in terms of NEMBA, it is unclear whether or not the prescribed 20 day timeframe within which an appeal must be lodged also applies to permits issued in terms of NEMBA. We therefore suggest the addition of the words "a permit" to this sub-regulation.

Regulation 5: Responding statement, and absence of answering statement

25. The Draft Regulations clearly envisage a wide appeal as far as it relates to the appeal submission. Although draft regulation 5 does not stipulate whether "supporting documentation that did not form part of the documentation considered when the original decision was made by the licensing authority" (as per draft regulation 4(2)(b)(ii)) may be submitted as part of a responding statement, there may well be instances where the inability to submit information supporting the response of the respondent in the appeal to the appeal submission would

[2] Mineral and Petroleum Resources Development Regulations GN R 527 under Government Gazette No. 26275 published on 23 April 2004, Regulation 74(1)

[3] Clause 71(a), which is an amendment of section 96 of Act 28 of 2002, as amended by section 68 of Act 49 of 2008

fundamentally prejudice that respondent. In that instance, the appellant must also be given an opportunity to answer any "new information not dealt with in the appeal submission of the appellant", as currently provided in Regulation 63(2)(b) of the 2010 EIA Regulations. It is a fundamental principle of administrative and natural justice that a party be able to respond to and answer any new information raised by the other party, failing which that new information raised by the respondent in the appeal must necessarily be struck out.

26. These difficulties come to a head when it comes to the time limit placed on the decision to be made on the appeal in draft regulation 7(1). No provision is made for extension of this timeframe, but it is also possible and likely that administrative justice will, prior to the decision, require an additional opportunity for the appellant to answer new material raised in the appeal. That decision made without allowing for an answer must then be made disregarding any information raised in the responding statement; failing which, the appeal decision will be liable to be set aside.

27. Given the risks posed by legal challenges to appeal decisions made in the circumstances described above, we therefore recommend that both the respondent's ability to support its responding statement with supporting documentation, and the appellant's ability to answer any new material, be clearly provided for in the Draft Regulations.

28. In line with the recommendation made on the timeframe for the appeal submission, we therefore recommend that draft regulation 5 also be amended as follows:

    "5. The applicant, the decision-maker, interested and affected parties and organs of state must submit their written response to the appeal authority and the appellant within 10 days from the date of receipt of the appeal submission, provided that the appeal authority may condone the late filing of the written response and supporting documentation if there is good cause to do so."

Regulation 6: Appeal panel

29. We welcome the retention of the provision for the constitution of an appeal panel. We submit, however, that such panel must be constituted for all appeals. This will ensure high quality and consistent decision-making on appeal, and thereby, deter litigation.

30. If our comment in paragraph 29 is disregarded, we point out that the phrase "is of the view" is too subjective. Instead, we suggest the inclusion of an objective test through the following re-formulation of this draft subregulation:

    (1) "If the appeal authority [is] reasonably believes that the appeal is legally or technically complex, expert advice must be sought or an appeal panel must be appointed, and the appeal authority must source independent expert advice or constitute an independent appeal panel, or both, within…"

31. Draft regulation 6(1) furthermore does not specify within which timeframe the appeal authority has to give instruction to the appeal administrator to source an expert or to constitute an appeal panel. The absence of such a provision may well result in situations where an appeal process is halted and the final decision on appeal therefore delayed. We therefore suggest the following reorganisation of draft regulation 6:

    (1) A failure by the appeal authority to give instruction to the appeal administrator to source the independent expert advice or to constitute the independent appeal panel as contemplated in subregulation (1) within 5 days from the receipt of the responding statement by the appeal administrator, shall be deemed as a decision by the appeal authority not to source such expert advice or to constitute such appeal panel.

    (2) The independent expert or the independent appeal panel must provide advice to the appeal administrator within 10 days from the receipt of an instruction from the appeal administrator.

32. Draft regulation 6 does not make provision for the membership of an appeal panel. We recommend that an appeal panel be constituted of appropriately qualified external and independent experts with the requisite knowledge, experience and skills to provide an appeal authority with meaningful recommendations. Such a composition would also ensure that the panel is objective and independent. There is also no indication of whether there will be a "standing" panel of available experts. If not, the extremely short timeframes within which these experts and/or panels must be constituted is likely to mean that the use of this section is not possible from a practical point of view. This has the potential to compromise the quality of appeal decisions.

Regulation 7: Decision on appeal

33. As mentioned above, we oppose the very short timeframe of 10 days given to the appeal authority to make a decision on appeals. Many of these appeals are necessarily going to be technically and legally complex, and it is simply not possible to maintain the quality of appeal decisions within such time constraints. The consequence of this will be an increase in review proceedings on the basis of appeal decisions that do not comply with PAJA.

34. No reference is made to expert advice in draft regulation 7(2). We therefore suggest the following re-formulation of this draft sub-regulation:

    (2) "The appeal administrator must make a recommendation on the appeal to the appeal authority within 10 days of the receipt of the written response referred to in regulation 6(2), in the event that an appeal panel has been constituted or expert advice has been sourced."

Regulation 8: Communication

35. As already pointed out, section 47D of NEMA provides that decisions made in terms of NEMA may be communicated to persons by, inter alia, ordinary mail and registered mail. This provides parties to the appeal process with the perverse incentive of using ordinary and registered mail to communicate with opposing parties in order to shorten further the already short timeframes provided for in the Draft Regulations. In our opinion, section 47D of NEMA does not legally require that the means of communication prescribed by it should apply to the Draft Regulations. We therefore suggest that draft regulation 8 be replaced by a list of acceptable means of communication, specifically excluding ordinary mail. This is a fair request that will mitigate some of the administrative justice challenges created by the Draft Regulations and its constrained timeframes, while being of negligible cost to developers.

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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