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6 September 2013

Submission to Portfolio Committee on Mineral Resources on the Mineral and Petroleum Resources Amendment Bill [B15-2013]:
The Bill does not make adequate provision for consultation with parties interested in and affected by mining activities, or for access to information by those parties, and therefore fails to give effect to the Constitutional rights to fair administrative action and access to information

1. This submission on the Mineral and Petroleum Resources Development Amendment Bill [B15-2013] ("the Bill") is made by the following organisations:
    a. **Earthlife Africa Johannesburg Branch** (www.earthlife.org.za)
    b. **groundWork South Africa** (www.groundwork.org.za)
    c. **Centre for Environmental Rights** (www.cer.org.za)
    d. **Environmental Monitoring Group** (www.emg.org.za)
    e. **Vaal Environmental Justice Alliance** http://vaalenvironmentalnews.blogspot.com/

2. The organisations listed above respectfully request an opportunity to make an oral presentation to the Portfolio Committee on the matters raised in this submission, at the public hearings scheduled to start on 11 September 2013.

3. The first part of this submission deals in general terms with the inadequacies of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) (MPRDA or "the principal Act") and the Bill in giving effect to **the principles of administrative justice, in particular in relation to consultation and access to information**. In the second part, we provide submissions on individual clauses of the Bill.

4. In this submission, "mining" should be read to refer to all prospecting, mining, reclamation, reconnaissance and exploration activities regulated by the MPRDA.

The Bill does not give effect to the principles of administrative justice

5. For the reasons described in this submission, the MPRDA does not give effect to the principles of administrative justice as set out in:
    a. section 33 of the Constitution of the Republic of South Africa, which provides that everyone has the right to **administrative action that is lawful, reasonable and procedurally fair**;
    b. section 3 of the Promotion of Administrative Justice Act, 2000 (PAJA)[1];
    c. section 6(1) of the MPRDA itself which states that "*[s]ubject to the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), any administrative process conducted or decision taken in terms of this Act must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness"*; and
    d. the Constitutional Court decision in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) (*Bengwenyama*).

[1] PAJA seeks to give expression to the right to just administrative action in terms of section 33 of the Constitution. Section 3(1) of PAJA provides that "administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair." The minimum standards for procedural fairness of administrative action in terms of PAJA are found in section 3(2)(b), which provides that *"[i]n order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-*

(i) adequate notice of the nature and the purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section (5)."

6. The MPRDA fails to give effect to these principles by failing to provide for adequate notice to and consultation with those who are interested in and affected by mining activities, and failing to make provision for access to information by interested and affected parties, rendering even those consultation opportunities that are provided for ineffective.

7. The Bill does not rectify these inadequacies in the MPRDA, nor does it provide for appropriate consultation with other organs of state through the Regional Mining Development and Environment Committee (RMDEC).

8. The timeframes within which consultation processes are required to take place are still woefully inadequate, despite this issue being raised by mining affected communities and civil society organisations numerous times with the Department of Mineral Resources (DMR): 30 days, for example, is all the time accorded to interested and affected persons to submit their comments and objections to a mining right application after the regional manager and the applicant have, in the prescribed manner, "made the application known"[2].

9. The methods of notice of proposed mining operations are such that those affected by them rarely see the notice, rendering the 30 day period for submission of comments and objections even more unfeasible.

10. Furthermore, interested and affected parties are expected to submit objections and comments on applications without being provided with the information contained in the applications themselves, effectively expecting interested and affected parties to make these submissions "blindfolded".

11. In our casework we see numerous examples of refusals by the DMR and the consultants hired by mining companies to provide interested and affected parties with even the most basic information about applications: for example, the works programme, proposed provision for rehabilitation and information relating to the financial and technical

[2] Section 10 of the MPRDA, as amended by section 7 of the Mineral and Petroleum Resources Development Amendment Act, 2008. Clause 6 of the Bill proposes changes to this section, as discussed in the annexure to these submissions.

capability of a company to conduct the proposed operation in a responsible and sustainable manner.

12. In most cases, mining companies and the DMR do not even notify interested and affected parties – including the owners and occupiers of land on which the mining is to take place – that a right has been granted, even when they have been specifically requested to do so. Given the minimum standards for procedural fairness of administrative action as set out in PAJA, including giving those affected by administrative action "a clear statement of administrative action" and "adequate notice of any right of review or internal appeal where applicable" this practice is a blatant infringement of the constitutional rights of persons interested in and affected by mining.

13. The importance of consultation and access to information in relation to mining was recognised by the Constitutional Court in *Bengwenyama*, where the Court held that *"[t]he exercise of prospecting rights is highly invasive of the use by owners of their land, even if only restricted to surface use of the land"* (at paragraph 40) and, at paragraph 63, "*the granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen"*.

14. Mining has an enormously disruptive and distressing impact on the lives of those affected by it. South African mineral law no longer requires that owners and occupiers of land consent to mining on their land. As such, the requirements of administrative justice must be reflected in the consultation and access to information provisions of the MPRDA. As the Constitutional Court stated in *Bengwenyama* (at paragraphs 65 and 66, our emphasis)*:*

> "*Under the common law a prospecting right could only be acquired by concluding a prospecting contract with the landowner, something which presupposed negotiation and reaching agreement on the terms of the prospecting contract.* ***The Act's equivalent is consultation, the purpose of which should be to ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land****. Of course the Act does not impose agreement on these issues as a requirement for granting the prospecting right, but that does not mean that consultation under the Act's provisions does not require* ***engaging in good faith to attempt to reach accommodation*** *in that regard."*

*"**Another more general purpose of the consultation is to provide landowners or occupiers with the necessary information on everything that is to be done** so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review. **The consultation process and its result is an integral part of the fairness process** because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair.*"

15. The experience of the Bengwenyama community, whose right to administrative justice was violated by the DMR, and whom the mining company treated with contempt, is typical of the experiences of mining affected communities throughout South Africa. Our proposals for amendment to the Bill, including the provision of adequate time frames for consultation, that consultation should take place in good faith, and that mining affected communities should be provided with "all the necessary information on everything that is to be done", are made with a view to ending these unfair and unlawful practices.

16. In addition to our submissions and proposals in relation to individual clauses in the Bill in the annexure to these submissions, we submit that, as a minimum, the following should be provided for in section 30 of Act 28 of 2002, as amended by section 25 of Act 49 of 2008 ("Disclosure of information"):

    a. An obligation on all applicants for rights under the MPRDA to make available the full application to interested and affected parties, automatically (i.e., without a specific request through PAIA or otherwise). Without key documents such as the works programmes, proposed provision for rehabilitation, social and labour plans 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 or how the operation will affect people and the environment;
    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 available to the public automatically, i.e. without a specific request through PAIA or otherwise.

17. We furthermore propose that section 30 of Act 28 of 2002, as amended by section 25 of Act 49 of 2008, be amended so as to include a reference to the objects referred to in section 2(h), i.e. the object of the MPRDA to "*give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development*".

The MPRDA's failure to give effect to the principles of administrative justice perpetuates the legacy of unequal access to and distribution of South Africa's mineral wealth: not addressed in the Bill

18. The MPRDA proclaims, in section 3(1), that *"[**m]ineral and petroleum resources are the common heritage of all the people of South Africa** and the State is the custodian thereof for the benefit of all South Africans*." The preamble to the MPRDA recognises "*the need to **promote local and rural development and the social upliftment of communities affected by mining***" (our emphasis). Despite these lofty goals, very few South Africans benefit from mining, and the pernicious impacts of mining on poor rural communities are well documented. The *Report of the Portfolio Committee on Mineral Resources on public hearings on the Mining Charter, dated 5 June 2013*, states at page 28:

"And the Chairman repeatedly voiced concerns well known to all members of the Committee: 'When we conduct oversights, we come back depressed. Because before you enter into a mine, you walk through a sea of poverty. ...In our own experience these Social and Labour Plans are indeed not implemented…Mining communities lament that here, within our area we extract the wealth of the country but there is no drop that comes back to us as the mining community."

19. The marginalisation of these communities by the DMR and by mining companies is achieved in the main by a failure to implement the principles of administrative justice, including providing those affected by mining with an adequate opportunity to be heard, and by a culture of secrecy and denial in relation to the provision of information about mining to affected parties. A particularly extraordinary example of this is the common position of the DMR, supported by mining companies, that the communities that are the subjects of social and labour plans *are not entitled to see these social and labour plans*.

20. In a joint publication by the international development organisation ActionAid and the Netherland Institute for Southern Africa, published in March 2008 and titled *Precious Metal: the impact of Anglo Platinum on poor communities in Limpopo, South Africa*[3] ("ActionAid report"), the chief director of mining and mineral policy at the time, Ms Futhi Zikalala, was interviewed. Ms Zikalala *"praised the fact that companies were required to produce a plan outlining how they will contribute to local economic development – the Social and Labour Plan (SLP) that is included in all mining applications."* When asked by ActionAid, however, why SLPs are never made public, Ms Zikalala replied that *"[t]his is an arrangement we have with the companies. We cannot disclose the information on companies to third parties."*[4]

21. It follows from this approach that communities affected by mining are also not properly consulted, if they are consulted at all, in the preparation of social and labour plans that are about them, and will have an enormous impact on them. Denying communities access to the very plans that are supposed to regulate their interaction with the mine is an action reminiscent of the apartheid government, which did not believe that such communities deserved to have a say in their own destinies. It is for this reason that we propose that section 30 of the principal Act be amended to include an obligation on all applicants for rights under the MPRDA to make available the full application to interested and affected parties, automatically, without a request in terms of PAIA or otherwise, and that this information **must include the social and labour plan**.

[3] https://www.actionaid.org.uk/sites/default/files/doc_lib/angloplats_miningreport_aa.pdf
[4] See page 20 of the ActionAid report

22. In April 2007 the United Nation's Special Rapporteur on adequate housing, Miloon Kothari, conducted a mission to South Africa, and made the following conclusions in his report:

"The Special Rapporteur…visited large development projects … and had the opportunity to meet communities affected by mining operations. In these meetings and others during the visit, the Special Rapporteur noted that there appears to be insufficient meaningful consultation between government officials and affected individuals and communities. Residents spoke with frustration about the lack of information on resettlement and relocation and of participation in resettlement planning and implementation… Programmes aimed at delivering housing and creating sustainable human settlements will only succeed where they are directly informed by the people who they affect, and where they are responsive and targeted to the specific needs of a given community."[5]

23. The ActionAid report presents detailed evidence of how mining, as it is currently conducted in South Africa and regulated by the DMR, perpetuates inequality. For example:

"This report concerns villagers who have been displaced from their land and in some instances from their homes by mining operations. On this matter South African law, embodied in the Mineral and Petroleum Resources Development Act of 2002, is very permissive towards mining companies. … Once a mining right is awarded to a company, the law does not require it to obtain permission from the occupiers or the owners of the land. Rather, the law expressly authorises the company to commence laying infrastructure and undertake mining on the land. Neither does the DME require written lease agreements to be concluded between the mine and the community; ***the negotiation and conclusion of a lease agreement is standard practice in relation to privately owned land (land owned by white people) but is the exception in relation to communal land (land generally used by black people)****."*[6] (our emphasis)

24. One of the conclusions of the ActionAid report is as follows:

[5] UN press release, *United Nations expert on adequate housing concludes visit to South Africa,* 7 May 2007
[6] ActionAid report, p12

"As a development organisation, ActionAid is well aware that the process of changing household socio-economic structures to the degree that Anglo Platinum has in its relocations requires very careful management. ***In our view, the most critical factor is systematic consultation with all the communities affected – yet this has simply not occurred.***"[7]

25. Consultation failures are implicated in the perpetuation of injustices against the poorest and most vulnerable communities in South Africa, injustices that have their roots in the apartheid era. The proclaimed objects of the MPRDA, including, as stated in the preamble, the promotion of the "social upliftment of communities affected by mining" and the realisation of "equitable access to South Africa's mineral and petroleum resources", cannot and will not be achieved unless the MPRDA is amended and implemented to realise the rights to administrative justice and access to information.

The MPRDA's failure to give effect to the principles of administrative justice exposes decisions under the future MPRDA to increased legal challenge: not addressed in the Bill

26. The short timeframes for consultation in the MPRDA are often one of the reasons given by mining companies for not conducting proper consultation processes. In consequence, interested and affected parties are not afforded adequate opportunity to consider and comment on complex, detailed applications. This violation of the right of interested and affected parties to fair administrative action is a basis for a decision to be appealed or reviewed.

27. By not allowing sufficient time and resources to determine the range of interests and conflicts relating to land and mineral resources, in a number of instances consultation failures are implicated in prospecting and mining rights being granted where land claims have not been settled (*Bengwenyama* is a case in point), opening further channels for potential litigation.

[7] ActionAid report, p40

28. As referred to above, interested and affected parties who have the right to be consulted about applications under the MPRDA, including communities, community-based organisations and non-government organisations, face enormous obstacles in obtaining access to the information they require in order for that consultation to be meaningful. Such obstacles are the direct result of mining companies' refusal to make available key documents to interested and affected parties, and the failure of the DMR's Information Officers to comply with Promotion of Access to Information Act, 2000 (PAIA)[8]. These refusals and non-compliance with PAIA provide further grounds for legal challenge.

29. Given South Africa's language diversity and illiteracy problems, the right to fair administrative action requires that objectors be entitled to submit their objections orally, and in a language of their preference. Experience shows us that in the absence of express provision for this in the legislation, this right will not be realised. Again, this exposes decisions to appeal or review on administrative grounds.

The MPRDA's failure to give effect to the principles of administrative justice means that conditions in mining affected communities are conducive to the generation of social conflict: Not addressed in the Bill

30. The preamble to the MPRDA affirms "*the State's obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development"*.

31. The objects of the MPRDA therefore reflect the adoption of sustainable development as a policy of the South African government. An important element of sustainable development in the mining sector is reducing social conflict over mineral development and its impact on communities affected by mining. Mining and social conflict are closely associated in South Africa. Stakeholder participation is one of the ways in which this conflict can be minimised. Stakeholder participation involves, at the very least, adequate provision for meaningful consultation with affected communities, and requires that those

[8] See Centre for Environmental Rights report *Unlock the Doors: how greater transparency by public and private bodies can improve the realisation of environmental rights* (2012) available at http://cer.org.za/wp-content/uploads/2012/04/Unlock-the-Doors.pdf

parties being consulted are provided with all of the information that they need in order to be able to participate meaningfully in the decision-making processes around mining.

32. In many cases the consultation provisions of the MPRDA are interpreted by mining companies, to the enormous detriment of mining affected communities, to require consultation exclusively with traditional authorities in respect of land use and social and labour plans, as well as other portions of their applications. Community members themselves are therefore not consulted, in contravention of PAJA. The MPRDA needs to state clearly that all members of the community are entitled to be consulted prior to the granting of a mining right or prospecting right, and not just traditional authorities. In the absence of express provision for this in the legislation, this right will not be realised.

33. There are, in addition, numerous examples of mining companies causing social rifts between traditional authorities and communities where benefits are distributed to traditional leaders and are not received by community members. The award of benefits or compensation in return for land use rights or any other concession in relation to mining by a traditional leader or any other structure must be disclosed to the DMR and to all interested and affected parties, and must constitute part of the consultation on the social and labour plan.

34. In support of these submissions, we quote again from the *Report of the Portfolio Committee on Mineral Resources on public hearings on the mining charter dated 5 June 2013:*

"The public hearings on the Mining Charter and the "transformation process in the mining industry" were held just one year before the Marikana tragedy brought into sharp focus the socio-economic problems that confront the mining industry, quite apart from business difficulties. The phrase "ticking time bomb" was used several times in evidence to the Committee. ...

To the first set of hearings with the 'top ten mining companies', the Chair said:

'The Portfolio Committee has had oversight visits across the country…where we would be overseeing the compliance on the mining laws but also the mining charter as well as the social and labour plans implementation. What we have found, which is in our reports that are in the public domain, is an appalling situation. Mining communities specifically

are trapped in abject poverty. What we have seen is a picture that is not good at all. It does not augur well for the future of the country…Your words will not speak more than what we have seen in the actual situation."[9]

The DMR's failure to consult with communities during the legislative reform process

35. We think that it is important to bring to Parliament's attention the inadequacies in the consultation process around the amendments to the MPRDA itself, and the further evidence provided by these inadequacies as to the poor treatment that mining affected communities receive from the DMR.

36. The draft bill was published for comment on 28 December 2012 – a particularly difficult time of year by any standard, when the normal channels of communication about such developments were closed by virtue of the holiday period - and comments on the Bill had to be submitted by 8 February 2013. The DMR did not make any attempts to enable rural mining affected communities to comment on the draft bill. This was particularly relevant given the extreme difficulty of commenting on a draft bill which amended an Amendment Act which had not yet been brought into force. Commenting on the draft bill, which required comparison and analysis of three separate pieces of legislation (the MPRDA, the Mineral and Petroleum Resources Development Amendment Act, 2008, and the draft bill) was a challenge even to lawyers who are experts in the field. The Minister's failure to issue a reconciled and single version of these three documents, or to explain the DMR's intention and objectives behind the draft Bill by way of an explanatory memorandum, created a significant obstacle to community participation and comment.

37. The memorandum to the Bill states that communities in Limpopo, Mpumalanga, North West and Northern Cape Provinces were consulted on the Bill. In the DMR's presentation to the National Assembly's Portfolio Committee on Mineral Resources on 30 July 2013, the DMR stated that these consultations took place in 2011. This contradicts the statement in the memorandum that communities had been consulted on the draft bill and the Bill, and makes it clear that in fact no community consultation took place at all in relation to the Bill.

[9] p28

38. It is also not clear where and exactly when these consultations took place, and the DMR has not made available any evidence of the results of these community consultations. Moreover, no consultations took place in the Eastern Cape, Free State, Gauteng and KwaZulu-Natal.

Meaningful consultation strengthens and benefits the mining industry and government

39. We conclude these submissions by noting that consultation is not, as is often perceived by the mining industry, a way to limit or constrain mining interests and activities. Instead, mining companies and the mining industry as a whole have much to gain from effective consultation that goes beyond the "box-ticking" that is so typical of the mining sector's approach. Not only can meaningful consultation significantly contribute to improved risk management, efficiency and cost-saving from poor anticipation of environmental and social impacts, but it can also significantly mitigate the risk to the state and the fiscus. More comprehensive, quality information is made available to the mining company and affected authorities, and more environmentally and socially appropriate conditions are set for the particular mine through the Environmental Management Programme or Plan and the social and labour plan, amongst other things.

40. Effective consultation can also ensure integration with community development desires beyond jobs, and beyond the life of mine, leading to improved development outcomes.

41. Below we set out our clause-by-clause comments and proposals for improvement in the Bill.

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

42. We submit that section 5A(c) (the amendment of which is not proposed in the Bill) does not fulfill the requirements of PAJA, and should therefore be amended in the Bill.

43. 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).

44. 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.

45. 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.

46. 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-clauses 6(2)(b) and 6(3)

47. 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.

48. 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:

49. **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.

50. The referral to consultation is discretionary, in a situation where the applicant was in any event always entitled to consult the objector and enter into 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 agreements to the DMR, and to any other interested and affected parties to the application.

    a. The timeframe of 30 days within which the result of the consultation must be submitted to the Regional Manager is woefully inadequate. Such a consultation would almost certainly necessitate a number of meetings, and, should an agreement be entered into, the terms of that agreement would have to be negotiated between the parties, a time-consuming exercise under any circumstances. We propose that the time period stipulated for the submission of the result of the consultation be at least 60 days.

    b. It is also unclear from the clause what impact this agreement will have on the deliberations of RMDEC in regard to the objection, and what the implications of this agreement will be for the environmental authorisation process and consultations and objections that arise in that process.

    c. 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

51. 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. Applications in terms of sections 11, 18, 24, 27(8)(a), 34 and 102 have the potential adversely to affect the environment and the rights and 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.

52. 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 officials at the DMR to give written notice to other departments with mandates or interests in a rights application under the Act, and an

opportunity to make representations. It is not appropriate simply to include these departments as "interested and affected parties" for the purposes of consultation.

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

Composition of RMDEC

53. We support the insertion of sections clarifying the composition and functions of the RMDEC, and we understand that the DMR is trying to address practical difficulties such as poor attendance and lack of continuity in representation on RMDEC.

54. 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 board 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 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 civil service.

55. 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.

56. The primary function of RMDEC is providing a forum for consultation between different authorities with mandates and expertise relevant to mining and the environment in the

application process for rights and permits in respect of the MPRDA. The proposed composition of RMDEC undermines this function in the following ways:

a. The proposed composition of RMDEC provides for *ex officio* membership of the Regional Manager and the Principal Inspector of Mines only. The remainder of the voting membership consists of "representatives of relevant State departments… or relevant organs of state within each sphere." No explicit provision is therefore made for the membership of representatives of the departments of environmental affairs and water affairs.

b. The power of the Minister to appoint non-voting consultants to RMDEC in the proposed section 10C(3) in the Mineral and Petroleum Resources Development Draft Amendment Bill, 2012 has not been included in the Bill. Given the diverse areas of expertise relevant to the mining industry, this is a particularly worrying gap in the composition of RMDEC.

c. All members of RMDEC are required to have "mineral and mining development, mine environmental management, petroleum exploration and production" expertise. No provision is made for members to have knowledge and expertise on natural resource planning, conservation, water science, land use planning and sociology. Knowledge in these fields of study is essential to informing a decision on the desirability of mining in a particular area.[10]

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

d. 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 provided for in the MPRDA;

[10] South African Biodiversity Institute, Department of Environmental Affairs, *et al* Mining and Biodiversity Guideline: mainstreaming biodiversity into the mining sector (2013) Expert knowledge is indispensable in the early stages of an application process since no major investment is yet made in the mining operation.

e. that the expertise required of members be extended to include more appropriate environmental scientific expertise, regional natural resource planning, economic planning, land use planning and sociology;

f. 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 deliberate in RMDEC deliberations, and add valuable expertise; and

g. that, in order to ensure that RMDEC will have access to expert advice in all areas of expertise in the mining industry, the Minister's power to appoint a non-voting independent consultant to advise RMDEC on technical, scientific or novel matters[11] be re-inserted.

RMDEC proceedings

58. In relation to proceedings, we call for the Bill to address the procedure and timeframes for RMDEC's work more expressly. 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), but the procedures adopted by RMDECs in different regions also 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.

[11] For example, marine mining.

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 and may well address the current disconnect between the information available on an application and the decision-maker.

RMDEC functions

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

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 objectors;

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;

d. making recommendations to the Minister in terms of section 54(5) and on agreements made between an applicant and an objector in terms of the proposed section 10(2)(b) and (3) of the Bill; and

e. publishing the RMDEC's reports to the Minister and their yearly business plans in terms of section 10G in the Provincial Government Gazettes.

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)

60. We draw to Parliament's attention that, because of the application of PAJA, if any rights are affected by the proposed decision to give consent to the cession, transfer, encumbrance, letting, subletting, assignment, alienation or disposal of rights and interests, the Minister should give notice of (or require the applicant to give notice of) such proposed decision to the 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.

61. It would be preferable for this process to be 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.

62. 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 for Environmental Affairs, and the Minister for Water Affairs.

Clause 11: Amendment of section 16 of Act 28 of 2002 as amended by section 12 of Act 49 of 2008

(Application for a prospecting right)

63. 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, present also in the 2012 Bill and which has not been rectified in the 2013 Bill, 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 be amended to read as such.

64. Section 16(4)(b) is amended to exclude "interested and", which was introduced by the 2008 Amendment Act. While the 2008 Amendment Act sought to broaden the people who should be consulted, the 2012 Amendment reverted to a position where the classes of people who are entitled to be consulted could be interpreted to be limited. The 2013 Bill perpetuates this. We propose that the 2008 Amendment, that seeks to recognise the broad range of people who ought to be consulted, should be adopted.

65. The 30 day period in subsection (4)(b) requiring such consultation has been 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. In any event, we propose that the period should be part of the Act, and not prescribed in regulations, and should be a period of at least 90 days.

66. Section 16(4)(d) requires an applicant for a prospecting right to submit relevant environmental reports required in terms of Chapter 5 of NEMA within 60 days of receipt of the notice from the Regional Manager. This is an extremely short time period to commission and prepare these environmental reports, in particular given the consultation obligations on an applicant during this process. Placing this kind of time pressure on

applicants to submit their environmental reports has, in our experience, a knock-on effect on the quality of the consultation process carried out by the applicant, i.e., the consultation process is extremely inadequate, if it is conducted at all, because the applicant has so little time to submit the reports to the Regional Manager. We propose a time period of at least 90 days for submission of these reports.

Clause 12: Amendment of section 17 of Act 28 of 2002 as amended by section 13 of Act 49 of 208

(Granting and duration of a prospecting right)

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

Clause 17: Amendment of section 22 of Act 28 of 2002 as amended by section 18 of Act 49 of 2008

(Application for a mining right)

68. 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.

69. We raise the following concerns in regard to the addition of the proposed subsection (4)(c):

    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. As mentioned in the first section of this submission, a common and very detrimental 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 disproportionately 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 all interested and affected parties, 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 of 2008
(Granting and duration of mining right)

70. 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 this "review" entails, or who should be responsible for such a review. Whatever process is followed – and this 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 the 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.

71. 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 had 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.

72. We strongly oppose the insertion of the word "and" rather than "or" after paragraph (a) as part of the proposed amendment of subsection (3). Such an amendment, which, we submit, is not the intention of the drafters, 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.

73. 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.

74. 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 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 a mining right)

75. 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 34: 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)

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 36: 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 section 49 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. Furthermore this amendment significantly diminishes the meaning and object of this section. It is relevant stakeholders with expertise in environmental and other specialist fields who are the appropriate parties to make representations that particular areas be designated in terms of section 49. It is our submission that making the Minister of

Mineral Resources responsible for the designation of such areas is in conflict with her mandate.

79. 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.

80. Timelines and other procedural steps must be stipulated for the declaration of an area under section 49.

Clause 41: Amendment of section 54 of Act 28 of 2002
(Compensation payable under certain circumstances)

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

82. 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. This power therefore represents an inherent conflict of interest.

83. Consideration must be given in this section to the procedures followed in obtaining the right and ensure that the owner and 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.

84. 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, the appropriate measures must be taken to address this.

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