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

Mr Jacob Mbele
Director-General of the Department of Mineral Resources and Energy

For attention: Mr Robert Phupheli
Ms Rudzani Tshibalo
Per Email: Gas.Policy@dmre.gov.za

Your ref: Gas Amendment Bill [B-2023]
Our ref: PLADO/GAB2024
29 February 2024

Dear Mr Mbele

SUBMISSIONS ON THE GAS AMENDMENT BILL [B – 2023] PUBLISHED FOR COMMENT ON 19 JANUARY 2024

1. We thank you for the opportunity to comment on the current version of the Gas Amendment Bill (B – 2023) ("the Bill"). We submit these comments on behalf of the Life After Coal/Impilo Ngaphandle Kwamahle ("LAC") coalition, which consists of three organisations, namely; the Centre for Environmental Rights ("CER"), groundWork and Earthlife Africa.

2. The CER is a firm of activist lawyers who defend the rights of communities and civil society organisations to an environment not harmful to health or wellbeing for present and future generations. Through litigation, advocacy and activist support and training, we seek to advance our vision of a more equal society in which environmental and climate justice is realised and all people and the planet flourish.

3. We submitted comments on a previous version of the Bill,Bill B9 – 2021,("the 2021 Bill") to the Parliamentary Portfolio Committee on Mineral Resources and Energy in the National Assembly on 30 July 2021. In those comments, we asserted that the 2021 Bill should be significantly revised to address numerous flaws, many of which are fundamental and render the 2021 Bill fatally flawed. Some of the concerns pertained to the 2021 Bill's disregard for the climate emergency, its administrative justice shortcomings and the Minister's lack of discretion, *inter alia.*

Impetus of the Bill in the context of climate emergency

4. We note that the object of the Bill is to modernise the Gas Act, in line with current and foreseeable developments in the gas industry. We submit accelerating the development of gas infrastructure, as the Bill seeks to do, is inappropriate for these purposes. Moreover, the Bill has serious implications for the climate crisis, and South Africa's own vulnerability thereto, and must, therefore, be seriously reconsidered.

5. The government has confirmed South Africa's extreme vulnerability to the impacts of climate change.[1] 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);[2] impacts on water resources, such as decreased water availability; and a higher frequency of natural disasters.

6. Already the impacts of drought, extreme weather events, and fires in South Africa have cost the country billions.[3] 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.[4] The government is having to subsidise these high costs and will increasingly have to do so.

7. 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 a threshold of safety for our climate, with severe consequences for Southern Africa, taking into account that in Southern Africa the rate of increase is twice that of the global average.[5]

8. The World Economic Forum's annual "Global Risks Report"[6] 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.

9. 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.

10. 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 not lock-in to new fossil fuel infrastructure which is not needed, and which the Bill seeks to accelerate. Commitment to expanded fossil fuel infrastructrure and development renders the Bill irrational.

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[1] 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.

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

[3] 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.

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

[5] 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".

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

11. Given South Africa's extreme vulnerability to the impacts of climate change[7] - 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").

12. Already South Africa is falling behind on its global and constitutional obligations to address climate change. The country's commitments, via the 2021 Nationally Determined Contribution update, fall outside the fair share range when the upper limit is considered; and are not consistent with the Paris Agreement 2° Celsius target – let alone the 1.5° benchmark set by the IPCC.

13. 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.[8] 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.[9] The effects of this will be catastrophic – impacting particularly on the most vulnerable sectors of South African society.

14. 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.[10] 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.

15. 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 reach that target of 1.5°C, electricity sectors around the world must decarbonize by 2050: gas plants cannot replace coal plants if we are to reach that target.

16. The objects of the Bill include: to modernise the Act, in line with current and foreseeable developments in the gas industry landscape, enhance compliance monitoring and enforcement provisions of the Act and incorporate provisions dealing with unconventional gases and new transportation technologies of natural gases that are not explicitly included in the Act. It further intends to address new technological advancements in the gas sector, particularly the transportation of gas by means other than a pipeline, including, but not limited to, transportation as liquefied natural gas and compressed natural gas.

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[7] P8, National Climate Change Response White Paper 2011, at https://www.environment.gov.za/sites/default/files/legislations/national_climatechange_response_whitepaper.pdf.
[8] https://climateactiontracker.org/countries/south-africa/.
[9] Id. See also "The Carbon Brief Profile: South Africa" available at https://www.carbonbrief.org/the-carbon-brief-profile-south-africa
[10] See the International Energy Agency's "Net Zero by 2050" report at page 23 Net Zero by 2050 - A Roadmap for the Global Energy Sector (windows.net)

17. We understand that in some parts of the world historically, gas has been considered a "bridge fuel"—cleaner and with lower carbon dioxide emissions than coal or oil—and a potential tool to help address climate change. However, LNG is neither clean nor particularly low in emissions. In addition, the massive investments in new infrastructure to support this industry, including pipelines, liquefaction facilities, export terminals, and tankers, creates new fossil fuel dependence, making the transition to actual low-carbon and no-carbon energy even more difficult.[11]

18. We note that, compared with coal, burning gas emits 505 to 60% as much carbon dioxide, the GHG that is the primary driver of climate change. However, the extraction, processing, and transport of gas also emits GHGs, including large amounts of methane from leaks and other fugitive emissions and intentional releases at wells, pipelines, and storage and processing facilities. Methane, which is the principal component of gas, does not persist in the atmosphere as long as carbon dioxide, but its climate impact is more than 80 times stronger in the short-term (20-year) time frame and 28 times stronger over the long term (100-year) time frame; it is the second-biggest driver of climate change.[12]

19. Additionally, it has been found that, export of gas extends the gas life-cycle, adding steps for liquefaction, overseas tanker transport, and regasification during which even more carbon dioxide and methane are emitted. These increase the total GHG emissions resulting from the use of gas— and raise serious questions about the effectiveness of internationally traded gas as a strategy to reduce emissions and combat climate change.[13]

20. 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 and transportation of gas, which would be accelerated under this Bill – including indirect emissions from construction, transportation and decommissioning, rehabilitation etc. – and the implications of the Bill for the following:

    20.1. 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;[14]

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

[11] https://www.nrdc.org/sites/default/files/sailing-nowhere-liquefied-natural-gas-report.pdf, page 4
[12] Ibid page 8
[13] Ibid page 9
[14] 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."

20.3. the extent to which the further exploitation of 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; and

20.4. The health impacts of the exploitation of the aforementioned emissions on the morbidity and mortality of local communities and residents of South Africa at large.

21. Essentially, calculating the external costs of exploiting fossil fuels would, in all likelihood show that, if the Gas Bill had to absorb the external costs of the resultant GHG emissions, it would not be financially feasible to operate. The science of attributing climate impacts to particular GHG emission sources is well-established and accepted.[15]

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

SPECIFIC COMMENTS ON THE BILL

Clause 9 - "[Advertising] Publication of notice of application for licence"

23. This clause provides for the manner in which an applicant for a licence may publish a notice of an application for a licence. We submit that this process should be expressly referred to as consultation. We further submit that the process provided for in this clause is inadequate notice given the extent of the impacts of the activities and the South African context where many affected parties might be illiterate or not read newspapers.

24. We submit that this Bill should draw on the consultation process as prescribed in the National Environmental Management Act, 1998 and the Environmental Impact Assessment (EIA) Regulations. The EIA Regulations provide a detailed description of what adequate notice entails aiming to ensure that barriers to participation including disability or literacy are lifted.

25. At the very least, notice must include, *inter alia*, affixing notice boards on the site of the proposed activities, in nearby settlements, on nearby transport routes, at the office of the local library, municipality, etc.; personal notification to parties such as landowners, land occupiers, holders of informal land rights; placing advertisements in government gazettes and local newspapers; publishing advertisements in both provincial and national newspapers where the activity might have an impact beyond municipality and alternative forms of notice to overcome barriers to participation including but not limited to language, illiteracy or disability, such as on local community radio .[16]

26. We further refer to our submissions in terms of clauses 11 and 12 below about meaningful consultation. We submit that the suggestions made therein should be incorporated within clause 9 as well.

[15] 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/.
[16] Regulation 41 of the Environmental Impact Assessment Regulations, 2014 as amended.

Clause 11 - Objection to license application

27. Clause 11 of the Bill provides for the objection process to be conducted within the period prescribed by the Minister and in a manner provided for by the Energy Regulator. We reiterate that this clause is vague and should be extended to provide for the manner in which the objection process should be conducted and clearly set out the timeframe for objection. To provide clarity, certainty and ensure meaningful consultation, the Bill should set out the process of public participation to be undertaken during the objection process, together with its timeframes. As it stands, the Bill fails to provide for a process of meaningful consultation in the way that the draft amendments to MPRDA Regulations, 2019[17] and the draft Mine Community Resettlement Guidelines[18] for instance, appear to be attempting to do. We submit that this Bill should draw from these and incorporate a definition of meaningful consultation into the Gas legislation framework. These failures are set out below.

28. The Bill does not properly advance the principles of administrative justice as set out above from the outset in that it does not stipulate the period within which consultation must be conducted in the applications for licenses. There is no provision for consultation, notification, or public participation in relation to how the energy regulator would conduct this process. The International Association for Public Participation has developed accepted core values and principles for the practice of public participation, the purpose of which is to help make better decisions that reflect the interests and concerns of potentially affected people.[19] According to these values and principles, public participation: **seeks to facilitate the involvement of those potentially affected by or interested in a decision; seeks input from participants in designing how they participate; and provides participants with the information they need to participate in a meaningful way**. Therefore, it is important that the Bill must not only set out the manner in which the objection process will unfold but must also clearly stipulate timeframes that are sufficient for meaningful consultation and submission of well-informed objections/comments. This is particularly important, considering that the lack of adequate time allocation does not allow for consultation in the objection and application process which, we submit, would allow companies to operate or launch reviews and appeals against refusals, without interested and affected parties knowing.

29. Furthermore, the Bill allows the applicant to respond but does not accord opportunities for consultation processes which we submit are required to take place and are still woefully inadequate and are not catered for in the National Energy Regulator Act 40 of 2004 (NERA). Under the NERA there are no timeframes for consultation, which in our experiences is often one of the reasons given by companies for not conducting proper consultation. In consequence, interested and affected parties are not afforded an adequate opportunity to consider and comment on complex, detailed applications.

30. For example, there is no time period afforded to interested and affected parties to subject their comments and objections to applications for licences. We reiterate our comments here, as those in relation to the MPRDA[20],

[17] 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-petroleumresources-development-regulations-2019

[18] 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

[19] https://www.iap2.org/page/corevalues

[20] 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

including that such a consultation would almost certainly necessitate a number of meetings and facilitation of independent technical advice on what is applied for, and, should an application be accepted as contemplated in clause 11, the terms of that agreement would have to be negotiated between the parties, a time-consuming exercise under any circumstances. We therefore submit that the Bill should allocate clear and adequate timeframes for consultation and submission of comments during license application processes.

31. 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 increases the need for decisions to be appealed or reviewed.

32. We recommend that the overall application and objection process be reviewed and included in the Bill 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:

32.1. 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;

32.2. the process should not be too prescriptive regarding the form in which an objection should take. This will ensure that participation from all sectors of the public is encouraged rather than discouraged;

32.3. 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;

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

32.5. the communication of the objection from the Regulator to the applicant should be copied to interested and affected parties (objector);

32.6. the applicant must be required to copy the objector in on its response to the objection to the Regulator; and

32.7. The objector should be given a right to respond to the applicant’s response to their comments.

33. In line with our comment above, we recommend that meaningful consultation should be included in the application for licences particularly those applications that would have an impact on rural or otherwise marginalised communities. This process should be included to allow for all notices provided for to interested and affected parties (including landowners and lawful occupiers 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 offshore area to which the application relates, is situated; and notices on community radio stations, in community halls, municipal offices,

or traditional offices) to be in English and at least one other official language that is dominantly used in the relevant area.

Clause 12 - Finalisation of application

34. In our previous comments on the 2021 GAB, we submitted that the time period prescribed of 60 days is insufficient to allow for adequate public participation and consideration of an application. We note the Department of Mineral Resources and Energy's response, dated 02 May 2022, which states that "The 60 days period will apply if there are no objections to the applications, and after receiving and considering objections, and the response of the applicant to objections as contemplated in section 18A (3), therefore 60 days is the minimum period."

35. We submit that section 19(2) of the proposed amendment should include additional requirements which will ensure that an applicant is not in non-compliance any of its licences issued for similar projects under the Act, including licences required by the National Environmental Management Act and the Specific Environmental Management Acts.

36. Furthermore, in terms of section 19(2), provision should be made to ensure that the project will not result in unacceptable pollution, ecological degradation, damage to the environment, contribution to GHG emissions; the granting of the licence will substantially and meaningfully expand opportunities for HDIs and women in the immediate locality of the project.

37. We submit that in granting or refusing a licence in terms of section 19(3), the Energy Regulator must provide the decision and the reasons therefore to IAPs.

38. We submit that there should be appeal process in terms of the act and that this appeal process should be , in line with the provisions of National Appeal Regulations 2014. In such a dispensation, it follows that the Energy Regulator should inform IAPs of their right to appeal a decision.

39. We further submit that the principles of administrative justice necessitate the consultation of IAPs in the process of the Energy Regulator issuing an operation licence in terms of section 19(4) and 19(5).

Clause 18 - term of licence and non-transferability

40. We welcome the removal of licences being granted for gas facilities for a duration of 25 years. We are however concerned by the discretion granted to the Energy Regulator to determine the duration for which licences are granted and how they are terminated.

41. We are of the view that licenses should be terminated based on relevant factors including the public interest, repeated non-compliance and consideration of the impact gas has on the climate. Research has shown that the full lifecycle of gas includes production, processing, transportation, and end use, and there are several forms that each of these stages might take depending on the source of the gas, the location of end use, and the end use purpose.

42. Each of these stages of the gas lifecycle releases methane, carbon dioxide, and other greenhouse gases. As stated in the preceding *paras*, the latest science on gas indicates that the greenhouse gas footprint of gas is worse than

that of either coal or oil, particularly when considered in the 20-year timescale most relevant to our climate future. In the past, conventional natural gas and shale gas were promoted as bridge fuels to an eventual fossil-free future.

43. The best available evidence shows that methane emissions are greater for shale gas and conventional natural gas than for oil products or coal, per unit of energy produced. Furthermore, the health impacts of gas are documented[21], as is the risk of gas developments and associated infrastructure becoming stranded assets in the near future[22].

Clause 28 - Handling of confidential information by Energy Regulator

44. 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 as the Energy regulator determines what information can be deemed confidential, therefore fails to give effect to the constitutional rights to fair administrative action and access to information.

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

45.1. Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair;

45.2. 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)."

46. The importance of consultation and access to information in relation to mining was recognised by the Constitutional Court in Bengwenyama, 25 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".

[21] *Emissions and Air Quality Implications of Upstream and Midstream Oil and Gas Operations in Mexico,* McDonald-Buller *et al*, Atmosphere Vol 12, Issue 12, December 2021
[22] Gas Pressure: Exploring the case for gas-fired power in South Africa, Halsey *et al*, International Institute for Sustainable Development, March 2022

47. 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 it. 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."

48. Clause 28 of the Bill inserts a new section 29A into the Act which; addresses the manner in which the Energy Regulator may deal with any confidential information at its disposal, obtained in terms of the Act, in accordance with the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

49. In our experience, in exercising its decision-making powers the Department of Mineral Resources and Energy 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; 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. This would be applicable to the Energy Regulator.

50. 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 State must allocate considerable additional resources to these challenges. It is 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.

51. If all relevant information is not made available to interested and affected parties during the consultation process, it would mean 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".

52. Interested and affected parties who have a right to be consulted about applications and granting of licences, 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.

53. Public Participation standards in line with the constitutional prescripts and legal requirements [such as administrative justice] include informing, educating and creating meaningful opportunity for the public to participate in the decision-making on an issue that affects their lives.[23] The Parliament of the Republic of South Africa acknowledges that the requirement to "inform" provides opportunity for access to information and is an absolute prerequisite for effective public participation.[24] It further lists some of the information that has to be disseminated when informing interested and affected parties such as subject-specific information; general, non-specific information; educational material; and educational workshops.

54. In light of the above, we reiterate that, with respect to disclosure of information across the Bill, the following should be provided for*, inter alia:*

54.1. an obligation on all applicants for rights and licences 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, 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;

54.2. include as a condition to all permits, rights and licences granted by the Minister or the Energy Regulator to the disclosure of the right or licence, and particularly the conditions attached thereto, to the public automatically (i.e. without a specific request through PAIA or otherwise) and swiftly;

54.3. a public, online database of permits, rights or licences issued by the Minister, hosted by the Energy Regulator/the Department; and

54.4. an obligation on the Energy Regulator/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.

Clause 7 - Activities no longer requiring licensing

55. The powers and obligations afforded/imposed on the Minister and the Energy Regulator under the Bill are problematic. Firstly, the Minister is not granted a discretion to award licences and rights contemplated under the Bill – if certain criteria are met, the Minister is obligated to grant these permits and rights. Ministerial discretion is essential and should be allowed a broader scope as opposed to being limited by the enforcement of conditions that the Minister should be obliged to award licenses if only minimal conditions are met.

56. Clause 7 introduces section 15A, which allows for the minister to announce that any activity contemplated in section 15(1) may be declared an activity that no longer requires a licence. This provision is concerning as the activities set out in section 15(1) were deemed activities that require a license to begin with. There is no explanation as to why such activities would no longer require a license. As a reminder, the activities listed under section 15(1) include to "construct gas transmission, storage or distribution facilities or convert infrastructure into

[23] Parliament of the Republic of South Africa, Public Participation Model, Draft 2: Version 6
[24] Ibid.

such facilities; (b) operate gas transmission, storage or distribution facilities; or (c) trade in gas." Allowing a loophole for these activities to no longer require a license encourages poor standards of accountability and assessment of how these activities and the concerned projects are being developed and conducted.

Clause 26 - Powers of Minister regarding new gas facilities, services or gas and integrated energy projects

57. The word "may" appears problematic in section 28A (1) as it provides that "The Minister may, by notice in the Gazette, after consultation with the Energy Regulator -

    (a) make a determination that new gas facilities, services or gas are required to promote the objects of this Act; and

    (b) require that the new gas facility, service or gas must be established or acquired through a procedure which is fair, equitable, transparent, competitive and cost-effective"

58. The word "may" affords a discretion for decisions that should be considered necessary to perform. Where new gas facilities are required, it should be an absolute requirement for the Minister to determine that such new facilities promote the objects of the act and should be established through a procedure that is fair, equitable, transparent, competitive and cost effective.

Free, prior and informed consent

59. 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 be able to address how the provision of permits and rights affect them.

60. 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 Another26 and the High Court in Baleni and Others v Minister of Mineral Resources and Others27 be applied. We highlight that as of June 2021, applications for conducting activities28 listed under the NEMA Environmental Impact Assessment Regulations Listing Notices on land owned by another person now require the consent of that person (Regulation 39).

Conclusion

61. We urge the Committee to address these concern in order to ensure that the Bill acknowledges the context in which it is proposed – one of climate emergency – and addresses the issues faced by local communities pertaining to public participation, access to information and consultation.

62. Furthermore, the disparity of outcomes between the benefit gleaned by energy profiteers and the adverse environmental and health burden borne by local communities who do not reap the same, or any, tangible benefit, must inform the provisions. We reiterate the submission that: "The only role for legislation regulating petroleum resources in the era of climate emergency is to regulate existing operations and facilitate a just transition away from fossil fuel extraction and transportation."

63. We thank you for the opportunity to submit these comments and trust that they will be duly addressed.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per:

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