Draft Amendments to the MPRDA Regulations, 2019

Table of Comments by the Centre for Environmental Rights, 31 January 2020

Definitions and Abbreviations

In this text any word or expression to which a meaning has been assigned in the Draft Amendments to the MPRDA Regulations, 2019 will have that meaning and, unless the context indicates otherwise

MPRDA Regulations	The current Mineral and Petroleum Resources Development Regulations published under GN R527 in GG 26275 of 23 April 2004 (as amended)

Key

[ ] Words in bold type in square brackets indicate omissions from existing enactments

__ Words underlined with a solid line indicate insertions in existing enactments

Specific comments on proposed amendments to the regulations

Regulation	Position in the Act and/or current MPRDA Regulations	Proposed Amendment	CER Comment	CER proposed amendment (if applicable)
Regulation 1: Definitions	"interested and affected persons" are currently defined as *natural or juristic persons or an association of persons with a direct interest in the proposed or existing operations or who may be affected by the proposed or existing operation.*	The substitution of the definition of "interested and affected persons" for the following definition- <u>"Interested and affected persons" means a natural or</u>	The expansion on the definition of "interested and affected persons" is welcome. However, we recommend that civil society and non-governmental organisations also be explicitly mentioned as one of the groups in the definition. In the past few years, civil society and non-governmental organisations have taken a strong and active role in	By the insertion of the following into the proposed amended definition of "interested and affected persons": <u>"(ix) civil society including non-governmental organisations"</u>

		juristic person or an association of persons with a direct interest in the proposed or existing operation or who may be affected by the proposed or existing operation. These include, but are not limited to; – (i) Host Communities (ii) Landowners (Traditional and Title Deed owners) (iii) Traditional Authority (iv) Land Claimants (v) Lawful land occupier (vi) Holders of informal rights (vii) The Department of Agriculture, Land Reform and Rural Development. (viii) Any other person (including on adjacent and non-adjacent properties) whose socioeconomic conditions may be	collaborating with the state to ensure a robust legal framework, especially, in mining. This explicit mention will be an important indicator of the recognition by the state of the work done by civil society and non-governmental organisations.	

		directly affected by the proposed prospecting or mining operation (ix) The Local Municipality (x) The relevant Government Departments, agencies and institutions responsible for the various aspects of the environment and for infrastructure which may be affected by the proposed project		

		The addition of the following definition: "**meaningful consultation"** which means that an applicant, in good faith, has engaged the landowner, lawful occupier and interested and affected parties in respect of the land subject to the application about the impact the prospecting or mining activities would have to his right of use of the land by availing all the information pertaining to the proposed activities enabling these parties to make an informed decision regarding the impact of the proposed activities.	We note that the definition of meaningful consultation only appears in the definition section and has not been used anywhere in the Draft Regulations. We recommend that the reason for this insertion be reviewed and this terms be incorporated into the Draft Regulations where appropriate. When doing so, we recommend that the following also be taken into account: • that the definition of meaningful consultation include an obligation that the applicant has taken all measures possible to engage all interested and affected parties; • that in addition to availing all the information pertaining to the proposed activities, that 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; the translation into plain language of scientific or otherwise technical language; • that a revised definition of meaningful consultation also take	

			into account an obligation on applicants to collaborate with interested and affected parties. However, before the above is undertaken, we argue that the Department require free, prior and informed consent affected communities in the regulation of mining and the legal framework in which it is situated. 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 court in the cases of *Baleni and Others v Minister of Mineral Resources and Others*[1] be applied. In this case, the court found that the consent of customary communities should be sought instead of mere consultation.	
Regulation 3(2)	(2) The notice referred to in subregulation (1) must be placed on a notice board at the office of the Regional Manager or designated agency, as the case may be, that is accessible to the public.	By the insertion of words into subregulation 3(2) as follows: "(2) The notice referred to in sub-	We reiterate our comments relating to meaningful consultation here. Accordingly the requirements and disbursement of this notice should be as inclusive and encourage as broad participation as possible. Therefore, there should be the requirement for	By the insertion of words into subregulation 3(2) as follows: "(2) The notice referred to in subregulation (1) must be placed on a notice board at the office of the Regional Manager or designated agency, as the case may be, that is

[1] Case No 73768/2016. This must also be considered in the context of the Constitutional Court judgment, *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 2019 (2) SA 1 (CC) where the Constitutional Court recognised that where land is held on a communal basis, all affected parties must be given a reasonable opportunity to participate at any meeting where a decision to dispose of their rights to land is to be taken, and that the aforementioned decision can competently be taken only with the support of the majority of these affected persons present at such a meeting.

		regulation (1) must be placed on a notice board at the office of the Regional Manager or the designated agency, as the case may be, that is accessible to the public or the website of the Department or the designated agency."	the Notice to be published on the Department and designated agency's website	accessible to the public, and on the website of the Department and the designated agency."
Regulation 3(3)	(3) In addition to the notice referred to in subregulation (1), the Regional Manager or designated agency, as the case may be, must also make known the application by at least one of the following methods - (a) publication in the applicable Provincial Gazette; (b) notice in the Magistrate's Court in the magisterial district applicable to the land in question; or (c) advertisement in a local or national newspaper circulating in the a where the land or offshore area to which the application relates, is situated.	By the insertion in Regulation 3(3) of paragraph (d) as follows: (d) place notice in community halls, municipal offices, or traditional offices in English and one other official language that is dominantly used in the relevant area."	In line with our comment above, we recommend that meaningful consultation should be expanded to allow for the Notice to be also published in *all* accessible media platforms.	By the amendment of regulation 3(3) as follows: In addition to the notice referred to in subregulation (1), the Regional Manager or designated agency, as the case may be, must also make known the application to all interested and affected persons through multiple for a, including, at a minimum, **[by at least one]** each of the following methods - (a) publication in the applicable Provincial Gazette; (b) notice in the Magistrate's Court in the magisterial district applicable to the land in question; (c) advertisement in a local or national newspaper circulating in the a where the land or offshore area to

				which the application relates, is situated; and (d) place notices in community halls, municipal offices, or traditional offices in English and one other official language that is dominantly used in the relevant area." (Note: If the above changes then the wording in this regulation should also change to encompass the above changes.)
Regulation 3(5)		By the insertion of subregulation (5) as follows: "(5) The Regional Manager shall obtain and keep confirmation of placement of the notice from; (a) the relevant Provincial Gazette, if the notice was published in terms of regulation 3(3) (a); (b) Clerk of the Court or photographs taken by the responsible official, if the notice was		By the insertion of subregulation (5) as follows: "(5) The Regional Manager shall obtain and keep confirmation of placement of the notice from; (a) the relevant Provincial Gazette, for the notice published in terms of regulation 3(3)(a)**[, if the notice was published in terms of regulation 3(3) (a)]**; (b) Clerk of the Court or photographs taken by the responsible official, for the notice advertised in terms of regulation 3(3) (b) **[, if the notice was advertised in terms of regulation 3(3) (b)]**; (c) the relevant local or national newspaper, for the notice advertised in terms of regulation 3(3) (c) **[, if the**

		advertised in terms of regulation 3(3) (b); (c) the relevant local or national newspaper, if the notice was advertised in terms of regulation 3(3) (c); and (d) photographs of the notice taken by the responsible official, if the notice was placed in terms of regulation 3(3) (d)."		**notice was advertised in terms of regulation 3(3) (c)]**; and (d) photographs of the notice taken by the responsible official, for the notice placed in terms of regulation 3(3) (d) **[, if the notice was placed in terms of regulation 3(3) (d)]**."
Regulations 3A and 3B		The addition of regulations 3A and 3B: "3A. Obligation on the part of the applicant to consult The consultation with landowners, lawful occupiers and interested and affected persons contemplated in section 16(4) (b), 22(4) (b), 27(5) (a) shall be conducted in terms of the public	While we support the attempt at the requirement for meaningful public participation and a public participation process to be conducted in terms of the Environmental Impact Assessment Regulations, 2014, we refer to our comments in respect of meaningful consultation and consent. We also propose that the regulations include an obligation to engage in consultation with and obtain consent on the process of resettlement, which are currently set out in Draft Mine Community Resettlement Guidelines, 2019 as opposed to being encompassed within the legislative framework.	3B(2) The notice must; (a) be in writing (b) state the date and time of entry to the land in question; (c) be accompanied by certified copies of the right or permit, as the case may be; and (d) Certified copies of the environmental authorisation and **[any relevant]** all authorisations required for the operation. (e) The holder referred to in sub-regulation (1) must submit proof of service of the notice to the office of Regional Manager in whose region the right relates."

		participation process prescribed in Chapter 6 of the Environmental Impact Assessment Regulations, 2014, Regulations 39, 40, 41, 42, 43 and 44 respectively. 3B. Notification by the right/permit holder before commencement of operations A holder of a reconnaissance permission, reconnaissance permit, mining permit, prospecting right, exploration right, mining right and production right must give the landowner or lawful occupier of the land and the Regional Manager at least 21 days written notice of his or her intention to		

		commence with the operations. (2) The notice must; (a) be in writing (b) state the date and time of entry to the land in question; (c) be accompanied by certified copies of the right or permit, as the case may be; and (d) Certified copies of the environmental authorisation and any relevant authorisations. (e) The holder referred to in sub-regulation (1) must submit proof of service of the notice to the office of Regional Manager in whose region the right relates.”		
Part V: Regulation on Notice of Profitability and Curtailment of Mining operations		By addition, after regulation 73 of regulation 73A.	Current regulations do not prescribe the form or content in which a section 52 notice is to be made to the Minister. The Draft Regulations propose a template to be completed by mining	

affecting employment			companies and seek to impose an obligation on mining companies to lodge the prescribed section 52 notice within 7 days after consultation with registered trade union/s, affected employees or their nominated beneficiaries. To this end, we welcome the inclusion of this prescribed form.	
Part VI: Regulation on application for use of surface of land contrary to the objects of the Act		By the addition of regulation: 73B as follows: "An applicant who applies for the approval of the Minister to use the surface of land in a way which may be contrary to the objects of the Act, or is likely to impede any such object must submit an application for approval to the relevant Regional Manager, which application must provide the specific information in the format required in this regulation as follows."	The current MPRDA Regulations do not prescribe the form or content in which a section 53 application is to be made to the Minister. To this end, we welcome the inclusion of this.	

Part VII: Regulation on compensation payable under certain circumstances in terms of section 54 of the Act		By the addition of regulation 73C as follows: **"**73C. Compensation payable under certain circumstances. 73C (1) If a resettlement or compensation related dispute cannot be resolved by agreement between the parties, the applicant or a holder of a prospecting right, mining right or a mining permit shall notify the Regional Manager about the dispute. 73C (2) The notice must be in writing as per notice form in *figure XYZ* and accompanied by a non-refundable fee of R1500. 73C (3) The Regional Manager must acknowledge receipt of the notice within	Currently no fee is payable to lodge a s54 Notice. The Draft Amendments seek to prescribe a process in terms of which the Regional Manager may resolve land access and "resettlement" disputes and, on the face of it, grants the Regional Manager powers that are not contemplated in section 54 of the Act. The process set out in the Draft Amendment Regulations is wholly inconsistent with the provisions of section 54 , for example, the provision does not require the Regional Manager to constitute a negotiation team, but merely requires him or her to consider the issues raised by the right holder and the written representations by the owner/lawful occupier of the land. We recommend a complete revision of this Regulation, taking into account the following: • harmonisation with section 54 of the Act; and • obligations with respect to obtaining consent.	

		seven days and initiate a negotiation process as contemplated in section 54(3) of the MPRDA. In this regard the Regional Manager shall; (a) Constitute a negotiation team comprising representation from all affected parties (the applicant, the right holder, representatives of affected community/ies, traditional leadership etc). (b) Develop Terms of Reference for the negotiation team with clear parameters regarding the role of the team, scope of its work, meeting dates and times and		

		timeframes to resolve the dispute. (c) Require all affected parties to submit all relevant information (documents, agreements etc) that pertains to the dispute. (d) Chair the meetings as per the terms of reference objectively with a view to facilitate a speedy resolution of the dispute. (e) Ensure that the meetings quorate and that every party is represented and mandated. (f) Refer complicated matters to the Deputy Director General, Director General or the Minister where warranted. 73C (4) The Regional Manager led process shall be concluded		

		within a period of up to 90 days. 73C (5) If a resettlement or compensation related dispute cannot be resolved through Regional Manager led process, parties to the dispute may refer the matter to an arbitration or conciliation process in terms of applicable legislation (Arbitration Act and Conciliation Act). 73C (5) The referral must be made within 30 days of the decision by the Regional Manager. 73C (6) The conciliation or arbitration process shall be undertaken and concluded within a period of up to 90 days. 73C (7) If a resettlement or compensation		

		dispute cannot be resolved by agreement between the parties, the Regional Manager led process or the conciliation or arbitration process, the aggrieved party may take the dispute to the competent court within 30 days of the arbitration or conciliation award."		
Chapter 3: Appeals		By the substitution of Regulation 74 as follows: **"74. Appeals against administrative decisions** (1) Any person who appeals in terms of section 96(1) (a) of the Act against an administrative decision, must **[within 30 days after he or she has become aware of the or should reasonably become aware of the**	While we are of the considered view that this Chapter 3 is ambiguously drafted creating uncertainty around timeframes, inter alia, and therefore requires amendment, we do not agree with the proposed amendments to the Chapter. It is problematic for a number of reasons, including but not limited to that: • it only refers to appeals contemplated in terms of section 96(1)(a) of the Act and has excluded s96(1)(b) appeals. This creates uncertainty regarding the manner in which appeals submitted in terms of section 96(1)(b) will be processed and the time periods applicable thereto;	

		administrative decision concerned, lodge a written notice of intention to appeal with the Director General or the Minister, as the case may be,] submit a written notice of intention to appeal to the Minister, the Regional Office from which the decision emanates and any other person whose rights may, in the opinion of the appellant, be affected by the outcome of the appeal. (2) The notice of intention to appeal referred to in sub-regulation (1) must be submitted within 30 days of the date of the decision.	• It is in conflict with the Act, for example it has incorrectly identified the Minister as the competent authority in relation to an appeal under section 96(1)(a), as opposed to the Director-General, and provided the Regional Manager with competencies and powers that the Act does not contemplate, especially in instances where there are complaints against the Regional Management • The obligation set out in Regulation 74(2) that a person must appeal within 30 days of the decision being made is problematic and flies in the face of the requirement of administrative justice. We have often seen in practice that interested and affected parties are not notified of decisions and accordingly only becoming aware of decisions after the 30-day period, through no fault of their own. The consequence of the proposed amendments will therefore be that persons who had a right to appeal an administrative decision being potentially prevented from doing so.	

			• The proposed amendments do not provide for logical, transparent sequencing of submissions. For example, if certain timeframes are not prescribed (eg proposed 74(3)(b)) yet other processes depend on them, it is impossible for parties to the appeal to know when the period for the latter process commences. Proposed 74(3)(d) is also problematic in this respect. • Proposed 74(6)(c) will be impossible to comply with. • The proposed regulation refers inconsistently to "statement" and "affidavit" creating uncertainty. • The reference in 74(15) to "both matters to be adjudicated upon in terms of section 96(1)(a) and (b)" appears to be erroneous, and is in either event without proper meaning. • Similarly 74(15)(a) and (b) appear to be erroneous. We also note that this provision is based on the MPRDA Bill, 2013 which has since been withdrawn. Finally, we do not agree with the current Regulation 74(3) which prescribes a fee for appeals. This has	

			serious access to justice issues in that certain parties who may wish to appeal in terms of section 96 of the Act would not be able to if they do not have access to money to file an appeal.	