

**Your ref:** Dr Dee Fischer

**Our ref:** Green Connection/ap

The Director-General  
Department of Environment, Forestry & Fisheries

**By Email:** [dfischer@environment.gov.za](mailto:dfischer@environment.gov.za)

13 December 2020

Dear Dr Fischer

**Re: THE GREEN CONNECTION COMMENT ON PROPOSED AMENDMENTS TO NEMA EIA REGULATIONS AND LISTING NOTICES (GN1224 of 13 November 2020)**

**A. Introduction**

1. These comments are submitted on behalf of the Green Connection, a registered non-governmental organisation, that believes that economic growth and development, improvement of socio-economic status and conservation of natural resources can only take place within a commonly understood framework of sustainable development. Green Connection aims to provide practical support to both the government and non-governmental/civil society sectors, which are an integral part of sustainable development.

**B. Amendment of regulation 6(5) relating to PASA**

2. It is noted that the proposed amendments to the Environmental Impact Assessment Regulations (EIA Regulations)<sup>1</sup> published in GN1224 of 13 November 2020 (the proposed amendments) seek to amend Regulation 6(5) by providing that applications for environmental authorisation relating to a petroleum resource (such as offshore oil and gas reconnaissance, exploration and production activities) must be submitted to the relevant office of the designated Agency.

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<sup>1</sup> GNR.982 of 4 December 2014: Environmental Impact Assessment Regulations, 2014 (as amended).

3. The South African Agency for the Promotion of Petroleum Exploration and Exploitation (Pty) Ltd, known as the Petroleum Agency South Africa (Proprietary) Limited (PASA) is the Agency designated by the (then) Minister of Minerals & Energy in terms of s70 of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) to perform the functions referred to in Chapter 6 of the MPRDA.<sup>2</sup>
4. Section 71 of the MPRDA sets out various mandatory functions for the designated Agency. These include that the designated Agency *'must promote onshore and offshore exploration for and production of petroleum'*.<sup>3</sup> Within the context the MPRDA, the designated agency is also required (among other things) to receive applications for (among other things) reconnaissance permits, exploration rights and production rights,<sup>4</sup> and to evaluate such applications and make recommendations to the Minister.<sup>5</sup>
5. The designated Agency is also required to *'review and make recommendations to the Minister with regard to the acceptance of environmental reports and the conditions of environmental authorisations and amendments thereto'*.<sup>6</sup>
6. This proposed amendment appears to seek to remedy the current (and historical) irregular acceptance of NEMA environmental authorisation applications by PASA. In the Green Connection's view, such applications should properly be submitted to the competent authority, namely the Department of Mineral Resources and Energy (DMRE), with PASA's role in NEMA EIA processes limited to reviewing and making recommendations to the Minister responsible for Mineral Resources with regard to the acceptance of environmental reports and the conditions of environmental authorisations (and amendments thereto).

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<sup>2</sup> GN 733 of 18 June 2004: Designation of the Petroleum Agency South Africa (Proprietary) Limited for the purposes of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002).

<sup>3</sup> S71(a) of the MPRDA.

<sup>4</sup> S71(b) of the MPRDA.

<sup>5</sup> S71(c) of the MPRDA.

<sup>6</sup> S71(i) of the MPRDA. 'Environmental authorisation' is defined in the MPRDA as having the meaning assigned to it in section 1 of NEMA. The terms 'environmental reports' is not defined in the MPRDA.

7. The Green Connection questions the legality of the designated Agency being assigned functions under the EIA Regulations that go beyond the enabling provisions of s71 of the MPRDA. This issue is of particular concern to the Green Connection given that the designated Agency is in terms of the MPRDA required to '*promote onshore and offshore exploration for and production of petroleum*', giving rise to a perception of institutional bias.
8. The Green Connection submits that the NEMA EIA Regulations should not be amended to provide that applications for environmental authorisation relating to a petroleum resource (such as offshore oil and gas reconnaissance, exploration and production activities) must be submitted to the relevant office of the designated Agency. Such applications should be submitted to (and processed by) the DMRE as the competent authority for such applications.

### **C. Amendments relating to Listing Notices**

#### *Offshore oil and gas reconnaissance activities*

9. It is noted that the proposed amendments to Listing Notice 1 include new activity 21B as an activity requiring environmental authorisation following a basic assessment application process, namely any activity (including the operation thereof) that requires a reconnaissance permit. Given that this addresses a significant gap in the EIA regulatory regime relating to reconnaissance activities (such as offshore oil and gas seismic survey activities), the Green Connection welcomes and supports this inclusion.

#### *Offshore oil and gas exploration activities*

10. It is noted that the proposed amendments to Listing Notice 1 include new activity 21C, namely any activity that requires an exploration right in terms of s79 of the MPRDA, as well as any other applicable activity as contained in this Listing Notice or Listing Notice 3 of 2014, required to exercise the exploration right.
11. Linked to this, the proposed amendment to Listing Notice 2 seeks to delete listed activity 18, which currently requires a scoping and environmental impact reporting (S&EIR) process for any activity which requires an exploration right in terms of s79 of

the MPRDA, including associated infrastructure, structures, and earthworks; or the primary processing of a petroleum resource including winning, extraction, classifying, concentrating or water removal (i.e. activities such as offshore oil and gas exploration activities, and activities related thereto).

12. This proposed amendment represent a significant weakening of the EIA regulatory regime relating to offshore oil and gas exploration. Having regard to the reality that offshore oil and gas exploration activities include the drilling and tapping of wells which could result in significant environmental impacts in the event of a catastrophic wellhead blowout, as well as the high degree of public concern relating to such activities, the Green Connection calls upon the Minister to retain exploration activities in Listing Notice 2, consistent with the Minister's Constitutional obligation to protect the environment through (amongst other things) reasonable legislative and other measures.<sup>7</sup>
  
13. The proposed amendments to the EIA Regulations also seeks to delete Regulation 20(4), which requires regarding basic assessment application processes that the Minister responsible for Mineral Resources may only issue an environmental authorisation if the provisions of s24P(1) of NEMA have been complied with, namely the financial provision for the remediation of environmental damage. On the face of it, this appears to be inconsistent with Regulation 2 of the *Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations (FPR)*,<sup>8</sup> the purpose of which is to regulate the determination and making of financial provision as contemplated in NEMA for the costs associated with the undertaking of management, rehabilitation and remediation of environmental impacts from (among other things) exploration operations (through the lifespan of such operations and latent or residual environmental impacts that may become known in the future). In light of this, and given that the proposed amendments do not seek to delete Regulation 24(4) which contains an identical requirement relating to scoping and environmental impact reporting

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<sup>7</sup> Constitution of the Republic of South Africa, s24.

<sup>8</sup> Proposed amendments to Regulation 19(1)(a) and 23(1)(a).

(S&EIR) processes applicable to production operations, the Green Connection submits that Regulation 20(4) should be retained.

*Deletion of listed activity 22 - Decommissioning*

14. It is also noted that the proposed amendments to Listing Notice 1 include the deletion of listed activity 22, which currently requires environmental authorisation (following a basic assessment process) for the decommissioning of any activity requiring a closure certificate in terms of s43 of the MPRDA or (among other things) a production right or exploration right where the throughput of the activity has reduced by 90% or more over a period of 5 years (such as offshore oil and gas exploration and production activities).
15. On the face of it, this also appears to represent a significant weakening of the EIA regulatory regime relating to (among other things) offshore oil and gas exploration, and the Green Connection questions the rationale for this proposed deletion.

**D. Amendments relating to financial provisions for remediation of environmental damage**

16. It is noted that the proposed amendments to the EIA Regulations seek to require basic assessment reports (BARs) and environmental impact assessment reports (EIAR) to include, where the application is a mining application, the plans, report and calculations contemplated in the FPR. The proposed amendments seek to delete various existing provisions relating to BARs, EMPRs, closure plans and EIARs being required to address or contain attachments that address the requirements as determined in the regulations pertaining to the financial provision for the rehabilitation, closure and post closure of (among other things) exploration or production operations (such as offshore oil and gas operations).<sup>9</sup>
17. It is noted that the proposed amendments define the term 'mining application' as meaning an application for environmental authorisation for a permission, right, permit

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<sup>9</sup> See for example (but not necessarily limited to) the proposed amendments to Regulation 19(1),(3), (4), (6) and Regulation 23 (3) and (4).

or consent required in terms of the MPRDA, and also includes hydraulic fracturing and reclamation.

18. While this definition does not make specific reference to offshore oil and gas activities (including the operation of that activity) requiring a reconnaissance permit, exploration right or production right in terms of the MPRDA (such as offshore oil and gas activities, and the related operation thereof), the reference to applications for environmental authorisation for (among other things) a right or permit required in terms of the MPRDA could be interpreted as extending the application of the proposed amendments to these offshore oil and gas activities.
19. If this is intended by the proposed amendments, BARs and EIARs submitted to the competent authority relating to offshore oil and gas activities (including the operation of that activity) requiring a reconnaissance permit, exploration right or production right would be required to include the plans, report and calculations contemplated in the FPR.
20. However, it is not entirely clear that this is the intention of the proposed amendment, as the term 'mining' is not defined in the proposed amendment or in the MPRDA, while the definition of 'mine'<sup>10</sup> in the MPRDA relates to 'minerals', which is in turn defined as excluding petroleum<sup>11</sup>.

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<sup>10</sup> 'Mine' is defined in the MPRDA as meaning, when:

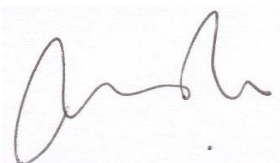
- (a) used as a noun:
  - (i) any excavation in the earth, including any portion under the sea or under other water or in any residue deposit, as well as any borehole, whether being worked or not, made for the purpose of searching for or winning a mineral;
  - (ii) any other place where a mineral resource is being extracted, including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or extraction or processing of such mineral resource; and
- (b) used as a verb, in the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area;

<sup>11</sup> 'Mineral' is defined in the MPRDA as meaning any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes:

- (a) water, other than water taken from land or sea for the extraction of any mineral from such water;
- (b) petroleum; or

21. In order to provide clarity and certainty, it is submitted that the proposed amendments to the EIA Regulations should clearly indicate that the proposed amendments referred to above are intended to also apply to offshore oil and gas activities (including the operation of that activity) requiring a reconnaissance permit, exploration right or production right.
22. If these proposed amendments are not intended to apply to offshore oil and gas activities (including the operation of that activity) requiring a reconnaissance permit, exploration right or production right, this should also be clearly stated.
23. In this event, it is submitted that the proposed amendments would unjustifiably exclude public comment (in the applicable BAR or EIAR processes) on the plans, report and calculations contemplated in the FPR relating to offshore oil and gas activities (including the operation of that activity) requiring a reconnaissance permit, exploration right or production right.

Yours sincerely



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Adrian Leonard Pole