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Advancing Environmental Rights in South Africa

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Dear Mr Andreas

COMMENTS ON THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL, 2012

1. In this document, the Centre for Environmental Rights (CER) submits comments on the Mineral and Petroleum Resources Development Amendment Bill, 2012 published for comment on 27 December 2012 (Notice 1066 of 2012, Government Gazette No. 36037, 27 December 2012) ("the Bill").

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

3. The CER is interested in making submissions on the Bill 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.

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4. In this regard, we would like to remind the Department of a detailed submission made to the Minister on behalf of thirteen non-government organisations on 6 April 2011. That submission, attached hereto, contained detailed comments on the challenges posed by the current Act to communities, community organisations and civil society, and made key recommendations for improvements. Where appropriate, we will refer back to this submission as the "2011 Civil Society Submission".

5. Before proceeding with our comments, we need to record that the absence of an explanatory memorandum to this Bill has made the task of making sensible comments on the Bill very difficult. This is particularly so in view of the complexities of a Bill that proposes to amend an Act amended by another Amendment Act which was never brought into effect. A series of briefings by Department of Mineral Resources (DMR) officials would also have made the Bill far more accessible to all affected parties.

6. As you will be aware, the Mineral and Petroleum Resource Development Amendment Act, 2008 (Act 49 of 2008) ("the 2008 Amendment") was never brought into effect by the Minister of Mineral Resources. We assume for the purpose of these comments that it is the Department's intention for the new Amendment Act, when it is promulgated and enacted, effectively to enact Act 49 of 2008 and simultaneously amend it.

GENERAL COMMENTS ON THE BILL

7. The CER welcomes 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, or "the principal Act"). Furthermore, a number of provisions in NEMA will now also be available to assist the enforcement of environmental laws against non-compliant mines.[1]

8. Unfortunately, the Bill does not go far enough, particularly by making no provision for the transfer of the environmental authorisation of mining to environmental authorities. We believe that the DMR is not well-placed to act as competent authority in respect of environmental authorisations under NEMA, both because:

   a. the DMR would have an inherent conflict between its obligations to promote mining, and its obligations under NEMA; and
   b. the DMR does not currently have anywhere near the human resource capacity to implement NEMA and the EIA regulations effectively. We have not been provided with any indication of the DMR's plans for resourcing the proposals in the Bill.

9. The Bill envisages various parallel application, consultation and objection processes, often without providing for timeframes, and often without any clarity on how these processes will interact with each other. Although this has not been shared with the public, we can only assume that the DMR has agreed flowcharts with the Department of Environmental Affairs (DEA) and the Department of Water Affairs (DWA) with a view to publishing draft regulations, and potentially further

[1] See our detailed critique of the "separate and unequal environmental rules for mines" in the 2011 Civil Society Submission.

amendments to NEMA and/or the National Water Act, 1998 (Act 36 of 1998) (NWA). In the absence of these proposals, it is extremely difficult to assess whether the Bill (particularly as read with NEMA) will result in both:

a. a more streamlined, integrated permitting process for mining and the other activities regulated by the MPRDA, and
b. just administrative action in decision-making under the MPRDA, including, in particular, adequate consultation with interested and affected parties.[2]

10. The Bill does not do enough to ensure that communities and other interested and affected parties are properly consulted on decisions to licence mining activities that will affect them. Communities are required to participate in multiple consultation and comment processes (one in terms of section 10, one in regard to the environmental authorisation, one on the social and labour plan to name a few) but the Bill nowhere requires that communities and interested and affected parties must be provided with complete and accessible information prior to these processes commencing or that applicants are obliged to report back to communities or respond to concerns raised. Although multiple consultations processes take place, these are still no more than box-ticking activities and it is not clear that the substantive issues raised in those processes will have any bearing on the decision ultimately taken. In addition, it is submitted that the standard that ought to be applied is not merely consultation but free, prior and informed consent, particularly in regard to mining on land owned or occupied by customary communities.

11. Moreover, the Bill makes no attempt to address the significant problems faced by interested and affected parties in gaining access to information about mining activities and proposed activities, , as argued in detail in the 2011 Civil Society Submission attached (see p.6).

12. In the process of transferring environmental management provisions out of the MPRDA into NEMA in the 2008 Amendment, a number of valuable provisions that support responsible environmental management by mines were lost from the MPRDA and not incorporated into NEMA. This includes, for example, joint and several liability for directors of a mining company for environmental damage caused. In these comments, we argue for the reinstatement of some of these provisions in the MPRDA, but it is in fact preferable and more equitable for these provisions to be incorporated in NEMA so that they are applicable to all persons that carry out activities listed under NEMA (including prospecting and mining, once those listings in the EIA Regulations are enacted).

13. While we support the dramatically increased penalties provided for offences under the MPRDA[3] as well as the principle of introducing an administrative penalty system, the way these matters have been dealt with in the Bill is ill-conceived and creates a range of inappropriate consequences, perverse incentives and opportunities for corruption. At the very least, to implement an administrative penalty system with the significant penalties proposed, an independent institution like a tribunal must be established to ensure administrative fairness and implementation of the rule of law.

SPECIFIC COMMENTS ON THE BILL

14. Below, we deal only with those clauses in the Bill on which we have comments at this stage. We reserve all rights to make further or improved comments at future occasions in the legislative process.

[2] See the submissions made in the 2011 Civil Society Submissions on integrated licensing and public participation.
[3] See the submissions made in the 2011 Civil Society Submissions entitled "Amendments required to penalty provisions applicable to environmental impacts of mines" (p.5-6).

Clause 1: Amendment of section 1 (Definitions)

15. The definition of historically disadvantaged person has changed from "any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect" to "any person, category of persons or community who had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 or the Constitution of the Republic of South Africa, 1993, which should be representative of the demographics of the country." This section should seek to empower disadvantaged communities and to address the inequalities created by an apartheid system. It is submitted that the amended definition limits the ability of the DMR to do this.

Clause 2: Amendment of section 2 of Act 28 of 2002, as amended by section 2 of Act 49 of 2008

16. Section 2(d) of the principal Act currently includes the phrase "historically disadvantaged persons, including women…". This section was amended by the 2008 Amendment Act to say "historically disadvantaged persons, including women and communities…". The Bill now proposes removing the phrase "including women and communities".

17. The emphasis on expanding opportunities to women and communities in particular was appropriate and necessary given their significant exclusion from sharing in the benefits in the exploitation of the nation's mineral and petroleum resources. As the extraction of minerals still does not adequately create opportunities for women and communities or benefit women and communities, the decision to amend the section to exclude women and communities is not justifiable. The need for women and communities to be the focus of opportunities and benefit sharing in the minerals sector is stronger today than it has been in the past and it is submitted that the phrasing in the 2008 Amendment should prevail.

Clause 3: Amendment of section 5A of Act 28 of 2002, as inserted by section 5 of Act 49 of 2008 (Prohibition relating to as *[sic]* illegal act)

18. It appears that the draft Bill inadvertently amends the first sentence of section 5A by substituting the phrase "conduct technical cooperation operations" with "conduct technical cooperations". The original phrase should prevail.

19. We further submit that Section 5A(c) (the amendment of which is not proposed in the Bill) does not fulfil the requirements of the Promotion of Administrative Justice Act, 2000 (PAJA), and should therefore be amended in the Bill.

20. Section 5A(c) provides that no person may conduct the stated activities or commence with any work incidental thereto without "giving the landowner or lawful occupier of the land in question at least 21 days written notice" (our emphasis).

    a. Particularly in circumstances where the land in question is owned and occupied by different parties, this provision allows substantial and potentially irreparable prejudice to the party who is not entitled to such notice.
    b. In addition, in circumstances where land is state owned but is managed in terms of customary law, administrative justice requires that all parties (the state, the traditional authority and the occupying community) be given appropriate notice.
    c. Moreover and in any event, we submit that the period of notice is insufficient and therefore unreasonable.

Clause 6: Substitution of section 10 of Act 28 of 2002, as amended by section 7 of Act 49 of 2008 (Consultation with interested and affected parties)

Sub-clause 6(2)(b) and (c)

21. These sub-clauses propose to create a statutory opportunity for the DMR to refer applicants to consult and enter into an agreement with an objector, which agreement must be in writing and disclosed to the DMR.

22. While this process might have some useful outcomes (a consultation process by the applicant for example, or compensation for the objector), and would in a limited way encourage greater transparency, we have the following concerns:

    a. This process takes place at a point when interested and affected parties are unlikely to have seen any documents and where little information is known about the nature, extent or risks associated with mining. However, there is no indication as to any guidelines for or provisions that must be addressed in such an agreement or what information must be available to the objector before negotiations take place. This raises concerns about disparities of power in negotiations.
    b. The referral to consultation is discretionary, in a situation where the applicant was in any event always entitled to consult the objector and enter an agreement. It would be more appropriate if all agreements concluded between an applicant and an objector should be disclosed to the DMR (even those not the result of a referral by the DMR). We propose, moreover, that it should be unlawful not to disclose any such agreement to the DMR.
    c. There are also no timeframes stipulated for this process, which makes it unclear what impact this agreement will have on the deliberations of the Regional Mining Development Environment Committee (RMDEC) in regard to the objection. It is also unclear what the implications of this agreement will be for the environmental authorisation process and consultations and objections that arise in that process.
    d. There are no details in the sub-clauses about the extent of consultation required, nor provision for an obligation on the applicant to consult in good faith with the objector. This may mean that a referral to consult with an objector may result in a "box-ticking exercise" by the applicant, with no real effort to address the objector's concerns.

Other necessary amendments to section 10

23. Over and above the proposed amendments in the Bill, there are also a number of pressing amendments necessary to bring the MPRDA in line with the Constitution and PAJA.

    a. Firstly, the section's application should be extended to applications for the renewal of rights (sections 18, 24, 27(8)(a) and 34) to the Minister's consent to transfer of rights in terms of section 11 and to applications for the Minister's consent to amendment of rights in terms of section 102, which sections, along with section 10B, we propose are amended in a corresponding fashion as appears hereinbelow. Such applications in terms of sections 11, 18, 24, 27(8)(a), 34 and 102 respectively have the potential adversely to affect the environment and the rights or interests of affected parties. Consultation with interested and affected parties should therefore be extended to these applications.
    b. Secondly, the inadequacies of consultation with interested and affected parties need to be addressed in this section. We support the development of the section to define the

procedures necessary to realise and give content to affected parties' rights to participate in the decision-making process and thereby legitimise prior consultation.

c. The consultation process set out in section 10 must accommodate parties who, due to disadvantage or illiteracy, cannot read written notices and cannot submit objections in writing. Objectors must be entitled to submit their objections orally and in a language of their preference.
d. Where mining is to take place on land that is managed in terms of customary law, measures must be adopted to ensure that both the community and the traditional authority are consulted. In addition, the section must stipulate that where mining is proposed to take place on land managed in terms of customary law, the traditional authority cannot enter into agreements with the applicant without the participation of the affected community or solely for the private benefit or interests of the traditional authority.
e. Finally, the timeframe for submission of comments and objections – 30 days - is inadequate. A period of at least 60 days must be allowed for initial objections and comments.

24. We are concerned that, with the deletion of section 40 by Act 49 of 2008, consultation with other government departments on applications under the Act has disappeared from the rights application process under the principal Act. Other than through RMDEC (assuming that these departments are part of that committee) there is no longer any obligation on the Minister or any official at the DMR to give written notice to other departments with mandates or interests of a rights application under the Act, and an opportunity to make representations. It is not appropriate simply to include these departments in "interested and affected parties" for the purpose of consultation.

Clause 7: Insertion of sections 10A, 10B, 10C, 10D, 10E, 10F and 10G in Chapter 4 of Act 28 of 2002 (Regional Mining Development and Environmental Committee)

Composition of RMDEC

25. We support the insertion of sections clarifying the composition and functions of the Regional Mining Development and Environmental Committee (RMDEC), and we understand that the DMR is trying to address practical difficulties like poor attendance and lack of continuity in representation on RMDEC.

26. However, the proposals undermine the primary advantage of retaining the RMDEC structure, which is to provide a forum for consultation between different authorities with mandates and expertise relevant to mining and the environment. Provisions borrowed from the boards of directors of companies like the proposed section 10E are not appropriate for government officials from sister departments, and will entail bureaucracy that will undermine continuity. Appointments by the Minister (the proposed section 10C(2)) and the compulsory vacation provisions (the proposed section 10E(1)) will necessarily cause delay, which in turn will cause extended periods of no representation on RMDEC by certain departments. This is particularly so because of the high staff turnover that is currently plaguing the civil service. Moreover, it is not desirable to have the Regional Manager sitting as *ex officio* chairperson of RMDEC. As the person who has various powers and obligations in relation to applications for rights and permits, as well as – it is proposed - enforcement - the Regional Manager is effectively required to preside over deliberations and the formulation of recommendations to him/herself, and cannot be expected to consider those recommendations in an impartial manner.

27. However, we support the power for the Minister to appoint consultants to RMDEC in the proposed section 10C(3), retained from the principal Act.

28. We therefore propose the following in relation to the composition of RMDEC:

a. that the *ex officio* nature of appointments to RMDEC be retained. In particular, to ensure that environmental concerns are adequately represented, the relevant Department of Water Affairs Regional Manager and relevant senior managers from provincial environment authorities, and provincial conservation authorities, need to be represented, and this should be expressly recorded;
b. that the expertise required of members be extended to include more appropriate environmental scientific expertise, regional natural resource planning, economic planning and land use planning;
c. that, in order to address both the issue of having necessary expertise on RMDEC, as well as continuity and attendance, the Minister appoint an independent consultant to chair the RMDEC. This would free up the Regional Manager to participate in RMDEC deliberations, and add valuable expertise.

RMDEC proceedings

29. In relation to proceedings, we call for the Bill to address the procedure and timeframes for RMDEC's work more expressly.[4] In particular:

a. Since procedures are not prescribed, in practice the relevant Regional Manager tends to develop procedures on an *ad hoc* and ongoing basis. Not only does this mean that applicants and objectors often cannot prepare adequately for RMDEC meetings (those to which they are permitted attendance), the procedures adopted by RMDECs in different regions vary vastly, and do not create a level playing field for applicants and objectors. If the purpose of RMDEC is to provide the Minister with advice or a recommendation based on a thorough assessment of the facts of the application and objections, then the MPRDA or its regulations should provide for a proper opportunity to make written and/or oral submissions so as to inform RMDEC members comprehensively of potential benefits and risks.
b. Although RMDEC is convened to hear, in part, environmental issues (as is suggested by its name), the section 10 notice is issued before the applicant has submitted its application for an environmental authorisation, and both RMDEC and the objector may not have access to critical information relating to the environmental assessment and impacts of the proposed mining activities. This undermines the ability of RMDEC to advise the Minister.
c. There is no obligation in the MPRDA, its regulations or the Bill for RMDEC to record proceedings and keep minutes. This is essential, since the RMDEC proceedings will form part of the record of decision for the purpose of possible litigation.
d. Because this recommendation forms part of the record of decision, there is also no good reason why the RMDEC recommendation should not be communicated to the applicant and objectors, and indeed at least some Regional Managers do so (again, the practice is inconsistent across the country). Requiring such communication would improve transparency and accountability.

30. In order to enhance both informed decision-making by the Minister and public participation, we propose that the functions of the Regional Mining Development and Environmental Committee be augmented. We propose that the functions of RMDEC listed in section 10B be expanded to include:

[4] This could potentially also be dealt with in revised regulations, relying on section 107(1)(l) of the MPRDA.

a. receiving comments and objections to applications in terms of section 11, 16, 18, 22, 24, 27, 34 and 102 and convening a public hearing in respect of each application to enable oral submissions from the applicant and objector;
b. deliberating on applications and comments and objections received and making recommendations to the Minister on applications accepted in terms of section 11, 16, 18, 22, 24, 27, 34 and 102;
c. making the record of the proceedings and the recommendation available to the applicant and objectors; and
d. making recommendations to the Minister in terms of section 54(5).

Clause 8: Amendment of section 11 of Act 28 of 2002 as amended by section 8 of Act 49 of 2008 (Transferability and encumbrance of prospecting rights and mining rights)

31. We draw to the DMR's attention that, because of the application of PAJA, if any rights are affected by the proposed decision to give consent for cession, transfer, letting, subletting, assignment, alienation or disposal of rights or interests, the Minister should give notice of (or require the applicant to give notice of) such proposed decision to affected parties, and provide a reasonable opportunity to comment. This would include, by law, giving affected parties access to sufficient information to allow them to comment on the proposed decision. We would prefer if this process was provided for expressly in the Bill, but in any event make it clear that it is our view, supported by that of senior counsel, that granting such consent under section 11 without complying with PAJA would make that decision of the Minister subject to review for non-compliance with PAJA.

32. Furthermore, given the significant potential environmental impact of prospecting and mining, we propose that the approval of an application for the transfer of rights should be made in consultation with the Minister of Water and Environmental Affairs.

Clause 11: Amendment of section 16 of Act 28 of 2002 as amended by section 12 of Act 49 of 2008 (Application for prospecting right)

33. We support the requirement in section 16(4) that an applicant whose application has been accepted by the Regional Manager must consult with both the landowner and the lawful occupier. However, there appears to be a drafting error in the amendment which has the effect of requiring such applicant additionally to consult with "an affected party". We submit that the legislative intention was likely to provide that the applicant shall consult with "any affected party" and propose that the subsection is amended to read as such.

34. Section 16(4)(b) is amended to exclude "interested and". This was introduced by the 2008 Amendment Act. While the 2008 Amendment Act sought to broaden the people who should be consulted, the 2012 Amendment reverts to a position where the classes of people who are entitled to be consulted could be interpreted to be limited. We propose that the 2008 Amendment, that seeks to recognise the broad range of people who ought to be consulted, should be adopted.

35. We note that the 30 day period in subsection 4(b) requiring such consultation was amended from "30 days" to "in the prescribed manner". 30 days was wholly inadequate and virtually made proper and adequate consultation impossible. However, without confirmation of what the proposed period is, it is not possible to assess whether this concern has been addressed or aggravated.

Clause 12: Amendment of section 17 of Act 28 of 2002 as amended by section 13 of Act 49 of 2008 (Application for prospecting right)

36. We strongly oppose the retention of the obligation on the Minister to grant rights should certain conditions be fulfilled. To give effect properly to the objectives of the Act, the Minister must have a discretion whether or not to grant a right, which discretion may be guided by the requirements of section 17(a) to (f), but which must operate over and above those requirements. We therefore submit that the word "must" in section 17(1) be replaced with the word "may".

37. We support the addition of paragraph (c) in subsection (2) as a new ground for refusal of applications for prospecting rights.

38. The proposed section 17(1)(a) now merely requires the applicant to show estimated expenditure and ability to implement the prospecting work programme (PWP). This proposed change removes the assessment of the applicant's estimated expenditure and ability to implement the PWP. This makes the assessment process less rigorous than before. Considering how often we see applicants without financial or technical means applying for prospecting right for the purpose of speculation, this proposed amendment does not promote responsible and accountable environmental management.

39. Since this is effectively a new application with far-reaching consequences for interested and affected parties, applications for renewal in terms of this section must incorporate a consultation process in terms of section 10.

Clause 17: Amendment of section 22 of Act 28 of 2002 as amended by section 18 of Act 49 or 2002 (Application for mining right)

40. We support the requirement in subsection (4)(b) that an applicant whose application has been accepted by the Regional Manager must consult with the landowner, the lawful occupier and interested and affected parties.

41. We raise the following concerns in regard to the addition of the proposed subsection 3(d):

    a. The 180 days stipulated is not sufficient time for the applicant to conduct the necessary studies and research to inform the social and labour plan (SLP), to consult affected parties, to prepare a draft SLP, to distribute the draft SLP, to allow for comment and to redraft a final SLP (which, if it is materially different from the first draft, should again be submitted for public comment). In addition, the SLP will likely need to be translated into a language accessible to communities and workers affected and this will take additional time. Each of these steps – research, translation, consultation, draft SLP, consultation, final SLP - should be stipulated in the legislation.
    b. This section does not refer to interested and affected parties but to "the community and relevant structures". It is not clear what "relevant structures" refers to. The section should be amended to read "relevant structures including labour unions, community based organisations, church groups and traditional leaders."
    c. A common practice has emerged of mining companies consulting exclusively with traditional authorities in respect of SLPs and other portions of their applications. The legislation needs to state clearly that all members of the community are entitled to be consulted prior to the finalisation of a project, and not just traditional leaders. There are, in addition, numerous examples of mining companies causing social rifts between traditional authorities and communities as benefits are disproportionally distributed to traditional leaders. The award of

benefits or compensation in return for land use rights or any other concession in relation to mining by the traditional leader or any other structure must be disclosed to the DMR and to the community and must constitute part of the SLP and the consultation on the SLP.

Clause 18: Amendment of section 23 of Act 28 of 2002 as amended by section 19 of Act 49 or 2002 (Granting and duration of mining right)

42. As argued in the context of prospecting rights above, we strongly oppose the retention of the obligation on the Minister to grant rights should certain conditions be fulfilled. To give effect properly to the objectives of the Act, the Minister must have a discretion whether or not to grant a right, which discretion may be guided by the requirements of section 23(a) to (h), but which must operate over and above those requirements. We therefore submit that the word "must" in section 23(1) be replaced with the word "may".

43. The amendment to subsection (1)(a) refers to the principles in section 37(2), which was deleted by Act 49 of 2002. The words "section 37(2)" should be replaced with "section 2 of the National Environmental Management Act, 1998 (Act 107 of 1998)."

44. The insertion of subsection (1)(e) refers to the "review" of the SLP every five years for the duration of the right. It is not clear what a "review" entails, or who should be responsible for such a review. Either way, whatever process is followed – which must be clarified in this section – such a review of the SLP must make provision for public participation and comment by affected parties. If the review proposes amendment of the SLP in ways that affect rights of affected parties, such notice and opportunities to make representations are in any event required by PAJA, and it is prudent to provide for a process in the Act.

45. We support the insertion of subsection 2A. This subsection was first inserted by clause 19 of the 2008 Amendment, but the Bill now proposes its amendment to exclude the direct reference to participation. On the one hand this may be read positively as participation is a standard requirement, and not a special condition. This is not clear, however, and may be read to exclude the right to require additional participatory processes where appropriate. The phrase "rights and interests of the community" needs to be clarified with regard to the rights and interests of traditional authorities, and it must be clear that benefiting and engaging with traditional authorities alone is not sufficient. This provision should take into account the requirements of customary law.

46. We strongly oppose the insertion of the word "and" rather than "or" after paragraph (a) in "and" rather than "or" after paragraph (a) as part of the proposed amendment of subsection (3). Such an amendment would significantly limit the circumstances under which the Minister may refuse to grant a mining right, which is inappropriate given the objects of the MPRDA.

47. Further in relation to subsection (3), we propose that a similar ground for refusal be inserted as has been inserted in clause 12(e) of the Bill dealing with the Minister's refusal of prospecting rights, namely, the submission of inaccurate, incorrect or misleading information by the applicant in support of its application or any matter required to be submitted in terms of the Act.

48. The amendment of subsection (5) by the 2008 Amendment Act provides that a mining right comes into effect on the "effective date". Under the principal Act, it came into effect on the date that the EMPR is approved in terms of section 39(4) (repealed by Act 49 of 2008). . Clarity on the determination of the effective date is required.

Clause 19: Amendment of section 24 of Act 28 of 2002, as amended by section 20 of Act 49 of 2008 (Application for renewal of mining right)

49. To preserve the integrity of the revised process for renewal of a mining right, it is vital that the compliance report referred to in the proposed section 24(b) be an "independent audit report".

50. Considering the reference to compliance with the environmental authorisation in the proposed section 24(2)(b), it is appropriate to amend the proposed section 24(3)(a) to include NEMA; not doing so would make a nonsense of including the environmental authorisation in the report. The proposed subsection should therefore read "… and is not in contravention of **[any relevant provision of]** this Act or NEMA **[any other law]**.

51. Since this is effectively a new application with far-reaching consequences for interested and affected parties, applications for renewal in terms of this section must incorporate a consultation process in terms of section 10.

Clause 20: Amendment of section 25 of Act 28 of 2002, as amended by section 21 of Act 49 of 2008 (Rights and obligations of holder of mining right)

52. Subsection (2)(h) is substituted in order to require the holder to submit an annual report detailing compliance with the Charter and the SLP. It is submitted that this subsection should be further amended to include the provision of the required information to affected communities, relevant structures and other interested and affected parties.

Clause 22: Amendment of section 27 of Act 28 of 2002, as amended by section 23 of Act 49 of 2008 (Application for, issuing an duration of mining right)

53. Although we appreciate the rationale for this proposal, from an environmental point of view it is not desirable to limit the development of a mineral resource to a specific timeframe as is proposed in the draft section 27(1)(a). Doing so may undermine the sustainable development of mineral resources as is required by the principal Act: rushing applicants to develop resources can result in poor decisions and less attention to maximum beneficiation or sustainable benefits.

54. The additional proposed subsection 6(d) should expressly refer to other statutory tools or measures of damage or degradation. We propose that the subsection be amended so as to include a reference to having regard to available statutory tools, recognised classification systems or measures of damage or degradation to determine whether the mining will result in unacceptable pollution, ecological degradation or damage to the environment.

55. The additional subsection (6)(e) should be amended to read "the applicant is not in contravention of any provision of this Act or NEMA."

No clause: Amendment of section 30 of Act 28 of 2002, as amended by section 25 of Act 49 of 2008 (Disclosure of information)

56. Communities, community-based organisations and non-government organisations face enormous obstacles in obtaining access to the documents they require to realise their environmental and other Constitutional rights. Such obstacles are the direct result of mining companies' refusal to make available key documents to interested and affected parties, and the failure of DMR

Information Officers to comply with the Promotion of Access to Information Act, 2000 (Act 2 of 2000).[5]

57. With this being the case, we request that provision be made in this section for:

a. an obligation on all applicants for new rights to make available the full application for rights under the MPRDA to interested and affected parties, automatically (i.e. without a specific request through PAIA or otherwise). Without key documents such as the works programmes and statements of financial and technical ability, it is not possible for interested and affected parties to assess whether the application complies with the MPRDA;

b. including as a condition to all rights granted by the DMR the disclosure of the right, and particularly the conditions attached thereto, to the public automatically (i.e. without a specific request through PAIA or otherwise);

c. a public, online database of rights issued by the DMR, hosted by the DMR; and

d. an obligation on the DMR to make all delegations of power by the Minister of Mineral Resources to the public automatically (i.e. without a specific request through PAIA or otherwise).

58. We furthermore propose that section 30 of Act 28 of 2002, as amended by section 25 of Act 49 of 2008, be amended further so as to include a reference to the objects referred to section 2(h).

Clause 28: Amendment of section 37 of Act 28 of 2002, as amended by section 30 of Act 49 of 2008 (Environmental Management Principles)

59. While the intention of the drafters of the Bill appears to be to limit the application of NEMA, the meaning of the proposed substitution is not clear. Moreover, the amendment may contradict the objects of the MPRDA as provided in section 2(h) and endorsed by the Constitutional Court in the decision of *Maccsand*[6], handed down in April 2012.

60. "Environmental requirements" is not defined, and it is unclear what aspects of the Act are governed by NEMA. It is submitted that the current wording of section 37 (as it is in the principal Act) should be retained.

No clause: Repeal of sections 38 to 42

61. Section 38 (Integrated environmental management and responsibility to remedy), 39 (Environmental management programme and environmental management plan), 40 (Consultation with state departments), 41 (Financial Provision for the remediation of environmental damage) and 42 (Management of residue stockpiles and residue deposits) were all repealed by the 2008 Amendment Act.

62. While these provisions are repealed to allow for environmental management and authorisation to be governed in terms of NEMA, subject to our comments in paragraphs 7 and 8 above, it is submitted that some key aspects of the provisions that do not appear in NEMA should be retained:

[5] See http://cer.org.za/themes/transparency/unlock-the-doors/. See also p.6 of the 2011 Civil Society Submission.
[6] *Maccsand (Pty) Ltd v City of Cape Town and others* 2012 (4) SA 181 (CC)

a. It is submitted that section 38 should be largely retained and amended rather than repealed. Section 38(1) stipulates that environmental management must constitute an integral and ongoing part of the mining activities. Importantly, section 38(1)(e) stipulates that a right holder is responsible for any environmental damage, pollution or ecological degradation whether it occurs inside or outside the area to which the licence relates. As section 37 has been amended such that the NEMA principles no longer explicitly govern all prospecting and mining operations, the requirement that environmental management must be integral to mining activities should be retained.
b. Section 38(2) of the principal Act states that, notwithstanding the Companies Act, 1973 (Act 61 of 1973) or the Close Corporations Act, 1984 (Act 69 of 1984), the directors of a company or members of a close corporation are jointly and severally liable for non-compliance with obligations under the environmental management programme regardless of whether it was inadvertently or advertently caused. No such equivalent provision exists in NEMA and the removal of this provision radically alters the ability of the Minister of Mineral Resources to enforce the obligations of mining companies in terms of both their mining licences and their environmental authorisations.
c. We submit that section 39(4)(b)(i) must be retained in section 38A to require the Minister expressly to consider the recommendations of the RMDEC committee, as well as the recommendations of the Departments of Environmental Affairs and Water Affairs (see comments in paragraph 24 re the loss of section 40 of the principal Act).

63. One of the key recommendations of a 2012 WWF-SA report on financial provision for rehabilitation and closure in South African mining[7] was "augmented and structured use of the independent review mechanism as a standard, default approach when assessing the adequacy of financial provisions." In the absence of provision for compulsory or voluntary peer review for financial provision in NEMA's section 24P of otherwise, this should be included in the Bill.

No clause: Insertion of sections 38A and 38B in Act 28 of 2002, by section 32 of Act 49 of 2008 (Environmental Authorisations)

64. Consideration of the DMR's capacity to implement this amendment is required, as current capacity is not sufficient.

65. We submit that section 38A must be amended to require the Minister expressly to consider the recommendations of the RMDEC committee (section 39(4)(b)(i)) in consultation with the Departments of Environmental Affairs and Water Affairs (section 40 of the principal Act).

66. Section 38B deems those in possession of an approved environmental management plan or programme to have an environmental authorisation in terms of NEMA; section 38B(2) allows the Minister to direct a holder to "upgrade" the environmental management plan or programme "if he or she is of the opinion that the prospecting, mining, exploration and production operations is likely to result in *unacceptable pollution, ecological degradation or damage to the* environment." In the ordinary course, a licence or permit application must be refused where it will result in unacceptable pollution, ecological degradation or damage to the environment. Where the Minister finds that such activities have been licenced, an investigation must be instituted to assess whether the holder has failed to comply the conditions set out in its permit or licence, or its environmental management plan or programme. If the holder is in compliance but should not have been awarded

7 Van Zyl et al. 2012. Financial Provisions for Rehabilitation and Closure in South African Mining: Discussion Document on Challenges and Recommended Improvements. WWF-SA. Available at http://www.wwf.org.za/?6600/acid-mine-draining.

the licence (due to the unacceptable pollution) provision must be made for this to be addressed properly and not merely through an authorisation "upgrade". Any such process must take place in consultation with the Minister of Water and Environmental Affairs and all other affected parties.

Clause 29: Amendment of section 43 of Act 28 of 2002, as amended by section 34 of Act 49 of 2008 (Issuing of a closure certificate)

67. We welcome the acknowledgement that environmental impacts of prospecting and mining may only become known 20 years after cessation of the operations and that the holder of the right or permit should remain responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance with the conditions of the environmental authorisation and the management and sustainable closure thereof.

68. However, our immediate concerns about the proposed amendments to section 43 include the following:

a. If a closure certificate is to be issued, notwithstanding the ongoing liability, it is not clear what the purpose of the certificate is.
b. The retention of any portion of the financial provision should be for the predicted life of the impacts (e.g. the expected time of mine decant, etc) and not be limited by a stipulated period, which may be too long or too short.
c. Under subsection (5A), the consequences, should the DWA and DEA or Chief Inspector of Mines not confirm within 60 days that the provisions of subsection (5) have been addressed, are not clear.
d. The proposed insertion of subsection (14) is a concern since the proposed subsection is so vague as to be impossible to interpret. It is of some concern that a holder may effectively opt out of its closure obligations by simply "formally / legally" abandoning the right. No procedure is stipulated for determining how "has not caused any environmental damage" is to be assessed.

Clause 31: Amendment of section 45 of Act 28 of 2002, as amended by section 36 of Act 49 of 2008 (Minister's power to recover costs in event of urgent remedial measures)

69. We support the requirement that the Minister of Mineral Resources must act in consultation with the Minister of Water and Environmental Affairs, and the requirement that the Minister may only use public funds to cover the necessary measures, if the funds raised by way of a High Court application to seize and sell the property of the right holder are insufficient.

70. It is unclear how this section would interact with the provisions of NEMA, particularly section 28 (Duty of care and remediation of environmental damage) and section 31L (Power to issue compliance notices), or section 19 of the National Water Act, 1998 (Act 36 of 1998) (NWA). In particular, it is not clear whether the powers of the Minister of Mineral Resources in terms of section 45 of the MPRDA have any bearing on the powers of the Minister of Environmental Affairs in terms of section 28 of NEMA, or the powers of environmental management inspectors in terms of section 31L of NEMA, or the powers of a catchment management agency under section 19 of the NWA..

Clause 32: Amendment of section 46 of Act 28 of 2002, as amended by section 37 of Act 49 of 2008 (Minister's power to remedy environmental damage in certain circumstances)

71. We are concerned about the proposed amendment to subsection (2), as a result of whichthe Minister would no longer be entitled to use funds appropriated by Parliament for that purpose if there is insufficient financial provision.

72. We are further concerned about how this provision interacts with sections 28 and 30 of NEMA, and sections 19 and 20 of the NWA. It is unclear how the obligations and duties of the Regional Manager will align with the obligations of the Environmental Management Inspectors designated in terms of section 31B of NEMA and mandated in terms of section 31D.

Clause 33: Amendment of section 47 of Act 28 of 2002, as amended by section 38 of Act 49 of 2008 (Minister's power to suspend or cancel rights, permits or permissions)

73. We are opposed to the removal of subsection (1)(d), as a result of which the submission of inaccurate, false, fraudulent, incorrect or misleading information would no longer be a basis for the Minister to suspend or cancel a right, permit or permission.

74. We are furthermore concerned about the removal of subsection (3) which required the Minister to issue directives. The remaining provisions are discretionary. The removal of this subsection also renders subsection (4) incapable of application.

75. In circumstances when the Minister fails to act in terms of section 47 despite a breach by a holder, provision must be made for the Minister to be compelled to do so (see, for example, section 28(12) of NEMA).

76. Where the holder's contravention or breach has an impact on interested and affected parties, or where it is reported by interested and affected parties, and particularly communities, landowners and lawful occupiers, the Minister must give those parties an opportunity to make representations in terms of subsection 2(c). The Minister must further be obliged to keep such parties informed and updated about the outcome of any process followed in terms of section 47.

Clause 35: Amendment of section 49 of Act 28 of 2002, as amended by section 40 of Act 49 of 2008 (Minister's power to prohibit or restrict prospecting or mining)

77. While the requirement that the Minister invite representations from relevant stakeholders prior to acting in terms of this section has been removed, we point out that PAJA would still require notice to affected parties, and an opportunity to make representations. The removal of the requirement from this section is therefore inexplicable and unfortunate to the extent that it may lead to unnecessary disputes about the Minister's obligations.
78. Provision must be made for communities and other interested parties to make application for an area to be declared as a mining restricted or prohibited area.
79. Timelines and other procedural steps must be stipulated for the declaration of an area under section 49.

Clause 36: Amendment of section 50 of Act 28 of 2002 (Minister may investigate occurrence, nature and extent of mineral resources)

80. Throughout this section we propose that the owner and the occupier and the person in control of the land is given notice and consulted.

Clause 39: Amendment of section 53 of Act 28 of 2002, as amended by section 42 of Act 49 of 2008 (Use of land surface rights contrary to objects of Act)

81. With reference to the Constitutional Court's decision in Maccsand,[8] it is our submission that this section 53 may fall foul of the Constitution in that it purports to permit the Minister to make land use planning decisions. It is therefore invalid.

Clause 40: Amendment of section 54 of Act 28 of 2002

82. The reference to "unreasonable demands" in subsection (1)(b) is unclear and is not clarified in the Bill.

83. It is submitted that the Regional Manager is not the appropriate party to make recommendations in regard to expropriation or any other matter as the Regional Manager is also required to chair RMDEC and to make a decision on the licence application.
84. Consideration must be given in this section to the procedures followed in obtaining the right and ensure that the owner and the lawful occupier and the person in control of the land has been properly and fully consulted and has been given an opportunity to be heard and to lodge objections in respect of the mining.
85. The relationship between traditional authorities and communities must be carefully considered in the amendment of this section. Where, for example, a traditional authority has agreed to allow a holder access to land (for compensation or otherwise) but the community has not, appropriate measures must be taken to address this.

Clause 41: Amendment of section 56 of Act 28 of 2002, as amended by section 43 of Act 49 of 2008

86. The Bill does not address the measures required to ensure that the obligations of a company are met when the company is finally deregistered. The MPRDA simply provides that, in the event that a company is finally deregistered, the right will lapse in terms of section 56(c). While a right may lapse, any outstanding issues in regards to the company's obligations to rehabilitate or to undertake activities under an SLP must be matters that are resolved prior to the final deregistration of a company.

Clause 65: Amendment of Section 91 of Act 28 of 2002 (Power to enter prospecting areas, mining areas or retention area)

87. We only comment on the proposed amendment to this section to the extent that it is relevant to inspection and enforcement of compliance with the environmental provisions that would remain in the MPRDA should the Bill be passed. We record that it is our understanding of the legislation that only environmental management inspectors designated by the Minister of Environmental Affairs under section 31B of NEMA are empowered to monitor and enforce compliance with NEMA and the environmental authorisations issued thereunder. This means that, whereas it is proposed in the Bill that the DMR would have the power to issue environmental authorisations, either:
    a. additional capacity must be provided within environmental authorities (primarily DEA and provincial environment departments) to do compliance monitoring and enforcement of environmental authorisations issued for mining activities; or
    b. the Minister of Environmental Affairs must designate DMR compliance and enforcement staff (who again will require additional capacity) as environmental management inspectors under

[8] *Supra*

section 31B(1)(a)(ii). Note that such DMR staff would have to comply with the Qualification Criteria, Training and Identification of, and Forms to be used by, Environmental Management Inspectors (GN R494 in GG 28869 of 2 June 2006) and complete the prescribed training before qualifying for designation.

88. We support the deletion of a member of the Board from the power to enter mining and related areas.

89. We also point out that section 91 does not afford authorised persons with the powers of arrest with or without a warrant other than those provided for in section 40 of the Criminal Procedure Act, 1977 (CPA) for peace officers, or in section 42 of the CPA for private persons. Powers of arrest should be a feature of any set of powers made available to enforcement officials.

Clause 66: Amendment of section 93 of Act 28 of 2002, as amended by section 67 of Act 49 of 2008 (Orders, suspensions and instructions)

90. We support the amendments to this section rendering the making of orders, suspensions and instructions mandatory by the authorised person in the event of contravention of the Act or of a right, permit or permission, or environmental authorisation.

91. We point out that, to comply with PAJA, any such order would have to be preceded by reasonable notice to the prospective recipient of the order, and an opportunity to make representations why such order should not be issued. The reasonable notice can be short depending on the situation. While this process does not strictly speaking have to be spelled out in the MPRDA because of the application of PAJA, in our experience officials only apply what is in the Act, and it is therefore advisable to include such a process, remembering that non-compliance with PAJA can result in the order being set aside by a court, with costs to be paid by the DMR (a lesson learned the hard way by other departments). We recommend that the DMR considers utilising the process provided for in Regulation 8 of the EMI Regulations in relation to compliance notices issued under section 31L of NEMA.

Clause 67: Amendment of section 94 of Act 49 of 2008 (Prohibition of obstruction, hindering or opposing of authorised person)

92. This clause proposes deleting a subsection which does not exist in the principal Act.

Clause 68: Amendment of section 96 of Act 28 of 2002, as amended by section 68 of Act 49 of 2008 (Internal appeal process and access to courts)

93. We support the deletion of the Director-General as appeal authority. In many instances, this provision means that an affected party would be lodging related appeals of separate decisions to the Minister and Director-General. This dual appeal not only causes great confusion and additional work for the appellant, the respondent and the DMR, but in our experience is in any event ignored by the DMR by processing both appeals as one.

94. We are of the view that the proposed section 96(1)(b) needs to be more specific, and at least to read:

"The Minister of Environmental Affairs if the decision was taken in terms of the National Environmental Management Act, 1998 (Act 107 of 1998) or relates to environmental matters and

issues incidental thereto. Such appeal will be regarded as an appeal under the National Environmental Management Act, 1998 (Act 107 of 1998)."

95. Note the correct citation for NEMA above – Act 107, not 106 – in this clause 68.

96. The proposed section 96(2)(a) should refer only to appeals under subsection (1)(a), since NEMA has its own suspension provision (section 43(7)) that will apply to appeals under the proposed section 96(1)(b).

97. It is not clear why subsection (3) has been retained in the Bill, since the issue of exhausting domestic remedies is adequately dealt with in section 7 of PAJA. We submit that this section in the principal Act should be scrapped in its entirety.

Clause 69: Amendment of section 98 of Act 28 of 2002, as amended by section 69 of Act 49 of 2008 (Offences), as read with Clause 70: Amendment of section 99 of Act 28 of 2002 (Penalties)

General comments about the new penalty regime proposed in the Bill

98. In principle, we support the incorporation of administrative or civil penalties in any regulatory system. Provision for non-criminal penalties akin to those provided for in the Competition Act, 89 of 1998 ("the Competition Act") is in line with international trends, and the Centre has for a long time advocated the use of administrative or civil penalties to improve compliance with environmental legislation.[9]

99. Having said that, no modern regulatory system can function without appropriate criminal sanctions operating alongside such a civil/administrative penalty system. The modern approach is that civil/administrative penalties should be the normal consequence of any violation, with criminal sanctions reserved for violations that are egregious, such as where the violator attempted to hide the criminal conduct.

100. We also support the new concept of daily fines introduced in the proposed section 99(1A)(f). Such fines have shown to be extremely effective in other jurisdictions to deter ongoing violations.

101. However, we have the following major concerns about the proposed penalty regime:
    a. Turnover penalties are not generally appropriate for criminal fines. The Competition Act, our best example of administrative penalties, reserves turnover penalties for administrative penalties for certain specific violations, and retains ordinary criminal fines in the form of monetary fine, imprisonment or both (see section 74 of that Act) for offences under the Act itself.
    b. The imposition of administrative penalties require a fair process based on the rule of law. The proposed administrative penalties are significant, and could potentially bankrupt a mining company. It is not at all appropriate to give the power to impose administrative penalties to a single official in the DMR (the Regional Manager), likely doesn't comply with PAJA (particularly the *nemo iudex in re sua* principle of administrative justice given the Regional Manager's role in the licencing process and in RMDEC), and also invites corruption. The only way to address this, and the accepted practice in South Africa and other jurisdictions, is to have an administrative tribunal like the Competition Tribunal.

[9] Fourie, M. "How civil and administrative penalties can change the face of environmental compliance in South Africa." South African Journal of Environmental Law and Policy, 2009. Vol. 16, No. 2, 93-127.

c. Calculations of administrative penalties should be done with reference to particular factors that should be taken into account by the body imposing the fine, such as those used in the Competition Act (section 59(3)):
    "(a) the nature, duration, gravity and extent of the contravention;
    (b) any loss or damage suffered as a result of the contravention;
    (c) the behaviour of the respondent;
    (d) the market circumstances in which the contravention took place;
    (e) the level of profit derived from the contravention;
    (f) the degree to which the respondent has cooperated with the Competition Commission and the Competition Tribunal; and
    (g) whether the respondent has previously been found in contravention of this Act."
d. The general approach to administrative penalties is that such fines are paid to the National Revenue Fund (section 213 of the Constitution). This allows proper allocation of resources by National Treasury, instead of it being ring-fenced for activities that may or may not be in line with national government policy at the time (such as those listed in the proposed section 99(1B)(5).

Specific comments about the proposed penalty provisions in the Bill

102. As argued in paragraph 22.b above, non-disclosure to the DMR by an applicant of any agreements with interested and affected parties should be included in the offences listed in section 99.

103. The two offences for which the most severe penalties are reserved are contraventions of sections 21 and 28 of the principal Act. These are both related to record-keeping and disclosure of prospecting, reconnaissance, mining and mineral processing data to the Regional Manager. Whereas there are obviously good reasons for ensuring that mining companies submit these records to the DMR, whether it is justifiable to punish such an offence with a maximum fine of 10% of annual turnover or four years' imprisonment or both, is disputable particularly in light of the devastating environmental damage that can be caused by mining without a right or environmental authorisation, or even for not complying with licence conditions, which is only punished with 5% of annual turnover.

104. Moreover and in any event, the proposed maximum penalties in sections 99(a) and (c) are not consistent. The general principle applicable to maximum fines and imprisonment is that they increase proportionally. For an unexplained reason, the offences under the proposed section 98(a)(iii) are punished with 10 years' imprisonment but 5% of annual turnover, while the offences under the proposed section 98(a)(i) deserves four years' imprisonment but 10% of annual turnover. This is a problem inherited from the principal Act of 2002, and should be addressed in the Bill.

105. It is wholly inappropriate to criminalise a contravention or failure to comply with the objects of the principal Act as the Bill purports to do by including section 2 under the proposed amendment to Section 98(a)(iii). It is also inappropriate to criminalise contraventions of the Council for Geoscience's obligation to advise the Minister (section 21(B)). Furthermore, we find no section 22A in the principal Act or the Amendment Act of 2008. The references to section 2, 21(B) and 22A should be deleted from the proposed section 98(a)(iii).

106. Similarly, large portions of section 27 are obligations on the Regional Manager and the Minister (Application for, issuing and duration of a mining permit), but still included in the offences in the proposed section 98(a)(iii). It is inappropriate to criminalise contraventions with such obligations.

107. It is not clear why non-compliance with section 20(2) (failure to obtain the Minister's consent prior to removing any mineral from a prospecting area) would no longer constitute a criminal offence under Bill – there is no reason why this activity should be decriminalised.

108. There appears to be no penalty provision for offences listed in the proposed section 98(a)(iv). Section 98(a)(iv) are again excluded from the alternative penalty calculation in the proposed section 99(1A). Note that the principle of *nulla poena sine lege*, if no penalty is provided, there is in law also no offence under section 98(a)(iv).

109. The proposed section 98(a)(iv) includes contravention of section 11(4), but contravention of the entirety of section 11 is included in section 98(a)(iii). Since it deals with the lodging of documents with the Mineral and Petroleum Titles Registration office and is therefore of a more administrative nature, this section should be carved out of section (98(a)(iii).

110. The proposed penalties in section 99(1A), which provides an alternative penalty calculation, needs to be revised substantially. The proposed penalties are by orders of magnitude too low to achieve any of the objectives of criminal prosecution, and are also completely disproportionate to the turnover penalties provided for in section 99(a). To still be talking about maximum criminal penalties of R20,000 (the proposed section 99(1A)(e) or even R800,000 (the proposed 99(1A) (c) and (f)) is laughable in the context of a mining industry whose earnings are recorded in millions and billions. Even NEMA has maximum penalties of R10 million.

111. Moreover, it should always be possible to determine annual turnover for a corporate entity. The Companies Act, 2008 (Act 71 of 2008), the Close Corporations Act (Act 69 of 1984) and the Income Tax Act, 1962 (Act 58 of 1962) all require companies and close corporations (as well as sole proprietorships beyond a threshold) to keep financial records and produce financial statements, even if not audited. In the case of the Income Tax Act, the entities should be rendering returns that provide turnover information.

112. It would be inappropriate, against public policy and against principles of good governance to give the Regional Manager a discretion whether or not to refer offences for prosecution to the National Prosecuting Authority, as is proposed in the proposed clause 99(1B)(2). The Public Service Commission's Code of Conduct already places a positive obligation on all civil servants to report any criminal activity to the appropriate authorities.

113. Moreover, the enforcement options listed in the proposed clause 99(1B)(2) should all be available to the DMR, not mutually exclusive elective options. There is no reason why a violator should not pay an administrative penalty and face criminal prosecution, which has entirely different consequences.

Clause 71: Amendment of section 102 of Act 28 of 2002, as amended by section 72 of Act 49 of 2008 (Amendment of rights, permits, programmes and plans)

114. For the reasons indicated in paragraph 10.1 above, we propose that the consent of the Minister to applications for amendment under this section be given in consultation with the Minister of Water and Environmental Affairs.

115. In section 102(2) of the principal Act as amended by section 72 of Act 49 of 2008, the proviso "unless the omission of such area or share was a result of administrative error" should be amended

in the Bill to read "administrative error in the documents referred to in (1) above". This subsection 102(2) should also make clear that it applies to both sections 2(a) and (b), and not just section 2(b).

116. We draw to the DMR's attention that, because of the application of PAJA, if any rights are affected by the proposed decision to give consent for an amendment or variation, the Minister should give notice of (or require the applicant to give notice of) such proposed decision to affected parties, and provide a reasonable opportunity to comment. This would include, by law, giving affected parties access to sufficient information to allow them to comment on the proposed decision. We submit that this process should be provided for expressly in the Bill. In any event, it is our view that granting such consent under section 102 without complying with PAJA would make that decision of the Minister subject to review for non-compliance with PAJA.

No clause: No proposed amendment to section 107 of Act 28 of 2002 (Regulations)

117. The Bill does not amend section 107 of the principal Act which empowers the Minister of Mineral Resources to make regulations about a wide range of environmental matters at or near the vicinity of mines – conservation of the environment, management of environmental impacts, air pollution. In view of the other changes proposed in the Bill, this is no longer appropriate.

118. We also draw the DMR's attention thereto that the Bill contains no proposed amendment to section 107(3), which limits the Minister's power to prescribe penalties for non-compliance with regulations to "a fine or imprisonment for a period not exceeding six months". Because of the application of the Adjustment of Fines Act, 1991 [Act 101 of 1991], the maximum fine that a magistrate could impose for the offence of contravening regulations under the MPRDA remains a negligible R10,000.

No clause: No proposed amendment to section 109 of Act 28 of 2002 (Act binds State)

119. This provision in the MPRDA excludes the State from criminal liability for violations of the MPRDA. Given increasing state involvement in mining, marked by the launch of the first state owned mine in Ogies in 2011, it is imperative to remove the phrase "save in so far as criminal liability is concerned" through an additional proposed amendment in the Bill to ensure a level playing field for all mining companies.

Conclusion

120. We are willing and able to make detailed submissions to the Department on any of the issues raised above.

121. We thank the Department for the opportunity to comment on the Bill and hope that our concerns can be addressed.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

Per: 

Melissa Fourie
Executive Director