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

Honourable SG Mantashe, MP
Minister of Mineral Resources and Energy
Pretoria

For the attention of: Ms Sibongile Malie
By email: representations@dmr.gov.za

Our ref: Comments_UPRD Bill 2019
21 February 2020

Dear Honourable Minister

SUBMISSIONS ON THE DRAFT UPSTREAM PETROLEUM RESOURCES DEVELOPMENT BILL, 2019

1. In this document, the Centre for Environmental Rights ("CER") submits comments in our own name and on behalf of our clients, groundWork and Earthlife Africa, on the draft Upstream Petroleum Resources Development Bill, 2019 published for comment on 24 December 2019 (Notice 1706 of 2019, Government Gazette No. 42931, 24 December 2019) ("the Bill").

2. The CER'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. Earthlife Africa is a non-profit organisation, founded in Johannesburg, South Africa, in 1988, that seeks a better life for all people without exploiting other people or degrading their environment. It strives to encourage and support individuals, businesses and industries to reduce pollution, minimise waste and protect our natural resources. Its vision is a society living within the ecological limits of sustainable development with an equitable distribution of resources for all, respect for all living things, and the end of social, economic and political exploitation.

4. groundWork is a non-profit environmental justice service and developmental organization working primarily in Southern Africa in the areas of climate and energy justice, coal, environmental health, global green and healthy hospitals, and waste. groundWork seeks to improve the quality of life of vulnerable people in South Africa, and increasingly in Southern Africa, through assisting civil society to have a greater impact on environmental governance. groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices.

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5. Thank you for the invitation to make submissions on the Bill. Before proceeding with our comments, we record that the absence of an explanatory memorandum to this Bill has made the task of making comments on the Bill very difficult. In addition, briefings by Department of Mineral Resources and Energy ("Department") or the Minister of Mineral Resources and Energy ("Minister") or the Petroleum Agency of South Africa ("PASA") would also have made the Bill more accessible to all interested and affected parties.

6. Our overall submission is that the Bill should not proceed in its current form, if at all. Legislation governing petroleum resources must only be put in place to ensure a just transition from fossil fuels to clean renewable energy. Our main submissions are summarised below:

   6.1. The Bill is a replication of the MPRDA, without consideration of the problems arising out of the MPRDA which are recreated in the Bill.
   6.2. Yet crucial objectives of the MPRDA have been removed, including issues surrounding the State's obligation to protect the environment, the need for transformation and community development imperatives.
   6.3. The Minister has failed to consider the implications of the Bill in the context of the climate emergency. South Africa, and the African continent generally, is extremely vulnerable to the impacts of climate change. Temperatures in the region are increasing at twice the rate of the global average. It is the government's constitutional imperative to protect South Africans against the impacts of climate change. This includes investing in abandoning fossil fuels and not putting frameworks in place that facilitate or accelerate new fossil fuel development such as gas infrastructure.
   6.4. The Bill does not make adequate provision for consultation with parties interested in and affected by the activities contemplated by the Bill, 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. This will lead to a range of problems, including exposing the Bill to a number of legal challenges.
   6.5. The powers and obligations afforded/imposed on the Minister under the Bill are problematic. Firstly, the Minister is not granted a discretion to award permits and rights contemplated under the Bill – if certain criteria are met, the Minister is obligated to grant these permits and rights. Secondly, the Minister has irregularly sought to violate the One Environmental System (OES) in the Bill and encroaches into the sphere of environmental regulation, thereby encroaching into the territory of the Minister of Environment, Forestry and Fisheries.

GENERAL COMMENTS ON THE BILL

Replication of provisions in the Mineral and Petroleum Resources Development Act, 2002 (MPRDA), yet removal of certain objectives

7. At the outset, we note with some frustration that the Bill is a replication of the MPRDA. CER, along with various other organisations have, since 2011, engaged with the Department and the Minerals Parliamentary Portfolio Committee about the inconsistencies and deficiencies in the MPRDA through various legislative reform processes1. We note that these inconsistencies and deficiencies have been carried over into the Bill.

[1] For CER's comments on the Mineral and Petroleum Resources Draft Amendment Bill and its engagement around the deficiencies in the MPRDA, please see https://cer.org.za/programmes/mining/submissions/mineral-and-petroleum-resources-development-amendment-bill-2013

8. We note with serious concern that certain crucial objectives of the MPRDA, including the affirmation of the State's obligation to protect the environment for the benefit of present and future generations through ecologically sustainable development; the need to promote local and rural development and uplift communities affected by extraction; the need for equitable access to resources; the need for eradication of discriminatory practices; and the need to address past racial discrimination are absent from the Bill. The Minister is requested to explain this.

9. We also note, in aggravation of the aforesaid, that there is no the provision for a framework dealing with social and labour plans in the Bill. The Minister is requested to explain this.

10. In addition to the inclusion of the above objectives and a social and labour plan framework, in an era of climate emergency, any legislation facilitating developments of this nature must have as one of its central objectives, alignment with South Africa's carbon budget.

11. It is clear that the Department/ PASA has not paid due consideration to the problems that have arisen and continue to arise under the MPRDA, and accordingly we recommend that this Bill does not continue in its current form.

Impetus of the Bill in the context of the climate emergency

12. The implications of the Bill for the climate crisis, and South Africa's own vulnerability thereto, are of major concern and must be given serious consideration.

13. The government has confirmed South Africa's extreme vulnerability to the impacts of climate change.[2] These impacts will largely be felt through: significant warming (as high as 5–8°C, over the South African interior by the end of this century, as a conservative estimate);[3] impacts on water resources, such as decreased water availability; and a higher frequency of natural disasters.

14. Already the impacts of drought, extreme weather events, and fires in South Africa have cost the country billions.[4] Virtually every province in the country has recently experienced, or is currently experiencing, severe, extended drought. The impacts of climate change are crippling livelihoods and jobs, and will have long-term impacts on food security, food prices, human settlements, and health.[5] Government is having to subsidise these high costs, and will increasingly have to do so.

15. The UN's Intergovernmental Panel on Climate Change (IPCC) has confirmed a global average temperature increase of 1.5 degree Celsius above pre-industrial levels, to be the tipping point for our

[2] P8, National Climate Change Response White Paper 2011, at https://www.environment.gov.za/sites/default/files/legislations/national_climatechange_response_whitepaper.pdf. See also the Address by the Minister of Environment, Forestry and Fisheries, Ms Barbara Creecy in the National Assembly in response to the State of the Nation Address (SONA) on 18 February 2020 ("SONA Response Address"), available at https://www.gov.za/speeches/minister-creecy-18-feb-2020-0000 where Minister Creecy noted those impacts occurring across the country in the form of prolonged periods of drought, severe storms and flooding.

[3] P128, Long Term Adaptation Scenarios: Climate Trends and Scenarios for South Africa.

[4] Western Cape Government: Environmental Affairs and Development Planning "Western Cape Climate Change Response Strategy 2nd Biennial Monitoring and Evaluation Report 2017/18" (March, 2018) available at https://www.westerncape.gov.za/eadp/files/atoms/files/WC%20Climate%20Change%20Response%20Strategy%20Biennial%20M%26E%20Report%20%282017-18%29_1.pdf.

[5] P129, Long Term Adaptation Scenarios: Climate Trends and Scenarios for South Africa.

climate, with severe consequences for Southern Africa, including that in Southern Africa, the rate of increase is twice that. [6]

16. The World Economic Forum's annual "Global Risks Report"[7] lists the climate crisis and environmental threats as the top five global risks in terms of likelihood. These are the world's top risks ranked by the likelihood of a global risk occurring over the course of the next 10 years. These are risks which have already materialised and will become more severe unless urgent meaningful action is taken.

17. It is the constitutional imperative of government, to ensure that people in South Africa are protected against these impacts – that their rights enshrined in the Bill of Rights in the Constitution of the Republic of South Africa, 1996 ("the Constitution") are upheld and protected. Economic development and job creation/sustainable livelihoods will be compromised in a country devastated by the effects of climate change.

18. In the next 10 years, significant ambition is needed to sufficiently reduce emissions within the necessary trajectory range and to get South Africa where it needs to be. Doing this requires a commitment to abandon fossil fuels as soon as possible – and certainly to avoid lock-in to new fossil fuel infrastructure which is not needed, which the Bill seeks to accelerate. This renders it irrational.

19. Given South Africa's extreme vulnerability to the impacts of climate change[8] - arguably any decision to lock the country in to more harmful greenhouse (GHG) emissions, through fossil fuel exploitation, which is neither necessary nor desirable, would be in direct contravention of the state's constitutional obligations to protect the rights of the people of South Africa, and the duty of care embodied in section 28 of the National Environmental Management Act, 1998 ("NEMA").

20. The Objects of the Bill include: "[to] *encourage and promote national development of petroleum resources through acceleration of exploration and production"; "promote economic growth and petroleum resources development in the Republic*"; and "*give effect to section 24 of the Constitution by ensuring that the nation's petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development*."

21. However, this Bill stands in contradiction to section 24 of the Constitution, and other constitutional rights, given the negative impacts for climate, health and the environment that would be caused by the industry that the Bill seeks to accelerate the development of. Legislation that would allow and enable new significant sources of GHG emissions (as the present Bill does) is irresponsible, irrational and in flagrant violation of the Constitution.

22. Already South Africa is falling behind on its global and constitutional obligations to address climate change. The country's commitments fall outside the fair share range; and are not consistent with the Paris Agreement 2° Celsius target – let alone the 1.5° benchmark set by the IPCC.

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[6] In her SONA Response Address (see footnote 3), Minister Creecy noted that "Science tells us that our country and our continent are warming much faster than the rest of the world. Whereas the world, on average, has warmed by roughly 1 degree, above pre-industrial times, in southern Africa, the rate of warming is twice that".

[7] At https://www.weforum.org/global-risks/reports.

[8] P8, National Climate Change Response White Paper 2011, at https://www.environment.gov.za/sites/default/files/legislations/national_climatechange_response_whitepaper.pdf.

23. On South Africa's present emissions trajectory (if all government targets were in the same range as South Africa's), warming (at a global average) would reach between 3 and 4° Celsius.[9] This would be even more for South Africa - its Nationally Determined Contribution confirms that even a global average temperature increase of 2°C translates to up to 4°C for South Africa by the end of the century.[10] The effects of this will be catastrophic – impacting particularly on the most vulnerable sectors of South African society.

24. In addition, studies have increasingly shown that moving towards gas as a bridge fuel towards transitioning to clean energy cannot be supported. Firstly, the IPCC's 1.5°C target cannot be met with new gas development. Research has shown that in order to meet Paris' 1.5°C target gas reserves already found in the ground must be left in the ground and all new fossil fuel development must be halted. In fact, even emissions from existing and proposed energy infrastructure represent more than the entire carbon budget that remains if our target is 1.5°C.

25. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty also submits that in order to hit that target of 1.5°C, electricity sectors around the world must decarbonize by 2050: gas plants are not the answer to replacing coal plants if we are to hit that target.

26. We submit that before any decision to promulgate this Bill can be made, consideration must be given to: the multifaceted impacts of the Bill for the climate crisis, including the additional GHG emissions that would arise from the exploitation of petroleum resources, which would be accelerated under this Bill – including indirect emissions from construction, transportation and decommissioning etc. – and the implications of the Bill for the following:

    26.1. the exacerbation of South Africa's own vulnerability to the climate crisis, including the social, external costs of these GHG emissions, the resultant climate impacts for South Africa and the constitutional rights of people in South Africa;[11]

    26.2. South Africa's international climate commitments under the Paris Agreement and its GHG emission trajectory; and

    26.3. the extent to which the further exploitation of oil and gas would even be economically and legally viable in a market where fossil fuels are increasingly constrained and such projects are likely to become stranded assets with high economic costs for the country.

27. Essentially, calculating the external costs of exploiting fossil fuels would, in all likelihood show that, if the upstream development of petroleum resources under the Bill had to absorb the external costs of

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[9] https://climateactiontracker.org/countries/south-africa/.

[10] Id. See also "The Carbon Brief Profile: South Africa" available at https://www.carbonbrief.org/the-carbon-brief-profile-south-africa.

[11] The Interagency Working Group on the Social Cost of Greenhouse Gases (IWG) in the USA has attributed global amounts in scope and applicability, representing the costs of global climate impacts. This is a widely used method for calculating the cost of projects' GHG emissions. The social cost of carbon, as determined by the IWG, is a consensus of the estimate of the social cost of carbon as calculated by three proprietary models: FUND, DICE, and PAGE, as described in the Technical Support Document available at https://www.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf (p5):
"*We rely on three integrated assessment models (IAMs) commonly used to estimate the SCC: the FUND, DICE, and PAGE models. These models are frequently cited in the peer-reviewed literature and used in the IPCC assessment. Each model is given equal weight in the SCC values developed through this process, bearing in mind their different limitations*."

the resultant GHG emissions, those operations would not be financially feasible. The science of attributing climate impacts to particular GHG emission sources is well-established and accepted.[12]

28. The only role for legislation regulating petroleum resources in the era of climate emergency is to regulate existing petroleum operations and facilitate a just transition away from fossil fuel extraction.

Failure to give effect to the principles of administrative justice

29. We submit that the Bill does not make adequate provision for consultation with parties interested in and affected by the activities contemplated by the Bill, 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. We submit that the range of problems that arise under the MPRDA will arise here as a result of this failure,[13] including but not limited to:

    29.1. perpetuating the legacy of unequal access to and distribution of South Africa's natural resources;
    29.2. exposing authorisations under the Bill to increased legal challenges; and
    29.3. promoting conditions in affected communities that are conducive to the generation of conflict.

30. The principles of administrative justice, are encompassed, at a minimum, in the following:

    30.1. Section 33 of the Constitution which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair;
    30.2. Section 3(1) of the Promotion of Administrative Justice Act, 2000 ("PAJA") which 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*
> *(iv) adequate notice of the right to request reasons in terms of section (5)."*

[12] See, for example, "The Law and Science of Climate Change Attribution" at https://journals.library.columbia.edu/index.php/cjel/article/view/4730; https://www.politico.com/agenda/story/2019/10/22/attribution-science-fossil-fuels-climate-change-001290 and refer to the work of the Climate Accountability Institute https://climateaccountability.org/.

[13] See the joint submission of CER together with other community-based and civil society organisations submitted to the National Assembly' Portfolio Committee on Mineral Resources on the Mineral and Petroleum Resources Development Amendment Bill [B 15D-2013].

31. The importance of consultation and access to information in relation to mining was recognised by the Constitutional Court in *Bengwenyama*,[14] 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*".

32. Like mining, the activities contemplated under the Bill have, and will have, an enormously disruptive and distressing impact on the lives of those affected by them. As such, the requirements of administrative justice must be reflected in the consultation and access to information provisions of the Bill. 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***."

33. Clause 7 of the Bill itself states that "*[s]ubject to the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), any administrative action in terms of this Act must be taken within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness*". However, as outlined below, the Bill does not adequately provide for this to be achieved.

34. In our experience, in exercising its decision-making powers the Department frequently does not give effect to section 33 of the Constitution and the provisions of PAJA. This is evidenced through legal challenges of inappropriate and irrational decisions, where interested and affected parties have the resources to do so; other forms of challenge, such as protest, where those resources are scarce or absent; and the violation of a range of human rights where even the resources to protest are scarce or absent. The latter is tragically common in our country where inequality, poverty and marginalisation are unacceptably high, particularly for black South Africans.

35. These challenges come at enormous cost to all affected: those suffering the effects of poor decision-making, those frustrated in their attempts to operate under poorly authorised licences; and the Department itself which must allocate considerable additional resources to those challenges. It is

[14] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC).

therefore imperative that the Bill expressly endorses the principles of administrative justice to ensure that the right to just administrative action is promoted and not hampered and the State, as it must, is actively protecting those members of society who need that protection most.

Public participation and consultation with interested and affected parties

36. Like the MPRDA, the Bill fails to provide for adequate notice to and meaningful consultation with those who are interested in and affected by the activities authorised under the Bill. Rather, the defective sections of the MPRDA are duplicated. Some of these are below.

Interested and affected parties

37. Firstly, there is no clear definition of who interested and affected parties encompass. This is problematic based on our previous experience with operations authorised under the MPRDA. In many cases the consultative provisions of the MPRDA are interpreted by mining companies as not to require consultation with land claimants in some instances. In others, it has led to companies consulting exclusively with traditional authorities in respect of land use and social and labour plans and otherwise, excluding the rest of the affected communities, in contravention of the principles outlined above. This has resulted in instances of a lack of social cohesion between traditional leadership and communities, especially where traditional leaders have received benefits or compensation for land use rights, which have not then been received by the community members. Sometimes that lack of social cohesion manifests in full-scale conflict.

38. Although we do not recommend a closed list of who falls within the definition of 'interested and affected parties', we recommend that as a minimum, the following groups be included: host communities, traditional authorities, landowners, land occupiers, land claimants, informal land rights holders, the relevant governmental departments, civil society.

Proper consultation and notice

39. Clause 28 of the Bill provides for a process of consultation with interested and affected parties when an application for an exploration right or production right is lodged and accepted. The Bill fails to provide for a process of meaningful consultation in the way that the draft amendments to MPRDA Regulations, 2019[15] and the draft Mine Community Resettlement Guidelines[16] for instance, appear to be attempting to do with the MPRDA framework. These failures are set out below.

40. The Bill does not properly advance the principles of administrative justice as set out above from the outset in that it limits the instances of when consultation is prescribed to the applications for exploration rights or production rights. There is no provision for consultation, notification, or public participation in relation to:

    40.1. the granting of permits;
    40.2. the amendment or renewal of rights and permits;

[15] CER's comments on the draft Amendments to the Mineral and Petroleum Resources Development Regulations, 2019 can be accessed here: https://cer.org.za/programmes/mining/submissions/draft-amendments-to-the-mineral-and-petroleum-resources-development-regulations-2019

[16] CER's comments on the draft Mine Community Resettlement Guidelines can be accessed here: https://cer.org.za/programmes/mining/submissions/submission-on-draft-mine-community-resettlement-guidelines-2019

40.3. the transfer of rights and permits; or
40.4. refusal of the granting of rights and permits.

The lack of or inadequate notification, consultation or public participation allows companies to operate or launch reviews and appeals against refusals, without interested and affected parties knowing.

41. Furthermore, the timeframes within which consultation processes are required to take place are still woefully inadequate and remain unchanged from those set out in the MPRDA. Under the MPRDA, the short timeframes for consultation 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.

42. For example, 30 days is all the time afforded to interested and affected parties to submit their comments and objections to exploration or production rights applications after PASA has made the application known in the prescribed manner and in a Gazette. We reiterate our comments here, as those in relation to the MPRDA[17], including that such a consultation would almost certainly necessitate a number of meetings and facilitation of independent technical advice on what is proposed, and, should an agreement be entered into as contemplated in clause 28, the terms of that agreement would have to be negotiated between the parties - a time-consuming exercise under any circumstances.

43. In addition, as with the methods of notice in the MPRDA, we consider the method of notice prescribed for notifying those interested and affected parties via notice in a Gazette to be unfeasible as those affected by the notices often do not see them. In addition, the consultation process does not accommodate those who cannot read or understand the language of written notices and cannot submit objections in writing. Experience shows that in the absence of express provision for this in the legislation, this right is not realised.

44. By not allowing sufficient time and resources to determine the range of interests and conflicts relating to land and petroleum resources, this violates the rights of interested and affected parties to fair administrative action and opens channels for decisions to be appealed or reviewed.

45. We recommend that the overall consultation process be reviewed to ensure that the constitutional right to administrative action that is lawful, reasonable and procedurally fair be given effect to. During this process, we recommend that the principles of meaningful consultation be incorporated, including that:

45.1. meaningful consultation be defined and include an obligation that the applicant has taken all measures reasonably possible and appropriate in the specific circumstances of its application to engage all interested and affected parties;
45.2. applicants take all reasonable measures possible to ensure that interested and affected parties understand the information provided and how it affects them specifically, in order for them to make an informed decision. This should include translations of text into the language used predominantly in the area, and the translation into plain language of scientific or otherwise technical language;

[17] See CER's and coalition members submissions on consultation and administrative justice in terms of the MPRDA Amendment Bill https://cer.org.za/wp-content/uploads/2016/08/Consultation-and-Administrative-Justice.pdf

45.3. a revised process of meaningful consultation also take into account an obligation on applicants to collaborate with interested and affected parties.

46. In line with our comment above, we recommend that meaningful consultation should be expanded to allow for all notices provided for to interested and affected parties (including landowners and lawful occupiers in clause 6(c) to also be published in all accessible media platforms, including notices in the Magistrate's Court in the magisterial district applicable to the land in question, advertisements in local or national newspapers circulating in the area where the land or near the offshore area to which the application relates, is situated; and notices on community radio stations, in community halls, municipal offices, or traditional offices in English and one other official language that is predominantly used in the relevant area.

Access to information

47. In conjunction with the above, the clauses surrounding access to information duplicate the problematic provisions in the MPRDA.

48. Firstly, clause 28 dealing with consultations with interested and affected parties provide that these parties are expected to submit objections and comments on applications without having seen the applications or been provided with the information contained in the applications themselves, effectively expecting interested and affected parties to make these submissions "blindfolded".

49. Interested and affected parties who have a right to be consulted about applications, including communities, community-based organisations and non-governmental 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 companies' refusal/failure/neglect to make available key documents to interested and affected parties.

50. In addition, once authorisations have been awarded to applicants, there is no obligation on the rights holders or PASA to even notify interested and affected parties that an authorisation has been granted. Further, clause 64 of the Bill contains a proviso in 64(2) that "[n]o information or data may be disclosed to any person if it contains information or data supplied in confidence by the supplier of the information or data." Given the minimum standards for procedural fairness of administrative action, 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 interested and affected parties.

51. We submit that, with respect to disclosure of information across the Bill, the following should be provided for:

51.1. an obligation on all applicants for rights and permits under the Bill 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, environment and social impact assessment reports and statements of financial and technical ability, it is not possible for interested and affected parties to assess whether the application complies with the Bill or how the operation will affect them;

51.2. include as a condition to all permits and rights granted by the Minister 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) and swiftly;

51.3. a public, online database of permits and rights issued by the Minister, hosted by PASA/the Department; and

51.4. an obligation on PASA/the Department to make all delegations of power by the Minister available to the public automatically, i.e. without a specific request through PAIA or otherwise.

Free, prior and informed consent

52. While reconsidering the consultation provisions (or lack thereof) in the Bill, we urge the Minister to consider other appropriate standards for public participation, specifically the internationally accepted principle of free prior and informed consent ("FPIC"). The application of FPIC would, among other things, facilitate the realisation of a range of human rights, socio-economic rights in particular, and empower communities to be better informed and able to address how the provision of permits and rights affect them.

53. In doing so, we recommend that the implications of the provisions of the Interim Protection of Informal Land Rights Act, 1996 as confirmed by the Constitutional Court in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*[18] and the High Court in *Baleni and Others v Minister of Mineral Resources and Others*[19] be applied.

Powers of the Minister

Obligation to grant rights and permits

54. We strongly oppose the retention of the obligation on the Minister to grant permits and rights should certain conditions be fulfilled. To give effect properly to the objectives of the Bill, the Minister must have a discretion whether or not to grant a right, which discretion may be guided by the requirements of the specific permit or right, but which must operate over and above those requirements. We therefore submit that the word "must" in these sections dealing with the granting of the rights and permits be replaced with the word "may".

55. The obligation is also utterly inappropriate and ill-conceived in the context of the activities regulated by the Bill given the climate emergency. These types of operations cannot be authorised on a case by case basis without regard to the cumulative impacts of the proposed operation, the proposed operation's contribution to South Africa's carbon budget, and the like.

Encroaching into the sphere of environmental regulation

56. We are concerned that the Minister has irregularly sought to violate the OES in the Bill. The Supreme Court of Appeal (SCA) has confirmed that "*the implementation of the One Environmental System*

[18] 2019 (1) BCLR 53 (CC).
[19] 2019 (2) SA 453 (GP).

would establish NEMA as the only environmental statute and the Environment Minister as the 'lead' minister."[20]

57. Notwithstanding this SCA litigation, and indeed, decision, in the Bill the Minister again encroaches into the sphere of environmental regulation, thereby encroaching into the territory of the Minister of Environment, Forestry and Fisheries. The following provisions are only some of the instances where the Minister has exceeded his powers in attempting to legislate on environmental matters which are reserved for the Minister of Environment, Forestry and Fisheries:

    57.1. Proposing a definition of Sustainable Development in section 1 when this is already defined in NEMA;
    57.2. Sections 29 and 30 relating to the establishment of Petroleum Development and Environmental Committee and their functions and duties;
    57.3. Provisions relating to appeals and particularly section 87 which seeks to depart from the position established under the OES that the Minister responsible for Environment is the appeal authority;
    57.4. Financial Guarantees as provided for in section 27(3) and section 73;
    57.5. The deeming provisions in section 67 in relation to EMPRs and EMPs approved under the MPRDA.

SPECIFIC COMMENTS ON THE BILL

58. Below, we deal only with certain specific clauses in the Bill. As indicated hereinabove, we submit that the Bill is in fact fatally flawed and should be reconsidered *in toto*. Should another iteration of the Bill be published in due course, we shall assess the need for further specific comment at that stage.

Definitions

59. A number of definitions in the Bill are vague and circular. They do not provide clear guidance on the meaning of the words. Examples include the following definitions:

    59.1. **Exploration operation** and **reconnaissance**: We recommend that the difference between these two activities be made explicit in the Bill. It is our understanding that reconnaissance includes geological surveys which presumably could also include drilling of cores. If this is not the intention, we advise that this definition be amended and precise activities contemplated for authorisation be outlined.
    59.2. **Petroleum**: The definition of petroleum contained in the Bill is open ended and lacks clarity on what is contemplated. It is not clear what petroleum resources are included and excluded in this definition.
    59.3. **Production operation:** This definition is circular and given the rights afforded to a production rights holder, there must be a clear outlining of what these activities entail and accordingly who will need to apply for a production right based on the activities that they undertake.
    59.4. **Owner**: The definition of owner in the Bill seems to only accommodate persons who have registered land. The definition does not take into account the majority of people in South

[20] *Minister of Mineral Resources v Stern and Others; Treasure the Karoo Action Group and Another v Department of Mineral Resources and Others* (1369/2017; 790/2018) [2019] ZASCA 99 at para 21.

Africa who are not registered owners of land but hold same in terms of customary law. Failure to recognise the different dynamics of ownership within the South African context places some groups of people at risk of being exploited and deprived of their rights in terms of the Bill.

Clause 29 – 30: Petroleum Development and Environmental Committee

60. We note that objections to the granting of an exploration or production right must be referred to the Petroleum Development and Environmental Committee by PASA, to consider the objections and to advise the Minister. While this is a good initiative in principal, history has shown, through the Regional Mining Development and Environmental Committee (RMDEC) (for mining) such a committee did not operate in the manner in which it was intended. Some of the issues identified with RMDEC were that some were not operational, some of the Regional Mangers did not properly implement the functions of the RMDEC and some objectors complained that the RMDEC would not be convened despite objections having been lodged. Our concern is that this will occur with the Petroleum Development and Environmental Committee.

61. It is thus not clear how the Petroleum Development and Environmental Committee will be different from RMDEC. Further, with the environmental regulation being situated in NEMA it is questionable whether such a committee should be governed under this piece of legislation.

Clause 50: Permission to remove and dispose of petroleum resources

62. We submit that interested and affected parties must be notified when a holder of an exploration right applies for permission from the Minister to remove and dispose of petroleum and when making an application for an environmental authorisation thereof. This clause in the Bill does not provide for any form of public participation. It is important that the public, especially affected communities, is/are included in all the processes pertaining to petroleum development. The law should not be selective on what is communicated to the public. This ensures meaningful engagement at all times.

Clause 67: Approved environmental management programmes and environmental management plans

63. We submit that the Minister has no power to regulate the deeming of authorisations as valid under NEMA.

Clause 74 – 75: Restriction or prohibition of exploration and production on certain land or block and Ministers powers to prohibit or restrict exploration or production

64. Subsections 74(1) and (2) seem to be counter-posed which will lead to unacceptable legislative uncertainty. Moreover, if it is the Minister's intention in this section to attempt to trump the powers of the Minister of Environment, Forestry and Fisheries under the National Environmental Management: Protected Areas Act, 2003, then this is unacceptable and unlawful, but also irrational in the current context of climate emergency.

65. For these reasons also, the protection afforded in section 74(2)(c) only to existing holders of extractive rights, and to no other rights holders, is also irrational.

66. In relation to the Ministers powers to prohibit or restrict exploration, we submit that South Africa's carbon budget should be an express consideration when exercising powers under this section.

Clause 87: Internal appeal process

67. We submit that an appeal against an administrative decision to award a right under the Bill should always suspend the decision pending the finalisation of the appeal. Without that suspension, the authorised activities will proceed and the appeal is rendered academic. This is a violation of a range of the appellant's rights, not least of which is the right to fair administrative action. The suspension is all the more necessary and important given that appeal processes in practice are rarely determined swiftly, and frequently are not determined at all.

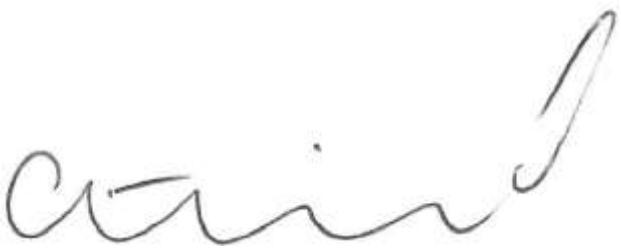
CONCLUSION

68. The final submission we wish to make at this stage is that the authorisation of operations contemplated by the Bill cannot commence before a strategic environmental assessment (SEA) for petroleum resources development in South Africa has been undertaken in order to inform the direction of the development of this industry. That SEA must then inform PASA's acceptance of applications for authorisations under the Bill for a specific block/region.

69. We are willing to make more detailed submissions to the Minister on any of the issues raised above should this be useful.

70. We thank the Minister for the opportunity to comment on the Bill and trust that our comments will be addressed.

Yours sincerely
CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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