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

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Dear Honourable Luzipho

SUBMISSIONS ON THE UPSTREAM PETROLEUM RESOURCES DEVELOPMENT BILL, B13 - 2021

1. Thank you for the opportunity to present our comments on the Upstream Petroleum Resources Development Bill (B13 – 2021) (the Bill). We submit these comments on behalf of the Life After Coal/Impilo Ngaphandle Kwamahle ("LAC") coalition, which is comprised of the Centre for Environmental Rights ("CER"), groundWork and Earthlife Africa.

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2. The CER envisions a South Africa where the Constitutional right to an environment that is not harmful to health or well-being and which is safeguarded for future generations is realised. Acting as part of LAC, we aim to ensure that there is a just transition that accompanies the phasing out of fossil fuels.

3. We submit that the Bill should not be promulgated in its current form due to several fundamental flaws. These include that the Bill disregards the fact of the climate emergency and its impetus contradicts, and will cause South Africa to fall foul of, our climate change commitments, the Bill has administrative justice shortcomings and the Bill is in conflict with the one environmental system (OES). OES governs the environmental regulation and management of mineral and petroleum extraction in terms of the 2008 Cabinet agreement which was enacted in section 50A of the National Environmental Management Act, 1998 (NEMA).

Climate catastrophe

4. The Bill seeks to accelerate the exploration and production of oil and gas reserves. This is explicit in section 2(j) of the Bill which states "The objects of this Act are to - ……accelerate exploration and production, and maximise the economic recovery of petroleum for the benefit of the people of South Africa;[1]"

5. The world is facing climate catastrophe. The United Nations Intergovernmental Panel on Climate Change (IPCC) 6th Assessment Report (AR6) confirms that climate change is caused by human activity. The adverse effects of climate change, such as significant warming, drought and an increase in the occurrence of natural disasters are happening on a scale that is unprecedented and alarming.[2]

6. AR6 confirms the IPCC Special Report that the tipping point for the climate is 1.5 degrees Celsius of average global warming above pre-industrial levels. In order to achieve this, there must be rapid and significant reductions in greenhouse gas emissions in the order of 45% decrease (over 2010 levels) by 2030, and a decrease to net zero emissions by 2050.[3]

7. As you no doubt know, the impacts of climate change are more severe in sub-Saharan Africa and the region is projected to warm at twice the global average levels. [4] South Africa is especially vulnerable to these impacts. The country will see significant warming and its already scarce water resources will be further constrained.

8. According to the 2017 National GHG Inventory Report[5] for South Africa (published in August 2021), the energy sector accounted for 410MtCO2e out of a total of 516MtCO2e in 2017. Of the 410MtCO2e, 380 MtCO2e were attributable to the combustion of fossil fuels, and a further 30 MtCO2e were as a result of fugitive emissions, a phenomenon almost entirely attributable to fossil fuel production. In this regard we must also highlight the importance of reducing methane emissions (which form the bulk of the fugitive emissions referred to above). According to the United Nations Environment Programme (UNEP), in its May 2021 Global Methane Assessment Report, "***In the absence of additional policies and measures, methane emissions are projected to continue rising*** *through at least 2040. Current concentrations are well above levels in the 2° C scenarios used in the IPCC AR5. The Paris Agreement's 1.5° C target cannot be achieved at a reasonable cost* ***without reducing methane emissions by 40–45 per cent by 2030."***[6] (our emphasis)

[1] Section 2(j), Upstream Petroleum Resources Development Bill, B13 - 2021
[2] IPCC 6th Assessment Report
[3] This was further confirmed at COP26 and COP27
[4] https://unfccc.int/sites/default/files/NDC/2022-06/South%20Africa%20updated%20first%20NDC%20September%202021.pdf on Page 3
[5] https://www.dffe.gov.za/sites/default/files/docs/nir-2017-report.pdf
[6] Page 8. UNEP Global Methane Assessment report: Summary for Decision-Makers
https://www.unep.org/resources/report/global-methane-assessment-benefits-and-costs-mitigating-methane-emission

9. It is common cause that gas extraction and processing is an environmental hazard due to the fact that it contributes towards global warming through the release of methane. Methane is a potent greenhouse gas (GHG) that has an 84x higher global warming potential than carbon dioxide over a 20 year period. Methane contributes a significant portion of the greenhouse gases causing climate change - up to 25% according the IPCC's Fifth Assessment Report of 2013 (IPCC AR5).

10. Looking at the full lifecycle GHG emissions of gas we are obliged to consider the fugitive emission, or leakage, of methane that occurs at various points in the supply chain – extraction, transport, storage, liquefaction and at point-of-use. Conventional gas production has been found to result in 2.8% to 3.5% leakage. This goes up to 3.6% to 7.9% for shale gas production, or fracking.[7] It is estimated that a 2.7% leakage rate will cancel out any climate benefits that gas has over coal. [8]

11. The International Energy Agency advises that in order to achieve net zero by 2050 there must be no new investment in fossil fuel.[9] The IEA further confirms that there is no need for new oil and gas projects. The *Net Zero by 2050: A Roadmap for the Global Energy Sector* report confirms that the path to net-zero requires "immediate and massive deployment of all available clean and efficient energy technologies"[10].

12. It is thus highly concerning, and irrational, that the Minister of Mineral Resources and Energy, and his department, seek to lock the country into new oil and gas projects.

13. Additionally, there are serious **economic risks** posed to goods and services created using fossil fuel energy. Because these have a high carbon footprint due to the direct and indirect GHG emissions caused by their production, they have exposure to increased taxes and other costs.[11]

14. If laws are applied more vigorously, and as policies, targets and financial pressures become ever more restrictive, we foresee the very real risk that fossil fuel infrastructure and developments will become inviable and illegal to operate long before the end of their economic lifespans, resulting in **stranded assets** and very likely placing burdens on the public purse in terms of decommissioning and management costs.

15. From the perspective of the well-being of the people of South Africa (and the world), by legislating to accelerate and lock into more fossil fuel extraction, our government would be wilfully subjecting its people to bear the heavy brunt of the climate catastrophe and additional economic risks.

16. This would constitute a violation of the Constitutional rights to an environment that is not harmful to health or well-being, and to have the environment protected for the benefit of present and future generations. These rights are realisable now. It would equally violate the Constitutional rights to health care, food, water and social security, life, dignity and the rights of the child. The Bill's enactment would be a flagrant disregard for the State's duty to protect the rights of the people of South Africa.

Administrative justice

[7] https://link.springer.com/article/10.1007%2Fs10584-011-0061-5

[8] https://www.scientificamerican.com/article/methane-leaks-erase-some-of-the-climate-benefits-of-natural-gas/

[9] https://www.iea.org/reports/net-zero-by-2050)

[10] Page 14, International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector*, 2021, https://www.iea.org/reports/net-zero-by-2050

[11] The European Union introduced the Carbon Border Adjustment Mechanism (CBAM) which will levy a fee on all imports based on their carbon footprint. An extensive fossil fuel powered electricity system will ensure that our exporters are heavily penalised and their competitiveness is at risk.

17. Sections 33(1) and 33(2) of the Constitution of the Republic of South Africa[12] provide that everyone is entitled to lawful, reasonable and procedurally fair administrative action[13] and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons[14]. Section 33(3) of the Constitution further provides that national legislation must be enacted to give effect to these rights[15]. To that end the Promotion of Administrative Justice Act ("PAJA") was promulgated.

18. In light of the duties imposed by the Constitutional obligation and the enabling legislation, it is our submission that the Bill is found lacking with regards to the Bill's provisions around public participation and consultation. These deficiencies leave the Bill open to litigious challenge. We discuss the aforementioned shortcoming below.

Public participation/consultation (IAPs)

Consultation provisions within the Bill

19. The consultation provisions within the Bill are wholly inadequate. This is evident in the Bill's failure to provide a definition of "interested and affected party" (IAP). There is usually no consensus on which parties are considered interested and affected as the term can be a disputed one between industry and civil society. This often leads to parties that have an interest in and/or are impacted by a proposed project not receiving notice of applications and being deprived of their right to participate in the application and authorisation process.

20. In our experience in working with mining–affected communities, the extractive industry, and those responsible for regulating it, often interpret the term, IAP, as referring to land owners and traditional authorities.

21. Such an interpretation is restrictive in that it does not allow participation by a host of parties interested in and/or affected by a proposed development, such as lawful occupiers, those who have land claims or those voices in communities that do not agree with and/or recognise the sitting traditional authority. We note that these disagreements and the disenfranchising of certain groups of people have led to violent conflict in the past.

22. It is thus paramount that the term IAP be defined. NEMA defines an IAP for the purposes of Chapter 5 as (a) any person, group of persons or organisation interested in or affected by such operation or activity; and (b) any organ of stale that may have jurisdiction over any aspect of the operation or activity.'[16] It is submitted that this definition is sufficient and should be echoed in the Bill for its purposes, but for the specific reference to Chapter 5.

23. While we do not suggest that there should be an enumerated (closed) list of IAPs, we submit that "IAP" should, at a minimum, include traditional authorities and host communities, landowners, land occupiers, land claimants, informal land rights holders, governmental departments and civil society[17].

[12] Constitution of the Republic of South Africa, Act 108 of 1996
[13] Section 33(1) Constitution of the Republic of South Africa, Act 108 of 1996
[14] Section 33(2) Constitution of the Republic of South Africa, Act 108 of 1996
[15] Section 33(3) further provides that the legislation enacted must*; (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration*
[16] Section 1, NEMA
[17] CER submission on the draft UPRD Bill, 20 February 2020

24. Section 20 of the Bill deals with applicants consulting with IAPs. It provides that the South African Agency for the Promotion of Petroleum Exploration and Exploitation ("PASA") must, within 14 days from the date of acceptance of an application, notify the applicant in writing to consult with the landowner, lawful occupier and any affected party. Furthermore, a consultation report must be compiled and submitted to PASA within 60 days of the date of acceptance of the application. It is noted, with concern that the consultation provision only provides for consultation in terms of section 15, 16 and 38 which pertain to licensing rounds for petroleum rights, licensing rounds for reconnaissance permits and applications for reconnaissance permits respectively. The limitation of consultation to certain types of applications is lamentable.

25. We lament the lack of <u>any</u> provision requiring any form of consultation when it comes to;

    a. The application for approval to progress to the next term (exploration phase);
    b. The application for approval to progress to next term (production phase);
    c. An application for a drilling permit;
    d. The application for extension of an exploration phase;
    e. The application for approval to progress to the production phase;
    f. Review of a petroleum right;
    g. The application for a retention permit;
    h. Open licensing rounds;
    i. The manner in which the petroleum right provides for the conducting of exploration applications;
    j. The application for permission to produce petroleum and conduct tests during exploration;
    k. The extension of the exploration phase period;
    l. Third party access to upstream petroleum infrastructure;
    m. The development of unitised development arrangements;
    n. The application for a closure certificate;
    o. The provision of financial guarantees for petroleum operations;
    p. Amendment applications;
    q. Transferal of rights applications;
    r. Conversion of exploration right to petroleum right (exploration phase) in the Transitional Arrangements;
    s. Conversion of exploration right to petroleum right (production phase) in the Transitional Arrangements;
    t. Conversion of production right to petroleum right; and
    u. The application for renewal of a retention permit.

26. Section 19 of the Bill pertains to PASA itself consulting with IAPs. As with section 20, the consultation provided for here only extends to section 15, 16 and 38. No reason is given for why other applications envisaged in the Bill, as listed in the preceding paragraphs, do not contain a mandatory consultation clause.

27. The failure of the draft UPRD Bill to create a robust framework, or at the very least to include mandatory consultations provisions for a number of important applications is concerning. One may argue that since PAJA applies to the Bill, consultation would be given effect to. However, in our experience with the DMRE and the mining industry, despite the applicability of PAJA to the MPRDA, we have found that the DMRE has not required applicants/holders to consult on certain applications, and applicants/holders do not self-regulate under PAJA.

28. The failure to include specific consultation provisions within the Bill is worrisome. Specific provision should be made within the Bill itself, to entrench a culture of consultation with IAPs other than mere reliance on the provisions of PAJA.

29. Essentially, IAPs are excluded from participation in the rights and permits application processes. Alongside the lack of definition of IAP, the lack of provision for consultation will invariably exclude already marginalised and vulnerable groups of people.

30. We further submit that the timeframe provided for (60 days for the applicant to submit a consultation report and thus an even shorter time for the applicant to conduct the actual consultation with the IAP) is woefully inadequate. Such consultations would invariably involve a number of meetings with IAPs as well as the investigating concerns, the potential commissioning of expert reports, *inter alia*, which would arguably require more time than 60 days. The provision in s.100 for notice by registered mail is utterly out of touch, given, among other things, the state of the postal service in South Africa.

31. Similarly, the notice method of publication in the Government Gazette is wholly inadequate and inappropriate. It is highly unlikely that most persons in the country who will be impacted by the activities proposed to be regulated under the Bill have access to the Government Gazette.

32. We draw attention to the National Environmental Management Act ("NEMA") and the Environmental Impact Assessment Regulations ("EIA Regs") which both provide for consultation alongside adequate notice. NEMA and the EIA Regs provide detail on what adequate notice entails. It is paramount that the consultation clauses in the Bill not only provide for consultation, but also adequate notice of an application to IAPs.

33. During the Covid-19 lockdown, in which many persons could not leave their homes save for essential service workers, important lessons were learnt about how important information can be conveyed to people.

34. At the forefront of the Minister's mind should be the fact that the purpose of notice is to ensure that all potential IAPs are made aware of a proposed consultation and that they are given adequate time to prepare for and participate in that consultation. The Constitutional Court, in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*[18], confirmed this when it held "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."[19]

35. Factors that would prevent participation in consultations, such as disability, language or literacy must be mitigated. This would entail publishing notices in on social media platforms, in the relevant Magistrates Court, in local and national newspapers that circulate in the area that the application pertains to, on community radio stations, and in community halls and municipal and traditional offices. These notices should ideally be in English as well as the main language/languages that is/are spoken in the area.

36. We submit that the insufficient public participation and consultation provisions in the Bill violates the rights of IAPs to fair administrative justice. This will lead to the designated authority facing a number of appeals and review proceedings following the application process should this Bill be promulgated as is.

37. The Bill would do well to; (a) define meaningful consultation and (b) provide that applicants take the necessary steps to ensure that IAPs understand the information in order to make an informed, and thus meaningful decision. The spirit of any such provisions should be that it is the duty and legal (and moral) obligation on applicants to work together and collaborate with IAPs in the consultative process.

[18] 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)

[19] at *para* 66

Access to information

38. Closely linked to consultation is the right to access information. In order for public participation to be meaningful, parties must have be given sufficient information that is also accessible, and adequate time to read and understand this information, taking technical advice where necessary, particularly given the type of applications contemplated by the Bill.

39. This requires a level of transparency that will bolster not only meaningful consultation regarding proposed petroleum developments, but also a better-informed citizenry that is able to participate in our Constitutional democracy in processes that are likely to impact their lives in a significant way. Meaningful consultation is defined as an IAP being given adequate notice and the necessary information (with the information being in a language the IAP can understand and that is a plain language version of technically dense reports) and affords reasonable time and opportunity to make an informed response.

40. Access to information is a Constitutional right. Section 32(1) of the Constitution provides that; "everyone has the right of access to any information held by the State; and any information that is held by another person and that is required for the exercise or protection of any rights."[20]

41. The Bill does not make provision for facilitating access to information for IAPs. Information such as applications for rights, including supporting documents (scoping reports, specialist reports, etc.) annexed thereto, plain-language explanations of the technical content of the proposed development, compliance reports relevant to the applicant/holder in relation to activities under the Bill, shareholding in the applicant/holder, information regarding the financial and technical ability of the applicant/holder to fulfil its obligations under the proposed development must necessarily be made available to IAPs if their engagement on the application is to be rendered meaningful.

42. It would defeat the purpose of any consultation that may occur within the ambit of the Bill if IAPs are required to submit comments on an application without having seen the application documents, reports, etc pertaining to that application. We submit that there should be mandatory provisions requiring applicants to furnish IAPs with all information (including applications for rights and permits) that will enable them to participate meaningfully in the consultation process.

43. We further submit that there should be a duty on the applicant/holder to notify IAPs of availability of these documents and that there should be a further requirement that these documents must be made available swiftly upon request by the proponent.

44. We also advocate for the automatic disclosure of certain categories of documents. In our experience, IAPs do not have ready and timeous access to the documents necessary to ensure their meaningful participation.

45. In the case of *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others*[21], IAPs were forced to approach the Court in order to obtain a copy of the mining right application from Transworld Energy and Mineral Resources.

[20] Section 32(1), Constitution of the Republic of South Africa, Act 108 of 1996

[21] Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others (96628/2015) [2020] ZAGPPHC 485; [2020] 4 All SA 374 (GP); 2021 (1) SA 110 (GP) (11 September 2020)

46. The Court held that IAPs are entitled to be provided with a copy of a mining right application upon requesting same from the Regional Manager of the DMRE[22].

47. Such information must be in a language, or languages, that IAPs can understand and should be provided through a medium that IAPs would be able to access in order to ensure that they are informed and able to participate meaningfully in the consultation process. We also advocate for the translation of technically laden, dense specialist reports into plain language for ease of reference.

48. Rather, the Bill seems to favour secrecy. Section 79 pertains to the submission of information (geological, geophysical, technical, financial and economic reports, studies, analysis, progress reports and interpretation) to PASA. Section 80(1) goes on to provide that this information must be kept confidential by PASA.

49. This provision appears to shirk the provisions of the Promotion of Access to Information Act ("PAIA") which makes provision for records being withheld from requesters in certain instances only.[23] These are contained in sections 34 – 46 of PAIA and include, *inter alia*, the mandatory protection of the privacy of a third party who is a natural person, the mandatory protection of the certain records of SARS and the mandatory protection of the commercial information of a third party.[24] The information referred to in section 79 of the Bill does not appear to fall within any of the grounds of refusal contained in PAIA and it is incorrect for the Minister to preempt future PAIA requests by excluding their disclosure. It is also *ultra vires* for him to do so.

50. Furthermore, of the 7 companies that hold rights for onshore gas activities (as listed in the Gas Master Plan Base Case Report), 5 of them have no public profile, do not respond to correspondence and are simply not contactable at all.

51. Copies of any of the rights granted are not published on the holders' websites (where there is a website). That they are not published and accessible is highly concerning and obstructive.

52. It is our submission that, in order to create a framework for meaningful consultation, there be adequate provision made to facilitate access to information in terms of the Bill. For example, we submit that Bill must require rights holders to publish copies of those rights on the holders' websites and where holders do not operate websites, to make those rights publically available swiftly on request.

53. We also submit that section 80 of the Bill should be deleted or entirely revised in order to ensure that it only enhances the provisions of PAIA and the section 32 Constitutional right to access to information and just administrative action generally.

Free prior and informed consent

54. We would like to turn the Committee's attention to the topic of free, prior and informed consent ("FPIC").

55. FPIC is an internationally recognised principle that is attached to international human rights standards, particularly the right of all peoples to self-determination and the right of all peoples to freely pursue economic, social and cultural development.[25] It has also been recognised in South Africa and, following the South African Human Rights Commission's National Hearings into the Underlying Socio-economic Challenges of Mining-

[22] *ibid*

[23] Promotion of Access to Information Act, Act 2 of 2000

[24] Section 34, 35 and 36, Promotion of Access to Information Act, 2 of 2000

[25] Food and Agriculture Organisation of the United Nations, *Free Prior and Informed Consent: an Indigenous Peoples' Right and a Good Practice for Local Communties*

affected Communities[26], the Commission directed that "in the consideration of and decision-making related to the granting of mining rights, the principle and policy of FPIC needs to be adhered and reported on."[27] We submit that given the impact of oil and gas operations, the Commission's directive has direct relevance and should be incorporated in the Bill.

56. The normative (legal) framework for FPIC is encompassed in several international legal instruments including: the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), the International Labour Organisation Convention 169 ("ILO 69") and the Convention on Biological Diversity ("CBD").

57. FPIC is also recognised in terms of the national law and policy of many countries around the world. Canada has passed the United Nations Declaration on the Rights of Indigenous People's Act which aims to reflect the standards set for indigenous people in the UNDRIP. Australia's Victorian Aboriginal Heritage Council released a Discussion Paper which called for a reform of Australia's Aboriginal Heritage Act, particularly to incorporate greater self-determination for indigenous persons. The proposed amendments would see Registered Aboriginal Parties ("RAPs") the power to veto cultural heritage management plans that would harm their cultural heritage.

58. At its core, FPIC is a principle that gives indigenous people the right to give or withhold consent to projects that would affect them or their territories.[28]

59. Furthermore, FPIC gives indigenous people and local communities the right, and leverage, to negotiate the terms and conditions under which a proposed project will be designed and implemented. This negotiation also includes elements of control over compliance monitoring and enforcement.[29]

60. The principle of FPIC is progressive in its values. It aims to balance the imbalanced power dynamic that is at play when extractive industries, and governments, seek to impose a project on indigenous peoples and local communities.

61. Incorporating the FPIC principle into the UPRD framework would address the injustice that local communities face with mining and oil and gas developments where their livelihoods are displaced, their homes uprooted and their health and well-being adversely affected while gaining little to nothing from the project that is responsible for these adverse impacts. It would seek to ensure a better legacy that is consistent with our Constitution, rather than one which perpetuates and aggravates poverty and inequality.

62. We submit that an overhaul of the public participation and consultation process in applications for extractives-related authorisations in South Africa would be enhanced by the implementation of FPIC as a standard. South Africa, hailed for having one of the most progressive Constitutions in the world, should give effect to the rights and values espoused therein.

63. Our experience, and that of our clients and partners, is that without FPIC, the rights of local communities are repeatedly violated and poverty and inequality are aggravated by extractives operations because they are pursued at any cost to the environment and to the climate, and therefore, people. The "economic development" those projects bring is only for the benefit of the few, making the rich richer and the poor poorer.

[26] https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf
[27] Page 91
[28] *Ibid* footnote 10
[29] *Ibid* footnote 10

Conflict with the OES

64. Parliament brought into existence a unified decision-making system for the extractives sector. This unified system is referred to as the One Environmental System ("the OES"). The OES is given effect to in section 50A of NEMA.

65. The Bill problematically proposes to legislate on environmental matters that are within the exclusive purview of the Minister for Forestry, Fisheries and the Environmental. In *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*) the Supreme Court of Appeal confirms the status of NEMA within the OES. In that judgment, the court held that *"the implementation of the One Environmental System would establish NEMA as the only environmental statute and the environment minister as the 'lead' minister."*

66. The Bill also provides for the creation of a new petroleum right. Section 5(1) of the Bill states that a "petroleum right granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967 (Act No. 16 of 1967) is a limited real right in respect of the petroleum and the block or blocks to which such a right relates"[30]. The newly created right gives the holder thereof the power to explore for or produce petroleum.

67. The Bill seeks to replace the system created by the MPRDA which governs exploration and production rights. Nowhere in the environmental legislative framework is a petroleum right provided for. It follows that the creation of a new right has ramifications for the functioning of the OES.

68. It is our submission that the conflict between the Bill and the OES is fatal to the Bill and renders it reviewable upon its enactment.

Local Economic Development

69. We note, with concern, that there is no social and labour plan (''SLP") framework in the Bill. There is absolutely no reference to local economic development, an omission aggravated by the fact that the extractives industry brings an enormous burden to bear on local communities who find their environment compromised, their access to water and water quality compromised, their air quality compromised, their health compromised, their access to land worsened by resettlement, *inter alia*, and as a result of all of this, their circumstances worsened.

70. Poverty alleviation and the reduction of inequality are core tenets of sustainable development.

71. We also lament the Bill's lack of inclusion of certain important objectives such as 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 for equitable access to resources; the need for eradication of discriminatory practices; and the need to address past racial discrimination. Such objectives are contained in the MPRDA and it is crucial that they reflect in the Bill so as to inform the ethos of the Bill in a manner that reflects the values contained in the Constitution.

72. It must also be noted that while the preamble of the MPRDA recognises "the need to promote local and rural development and the social upliftment of communities affected by mining[31]", the Bill does not have a similar value in its preamble. One of the objects of the Bill is to "advance the social and economic welfare of all South

[30] Section 5(1), Upstream Petroleum Resources Development Bill, B13 - 2021
[31] Preamble, MPRDA

Africans[32]". The absence of a social and labour plan regime, or anything directly dealing with local economic development renders this objective empty.

73. Such a situation maintains the and further entrenches the poverty that afflicts many communities affected by the extractives industry. Communities are left in a worse-off position than they were before an extractives operation came along. This injustice needs to be addressed by way of a robust, and enforceable SLP framework expressly provided for in the Bill.

74. Having a framework for local economic development in place is crucial. It is a question of environmental justice, in the context of the environmental injustice that besets extractives-affected communities. It is paramount that communities in proximity to the operations of extractive industries benefit from those operations.

75. We submit here proposals for an SLP framework that should be incorporated into the Bill. These suggestions would ideally serve as principles that govern the implementation of the framework, if not also more direct, mandatory provisions. These suggestions are, *inter alia*;

    a. An SLP framework in terms of the Bill would need to adequately provide for the specific needs of the community;
    b. A requirement for the completion of an SLP framework should be meaningful consultation with affected communities and consensus on the needs to be addressed and the proposed targets contained in the SLP framework;
    c. An SLP framework should take into account the principles contained in the Bill of Rights and NEMA. Sustainability and generational equity considerations, *inter alia*, should inform any SLP famework;
    d. The SLP framework should contain information about the authorised project. Information such as background and context and the nature and extent of the impacts of the operation should be included. The information should be free of technical jargon and should be in a language that is understood by the members of the affected community;
    e. The disparate impacts of extractives along racial, gender and socio-economic lines should be acknowledged in the SLP and specific detail on how these disparities will be addressed by the SLP should be contained; and
    f. The SLP should have signed undertakings and timeframes and targets for the achievement of the goals contained in the SLP.

76. There is valuable research that has been conducted by our colleagues at the University of the Witwatersrand's Centre for Applied Legal Studies ("CALS") which contains recommendations on how to improve the SLP framework in the MPRDA[33]. We point the Committee to this research as the lessons taken from their work must be taken up in the Bill.

Minister's lack of discretion

77. The Bill contains several provisions pertaining to the granting of rights and permits in which the Minister MRE and PASA are obligated to grant licenses in instances in which certain conditions contained in the Bill are met.

78. These provisions include, *inter alia,*

    a. Section 39, which pertains to the granting of a reconnaissance permit;

[32] Preamble, MPRDA
[33] Centre for Applied Legal Studies, *The Social and Labour Plan Series: Phase 3: Alternative Models for Mineral-Based Social Benefit,* March 2018

b. Section 44, which pertains to the granting of a petroleum right;
c. Section 47, pertaining to an application to progress to next phase (exploration phase);
d. Section 52, which deals with the application for a drilling permit;
e. Section 59, pertaining to an application to progress to production phase); and
f. Section 63, dealing with an application to progress to next term (production phase).

79. We submit that the aforementioned provisions tie the hands of the Minister MRE and PASA in that they are bound to recommend and grant rights and permits. The peremptory wording used in these provisions should be changed to allow for discretionary decision-making.

80. To reduce the granting of licenses to a check-box exercise is part of the lamentable approach to accelerate oil and gas development. As discussed earlier, it is inappropriate and irrational when the country (and the rest of the world) is in the throes of climate catastrophe

81. Such an approach deprives the decision-makers of the power to assess an application beyond the pre-requisite requirements put forth in the Bill. We do not suggest that the decision-maker should have an unfettered discretion, merely that there should be the option to decline an application should other social, economic or environmental interests, in line with the NEMA principles and the Constitution, outweigh the proposed benefits of an oil and gas development.

PASA declaration of frontiers

82. Section 8 of the Bill pertains to the administration of acreage.[34] Section 8(2) states that "The Petroleum Agency must, by notice in the Gazette, designate any area, block or blocks, including shale gas acreage, over which there is no or limited knowledge of the geology as frontier"[35]. The declaration of frontiers creates an 'open season' on oil and gas development. This runs counter to South Africa's commitments in terms of its Nationally Determined Contributions ("NDC's") as well as its obligation to rapidly decarbonise.

83. It is submitted that the reference to the creation of petroleum frontiers should be removed from the Bill.

Land

84. Land is a pertinent topic in present-day South Africa. We submit that the issues that the topic raises are not addressed adequately by the Bill. This is unfortunate as the Bill presents an opportunity to set an important precedent for the land rights of vulnerable and previously disadvantaged communities.

85. Firstly, the definition of 'owner in relation to land' is referred to as "… a person in whose name the land is registered; or if it is land owned by the State, means the State together with any occupant thereof"[36].

86. Given that an owner is granted specific rights of consultation in terms of the Bill, the application of the term owner to an extremely narrow group of people is unfortunate as it fails to take into account those categories of people who have outstanding land claims in respect of land of which they were historically dispossessed and those who own or have rights to communal land, which may not be registered in their name, *inter alia.*

87. What this would essentially entail is that a large group of people will be disaffected by the provisions of the Bill. This is aggravated by the fact that the extractive industry is a land-intensive one, and large swathes of land would be utilised for this purpose.

[34] Section 8, Upstream Petroleum Resources Development Bill, B13 - 2021
[35] Section 8(2), Upstream Petroleum Resources Development Bill, B13 - 2021
[36] Section 1, Upstream Petroleum Resources Development Bill, B13 - 2021

88. Section 92 deals with the expropriation of land. Because of South Africa's painful history of forced expropriation, it is paramount that the Bill contain provisions addressing the arrogation of land that ensures that the expropriation of land be in accord with the rights contained in the Bill of Rights as well as the expropriation clause contained in the Constitution (Section 25).

Appeals

89. Section 99 of the Bill governs the internal appeal procedure. We commend the inclusion of the automatic suspension of the administrative decision contained in section 99(2)(a). Without that suspension, the authorised activities will proceed, the environmental harm is caused 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 in our experience of internal appeal processes to the Director General and Minister of Mineral Resources and Energy respectively under the MPRDA, these are rarely determined swiftly, and frequently are not determined at all.

90. We note that section 99(4) states that "Sections 6, 7(1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), apply to any court proceedings contemplated in this section"[37]. It is suggested that the provision be amended as the entirety of PAJA is applicable to court proceedings. To appear to limit the sections of PAJA that are applicable in terms of the Bill runs the risk of creating legal uncertainty.

Rehabilitation and financial provisioning

91. Environmental rehabilitation is an important aspect of the legal framework. This is to ensure compliance with the environmental management principles contained within section 2 of NEMA as well as the section 24 Constitutional right. The North Gauteng High Court, in the case of *Trustees for the Time Being of Groundwork Trust and One Other v The Minister of Environmental Affairs and Others* (Deadly Air case), held that the section 24 Constitutional right is an unqualified right in the here and now (it is immediately realisable).

92. It is paramount that the rehabilitation and decommissioning process be managed through the provisions of NEMA as the enabling legislation.

93. Section 87 of the Bill pertains to financial guarantees. We submit that the Bill should be clear in stating that the guarantees referred to herein are in addition to financial provision provided for elsewhere, particularly section 24P of NEMA. We submit (and will reiterate in our specific comments on the Bill below) that if the financial guarantees referred to in section 87 are intended to provide for environmental rehabilitation, then it must be noted that this is not within the legislative competency of the Min MRE, but rather the MIN FFE as per the OES and the provision must be deleted.

Health and economic outcomes

94. The health impacts of gas are well documented[38]. Air pollution, water contamination, noise pollution and psychosocial stress all contribute towards the adverse health outcomes that affected communities endure.[39]

[37] Section 99(4), Upstream Petroleum Resources Development Bill, B13 - 2021

[38] 1 Ramon Alvarez and Elizabeth Paranhos. Air Pollution Issues Associated, Environmental Defense Fund, (2012), https://www.edf.org/sites/default/files/ AWMA-EM-airPollutionFromOilAndGas.pdf

[39] Gregg Macey et. al., Air concentrations of volatile compounds near oil and gas production: a community-based exploratory study, Environmental Health, (2014), https://ehjournal.biomedcentral.com/articles/10.1186/1476-069X-13-82.

95. Studies have shown that petroleum development is linked to increased mortality and increased morbidity such as adverse outcomes in pregnancy (premature and pre-term pregnancy), greater incidences of cancer and respiratory and pulmonary diseases[40]. This will lead to higher rates of hospitalisation, putting more strain on healthcare systems that are already overburdened.[41]

96. Along with the health impacts, the economic impacts of increased morbidity and mortality cannot be understated. One of the aims of the Bill is "to promote economic growth …in the Republic". With regards to coal, another fossil fuel industry, the economic cost as a result of morbidity is estimated to be in the billions of dollars.[42]

97. Furthermore, the Bill, in aiming to accelerate petroleum development, fails to take into account the negative impact that locking into oil and gas development will have on the country's economy. As the world must move away from fossil fuel, including gas, the risk of sinking large amounts of money into an industry may lead to a situation where we have invested billions into a stranded asset – an industry that has turned into a liability before the end of its expected economic lifespan.

98. Furthermore, no adequate provision is made for the protection of persons from the health and safety hazards inherent in the exploration and production phases of petroleum development.

99. As a reference point, the Mine Health and Safety Act[43] ("the MHSA") provides for the protection of the health and safety of persons at mines. The provisions of the MHSA, however, extend beyond a mine's boundaries and place obligations on mines to protect the rights of those who are not impacted by the mines operations, many of whom may not necessarily be employees of the mine.

100. The provisions of the MHSA are not referred to in the Bill. By comparison, the MPRDA makes express reference to the MHSA and the applicability of its provisions. While section 10(i) of the Bill states that PASA must "enforce health, safety and quality standards in accordance with the applicable legislation regulating upstream petroleum health and safety"[44], there is no detail on how this will be accomplished within the provisions of the Bill. Ideally, the provisions of the MHSA must be made applicable to the Bill. If this is not done, then we submit that the Bill cannot come into operation until such time that there is applicable legislation governing health and safety at oil and gas operations.

Specific comments

Consultation (section 19 and 20)

101. Section 19(2) of the Bill provides that "*The Petroleum Agency, having regard to the consultation report in respect of the consultation process undertaken by the applicant, may conduct public hearings on the application that has been accepted as contemplated in sections 17, 38(2) and 43(2) within the prescribed period after receiving a consultation report from the applicant*.[45]"

[40] Mohd Faiz Ibrahim et al. Children's exposure to air pollution in a natural gas industrial area and their risk of hospital admission for respiratory diseases, Environmental Research,, (2022), https://doi.org/10.1016/j.envres.2022.112966.
[41] Mary Willis et al. Associations between Residential Proximity to Oil and Gas Drilling and Term Birth Weight and Small-for-Gestational-Age Infants in Texas: A Difference-in-Differences Analysis, (2021), Environmental Health Perspectives, https://ehp.niehs.nih.gov/doi/full/10.1289/EHP7678.
[42] Myllyvirta and Kelly, Air Quality, Health, and Economic Impacts of a New Coal Mine and Power Plant in Lephalale
[43] Occupational Health and Safety Act, Act 85 of 1993
[44] Section 10(j), Upstream Petroleum Resources Development Bill, B13 - 2021
[45] Section 19(2), draft UPRD Bill

102. We commend the Bill's inclusion of public hearings, which is missing from existing legislation governing the extractives industry.

103. We note, however, section 20(2) of the Bill which states that "The Petroleum Agency must attend consultation processes undertaken by the applicant as contemplated in subsection (1)(a) to ensure that the process is transparent, fair and meaningful."[46]

104. We submit that a provision that makes it mandatory for PASA to conduct public hearings on every application made in terms of the Bill may not be realistic and may lead to violations of the provisions of the legislation, should it be promulgated.

105. We propose, rather, that PASA has a discretion as to the when to attend public hearings with parties affected by an Applicant. The Bill must, however, provide guidance to PASA on how to exercise this discretion.

Application for a drilling permit (section 52)

Section 52 pertains to an application for a drilling permit. We submit that PASA may only issue a drilling permit if the drilling plan and the impacts of drilling have been assessed and dealt with in the EMPR that supports the EA that is attached to the right issued ito the Bill.

Compliance Monitoring and Enforcement

106. It is our submission that the Bill must include harsher sanctions for non-compliance in order to deter violations, especially those that result in environmental degradation. Sanctions in existing legislation are not stringent enough and the Bill presents an opportunity to create a better framework for sanctions and penalties.

''sustainable development''

107. NEMA defines sustainable development and it is inappropriate and undesirable for the Bill to create its own definition that differs from NEMA's – not least because of it being *ultra vires* the Min MRE's mandate, but also because of the uncertainty it introduces given the intersection of extractives and environmental legislation

Object in s.2(d)

108. While we support a racial justice imperative for any industry, we submit that the omission from the Bill, of a gender justice imperative, particularly in relation to black women, is an unacceptable omission and must be rectified.

Object in s.2(j) (and s.65(1)(a) and (b))

109. Given what we know about the impacts of oil and gas extraction, not least its emission of the potent GHG, methane, an object that promotes the acceleration of exploration and production and the maximising of petroleum recovery directly conflicts with the duty on the state, and the Min MRE to give effect to s.24 of the Constitution. Our submission in this regard applies equally to s.65(1)(a) and (b) (manner of conducting production operations).

Functions of Petroleum Agency

[46] Section 20(2), draft UPRD Bill

110. We submit that there is an inherent contradiction between the functions set out in s.10(a), (d) and (f) and the function set out in s.10(m). However, for so long as the Agency inappropriately holds the function in s.10(m), in terms of the OES, it also holds the function of monitoring compliance with EAs, enforcing compliance with EAs and reporting to the Minister in respect of compliance with EAs. It is notable that the Bill does not reflect that function.

s. 17 Acceptance of applications

111. We submit that it should be a requirement of s.17(2) that the applicant is not in non-compliance with the Act or NEMA. We submit that s.17(2)(b) must include financial and technical ability to comply with the environmental management programme and closure and decommissioning obligations. This submission applies to all of the provisions of the Bill that deal with the acceptance and granting of rights respectively, including, for example, s.59.

s.21 Establishment of Petroleum Development and Environmental Committee

112. Environmental matters must be regulated in terms of NEMA and the EIA Regulations in terms of the OES. Therefore, we submit that "Environmental" must be removed from the name of this committee. To the extent that this committee considers environmental issues as the name suggests, it is contrary the OES and duplication of the EIA public participation process which is untenable for IAPs and creates legislative uncertainty which is undesirable.

s. 28 Transferability

113. 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.

114. It would be preferable for this process to be provided for expressly in the Bill, because, despite the applicability of PAJA, in our experience the Minister considers and grants these applications behind closed doors. We in any event make it clear that it is our view that granting such consent under section 28 without complying with PAJA would make that decision of the Minister subject to review for non-compliance with PAJA.

115. Furthermore, given the significant environmental impact of oil and gas extraction, we propose that the approval of an application for the transfer of rights should be made in consultation with the Minister responsible for Environmental Affairs, and the Minister responsible for Water Affairs.

s.29 Granting of transfer

116. We submit that this section must include financial and technical ability to comply with the environmental management programme and closure and decommissioning obligations as a condition precedent for granting consent by the Minister.

s.31 Participation of black persons in petroleum rights

117. While we support a racial justice imperative for any industry, we submit that the omission from the Bill, of a gender justice imperative, particularly in relation to black women, is an unacceptable omission and must be rectified.

s.44 Granting of right

118. We submit that it is wholly inappropriate for any right or authorisation governed by the Bill to be "subject to prescribed terms and conditions to be agreed upon by the holder and the Petroleum Agency…" (our emphasis) Firstly, it is inappropriate by virtue of the fact that the "agreement" is envisaged for a future point and secondly, it is simply inappropriate for the Agency and the Minister to abdicate their responsibilities in this manner to the holder of a right. Thirdly, this provision enables the holder and the Agency (and the Minister for that matter) to create terms and conditions for the right that are outside the public participation process, thus violating the right of interested and affected parties, and indeed other state departments, to just administrative action in relation to operations that have a profound impact.

s.62 Application for approval to progress to next term (production phase)

119. Consultation must take place where any decision is taken which may have environmental impacts not assessed as part of the initial petroleum right application process. So, for example the application for the approval to progress to the next phase (production phase) should expressly include public participation in those instances where additional impacts are identified and assessed, as it is an administrative action. The section is otherwise in conflict with PAJA and NEMA and will attract challenge.

s.70 Granting and duration of retention permit

120. We support the provision in s.70(3) and it is crucial that this remains expressly dealt with in the Bill.

s. 77 Unitisation

121. It is critical that this section is made expressly subject to compliance with Chapter 5 of NEMA and the NWA and that activities in terms of this section are subject to environmental authorisation and a water use licence.

s.84 Issuing of closure certificate

122. Given the environmental impacts of oil and gas extraction, and the risks associated with inadequate closure and decommissioning (environmental and financial), it is untenable that s.84(7) empowers the Petroleum Agency to process and finalise an application for a closure certificate without the fulfilment of the provisions of s.84(5). That section prescribes that "no closure certificate may be issued unless the Chief Inspector and other government department responsible for the administration of any law which relates to a matter affecting the environment have confirmed in writing that the provisions pertaining to health and safety and management of pollution to water resources, the pumping and treatment of extraneous water and compliance to the conditions of the environmental authorisation have been addressed".

s.87 Financial guarantee for petroleum operations

123. We submit that this section should make it clear that the financial guarantee prescribed therein is in addition to the financial provision that is prescribed in terms of s24P of NEMA. If the intention in this section is to deal with financial provision for environmental rehabilitation, then the section is likely not the purview of the Min MRE and rather that of the Min FFE in terms of the one environmental system.

s.91 Compensation payable under certain circumstances

124. Given the considerable impact of oil and gas extraction for land owners and occupiers, the couching of the provisions of this section in their current manner is inappropriate, regrettable, and likely to have adverse effects for those members of civil society directly affected by extraction. We submit that the provision should place a positive obligation on the holders of rights under the Bill to compensate land owners and occupiers of the land over which rights under the Bill have been issued by the state.

s.103 Administrative penalties

125. We commend the include of an administrative penalty regime but submit that if it is to perform one of its key objectives – deterrent – then the maximum penalty amount must be dramatically increased. Regard should be had to the annual turn-over of oil and gas operations and fines should bear a relationship to those. We do not support the proposed use of the fund referred to in s.103(4) which is promotion of exploration activities. Instead the fund should be used to address the negative impacts of the industry, namely for environmental rehabilitation, ecological protection and for economic diversification projects for affected communities.

109. Act binds State

126. We submit that the Bill must bind the state insofar as criminal liability is concerned. State owned entities conduct oil and gas activities and should be subject to the full might of the law, given their egregious impacts. There is no rational reason to exclude this. NEMA binds the state to criminal liability and we submit that it would be irrational to exclude criminal liability on the part of the State in this Bill.

Conclusion

127. As indicated, we submit that the Bill is fatally flawed owing to the fact that it is in conflict with the OES. As such, it cannot be brought into effect in its current form without significantly threatening the implementation of NEMA by the regulator and industry, therefore threatening the environmental rights contained in section 24 of the Constitution. Accordingly, it is probable that the passing of the Bill in its current form will be challenged on judicial review.

128. The problem permeates the Bill throughout. We endorse the submissions to the Portfolio Committee made by the Department of Forestry, Fisheries and the Environmental under cover of the letter addressed to you by the Minister for Forestry, Fisheries and the Environment dated 3 August 2022.

129. In particular, we endorse the following submissions by the Minister and her Department:

> All environment / environmental authorisation related/ financial provisioning related provisions need to be removed from the Bill as it must be dealt with in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA) and the Environmental Impact Assessment Regulations, 2014, as amended (EIA Regulations), as per the One Environmental System (OES) and section 50A of NEMA, in order to avoid future conflict between the legislation. By removing the EA requirements and timeframes from the Bill, it will allow for licensing processes to run concurrently and can reduce timeframes significantly, if the staggered approach suggested in the Bill is not followed.

In some instances, it may be necessary to cross-refer to NEMA in order to ensure that the rights will not be unregulated in terms of NEMA. It can be considered to include a general provision in the Bill to provide that an EA will be a prerequisite where an EA is required in terms of NEMA. Furthermore it should be included in the Bill that financial provisioning must be dealt with in terms of NEMA and the NEMA Financial Provisioning Regulations.
The creation of a new type of right, namely a petroleum right results in misalignment with the EIA Regulations identified activities. The petroleum right is not identified as an activity in terms of section 24(2) of NEMA. This means that no environmental authorisation will be required for a petroleum right, unless amendments are made to the NEMA EIA Regulations that requires environmental authorisation in terms of the EIA Regulations Listing Notices to include the petroleum right as an identified activity requiring environmental authorisation. The petroleum right will also not require financial provisioning as an applicant in the Financial Provisioning Regulations is defined to mean an applicant for a prospecting right, mining permit, mining right, exploration right or production right in terms of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA). In addition the definition of "holder" in the Financial Provisioning Regulations refers to holders in terms of section 41 and 89 of the MPRDA. A "holder of a right or permit" means the holder of a prospecting right, mining permit, mining right, exploration right or production right in terms of the MPRDA. NEMA defines "listed activity" when used in Chapter 5 of NEMA to mean an activity in identified in terms of section 24(2)(a) and (d) of NEMA. "Specified activity", when used in Chapter 5 of NEMA, means an activity as specified within a listed geographical area in terms of section 24(2)(b) and (c). Section 24(2)(a) of NEMA provides that the Minister may identify activities which may not commence without an environmental authorisation. The definition of financial provision in NEMA is linked to applicants for environmental authorisations. Where no EA is required, no financial provision is thus required in terms of NEMA and the Financial Provisioning Regulations. It is therefore clear that some work will be required to align the Upstream Petroleum Resources Development Act and the EIA Regulations identified activities and to ensure that financial provisioning is required for the petroleum right. The coming into operation of the Upstream Petroleum Resources Development Act will therefore need to be delayed until such time as alignment have been achieved so that all amendments (both the Upstream Petroleum Resources Development Act, the EIA Regulations and the Financial Provisioning Regulations, can be brought into operation at the same time. It should also be noted that the provisions of the National Environmental Management Laws Amendment Bill (NEMLA), which amend NEMA and which will shortly be brought into operation defines financial provision to mean the amount which is to be **provided in terms of NEMA** by a holder, holder of an old order right or applicant, guaranteeing the availability of funds to fulfil the obligation to undertake progressive rehabilitation, decommissioning, closure and post-closure activities including the pumping and treatment of polluted or extraneous water. The definition of holder and holder of an old

order right in NEMA currently refers to the MPRDA. It would therefore be necessary to include a transitional provision in the Upstream Petroleum Act to provide that any reference to MPRDA must be read as references to the Upstream Petroleum Resources Development Act. NEMLA also links the requirement for financial provisioning to an environmental authorisation.

As can be seen there is an urgent need for coordination before the Upstream Petroleum Resources Development Act can be brought into operation. (our emphasis)

130. We thank you for the opportunity to present these comments and we act in the faith that they will be duly considered and implemented.

131. Thanking you.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per:

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