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Submission on the Minerals and Petroleum Resource Development Act, 2002 ("MPRDA")

Draft Amendments to the Mineral and Petroleum Resources Development Regulations, 2019 for Public Comment: Government Gazette number 42870

("**The Draft Amendment Regulations**")

Introduction

1. Corruption Watch ("CW") is a non-profit civil society organisation. It is independent, and it has no political or business alignment. CW intends to ensure that custodians of public resources act responsibly to advance the interests of the public. Its ultimate objectives include: fighting the rising tide of corruption; the abuse of public funds in South Africa; and promoting transparency and accountability to protect the beneficiaries of public goods and services.

2. CW has a vision of a corruption free South Africa, one in which educated and informed citizens are able to: recognise and report corruption without fear; where incidents of corruption and maladministration are addressed without favour or prejudice; and where public and private individuals are held accountable for the abuse of public power and resources.

3. As an accredited Transparency International Chapter in South Africa, core to our mandate is the promotion of transparency and accountability within private sector and state institutions in order to ensure that corruption is addressed and reduced through the promotion and protection of democracy, rule of law and good governance.

4. CW welcomes the opportunity to make submissions on the Draft Amendments to the Mineral and Petroleum Resources Development Regulations, 2019 for Public Comment ("**The Draft Amendment Regulations**")

5. We note from the preamble to the Draft Amendment Regulations that they are intended to amend the Mineral and Petroleum Resources Development Act 28 of 2002 Mineral and Petroleum Resources Development Regulations in line with best practice and due consideration of the amendments of the Mining Charter.[1] We specifically note Section 100(2) (a) of the MPRDA which states that, "*in order to ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must develop a broad-based socio-economic empowerment Charter. The Charter must set the framework for targets and timetable for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and beneficiation of such mineral resources."*

6. However, CW is concerned that regulations have the effect of placing limitations on the ability of communities to voice their concerns and participate meaningfully in decision making processes which affect them, particularly mining activities which may affect their security of tenure, their social and natural environment and other socio-economic conditions. CW is further concerned with the extent to which the amendments do not adequately regulate social and labour plans (SLP's), environmental impact management and create a legislative gap with regards the role of regional managers

[1] The Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 ["The Mining Charter"].

as well as the Minster for the prevention and protection against potential human rights violations.

7. CW therefore makes submissions related to the following key issues: ensuring the regulations limit harm to vulnerable mining communities; that they ensure that benefits reach the communities and; that the mining application process, payments of taxes, royalties, SLP's and environmental rehabilitation are transparent, effective and meet international best practise guidelines on environmental sustainability[2].

8. The points raised in this submission are in line with CW's body of work in the mining sector that looks into the vulnerabilities in the mining application process.[3] The outcomes of CW's research highlights the lack of consultation with mining affected communities as being one of the key weaknesses in the mining application process. Over and above the lack of meaningful community consultations, the maladministration of SPL's severely affects the upliftment of mine affected communities, the environment and management of mining royalties and community benefits.[4]

9. CW therefore encourages amendments that enhance meaningful consultations with the most affected members from the initial stage of the application process until the rehabilitation stage. We respectfully submit that meaningful engagement with all key stakeholders with specific reference to mine affected community members must take place throughout the entire mining value chain. This must take place at all stages that

[2] International Council on Mining and Metals (ICMM) has published a set of principles for sustainable mining which include 'contributing to community development from project development through closure in collaboration with host communities and their representatives' in the form of a toolkit for managing the closure process, rehabilitation and environmental management. See https://www.icmm.com/en-gb/environment last accessed 28 January 2020.
[3] Corruption Watch, Mining for Sustainable Development Research Programme available at <https://www.corruptionwatch.org.za/wp-content/uploads/2017/10/01678-CW-MINING-FOR-SUSTAINABLE-DEVELOPMENT-REPORT-%E2%80%93-LAYOUT-ONLINE.pdf >
[4] Corruption Watch, Mining Royalties Research Report, 2018 available <https://www.corruptionwatch.org.za/wp-content/uploads/2019/03/Mining-royalties-research-report-final1.pdf> last accessed on 27 January 2020.

encompass key decisions made before, during and after mining, including: the granting of rights and authorisations; the regulation and monitoring of operations; the collection of taxes and royalties; revenue management and allocation; and the implementation of projects and policies.

10. CW research into the management and administration of mining royalties or community royalties illustrates the high corruption risk that occurs where meaningful consultation across all stages of mining operations do not take place within communities. The research indicates that the lack of adequate community consultation particularly during the mining licenses stage of the value chain and the revenue management of the monies that accrue to the community due to of the operations often results in millions of rands squandered, stolen or diverted – leaving communities in concerning levels of poverty and enduring detrimental environmental conditions.[5]

11. Submissions are therefore made under the headings below:

    11.1. Inadequate measures to ensure effective meaningful consultation;
    11.2. Inadequate monitoring and implementation processes with regards to regulations of SLPs;
    11.3. Environmental impact assessment vulnerabilities; and
    11.4. Appeals

[5] Ibid.

Inadequate measures to ensure effective meaningful consultation

12. Chapter 1: Interested and Affected Parties – Consultation

12.1. The outcomes of the CW's research focusing on the vulnerabilities in the mining application process[6] and on the management and administration of mining royalties[7] have highlighted the lack of consultation with mining affected communities as being a key stumbling block in realising the social and developmental goals of mining. When the voices of various segments of the community are not heard or taken into account in the adjudication of awards of mining licences, or during consultations on SLP's and mine development projects, the objectives of mining beneficiation is severely impaired.

12.2. Regarding our research on the vulnerabilities in the mining application process, we note that the Department of Mineral Resources (DMR) has issued a *"Guideline for Consultation with Communities and Interested and Affected Parties"* (the "Guideline").[8] However, these guidelines do not address the failure of companies to engage in meaningful consultation with mining affected communities. In terms of the rationale for the requirement of consultation with interested and affected parties[9] and communities,[10] the Guideline states that *"it*

[6] See Note 3.
[7] See Note 4.
[8] See http://www.dmr.gov.za/Portals/0/consultation_guideline.pdf The Guideline aims to provide clarity on the implementation of the sections of Mineral and Petroleum Resources Development Act 28 of 2002, particularly sections 10(1)(b), 22(4)(b), 27(5)b) and 39 which all require notification and consultation with communities by the Regional Managers and applicants for rights in terms of the relevant sections of the Act.
[9] Interested and affected communities include inter alia, host communities, land owners and traditional authorities although, as already indicated traditional authorities are often consulted as representatives of the community and other interested and affected parties, to the detriment of such communities.
[10] A community is defined in the Guideline as "a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: provided that, where as a consequence of the provisions of the Act, negotiations or consultations with the community are required, the community shall include the members or part of the community, directly affected by prospecting or mining, on land occupied by such members or part of the community."

is to provide them with the necessary information about the proposed prospecting or mining project so that they can make informed decisions, and to see whether some accommodation with them is possible insofar as interference with their rights to use the affected properties is concerned. Consultation under the Act's provisions requires engaging in good faith to attempt to reach such accommodation." CW's and others' research indicates that this type of consultation is often insufficient and incomplete with mining companies and the DMR consulting only with selected members of the mine affected community. Those who are consulted often feel compelled into signing off on consultation reports, without broader community consultations taking place which ensure that community interests are taken into account.[11]

12.3. For years, it was held[12] that Interim Protection of Informal Land Rights Act ("IPILRA")[13] was overridden by the Minerals and Petroleum Resources Development Act ("MPRDA").[14] This made it possible for mining to proceed without community consent. However, the recent landmark Constitutional Court Judgment regarding the Xolobeni[15] community held that the IPILRA must be read with MPRDA emphasising that community consent is a prerequisite to mineral right ownership. Judge AC Basson reiterated that, *"The MPRDA and IPLRA serve two different functions but must be read together. That is not to say that the MPRDA does not apply on customary land. It does, but so does IPILRA which imposes the additional obligation upon the Minister to seek the consent of*

[11] Citing the legislative review panel mandated by Parliament and chaired by former president Kgalema Motlanthe, our report noted his comments on the trend of asking traditional leaders to give the go ahead on mining projects while supposedly representing the entire community. He stated that "mining companies merely give these leaders an office or a 4x4 vehicle and they sign off." See https://www.businesslive.co.za/bd/national/2017-07-26-kgalema-motlanthe-panel-not-keen-on-laws-on-mining/
[12] Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another 2019 (2) SA 1 (CC).
[13] Interim Protection of Informal Land Rights Act 31 of 1996.
[14] Mineral and Petroleum Resources Development Act No. 28 of 2002.
[15] *Duduzile Baleni & Other v DMR and others* 2019 (2) SA 453 (GP).)

the community who hold land in terms of customary law as oppose to merely consulting with them as is required in terms of the MPRDA. Granting this community special protection is not in conflict with the provisions of the MPRDA but in line with Constitutional objectives to protect the informal rights of customary communities that were previously not protected by the law".[16]

12.4. The Draft amendment regulations makes provision for consultation with interested and affected person. Accordingly, the amendment of the definition of interested and affected person includes a natural or juristic person or an association of persons with a direct interest. The regulation further provides a list of persons in Regulation 1,[17] and includes interested and affected persons with a direct interest. While we welcome this definition as it is inclusive of natural persons in their individual capacity in terms of viii, we are concerned that the definition for ***meaningful consultation*** merely requires good faith on the part of the applicant. While this requires the applicant to go further than mere notification of the affected and interested parties, the reality is that the guidelines have similar requirements which has led to the limitation of participation rights of community members. We therefore submit that where meaningful consultation is referred to, minimum standards of global best practice of free, prior and informed consent (FPIC) be embedded within the regulation so as to require the

[16] Ibid para 75 – 76.
[17] "Interested and affected persons" means a natural or juristic person or an association of persons with a direct interest in the proposed or existing operation or who may be affected by the proposed or existing operation. These include, but are not limited to; –
(i) Host Communities (ii) Landowners (Traditional and Title Deed owners) (iii) Traditional Authority
(iv) Land Claimants (v) Lawful land occupier (vi) Holders of informal rights (vii) The Department of Agriculture, Land Reform and Rural Development (viii) Any other person (including on adjacent and non-adjacent properties) whose socioeconomic conditions may be directly affected by the proposed prospecting or mining operation (ix) The Local Municipality (x) The relevant Government Departments, agencies and institutions responsible for the various aspects of the environment and for infrastructure which may be affected by the proposed project.

applicant to avail information to enabling parties to make an informed decision regarding the impact of the proposed activities.

12.5. We note that FPIC is recognised as the international minimum standard applied to indigenous peoples and is recognised in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[18] FPIC follows a bottom up participation and consultation, which allows communities to give or withhold consent to a project that may affect them or their land. Furthermore, FPIC enables communities to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. This principle is embedded within the United Nations universal right to self-determination.[19]

12.6. We recognise however that consent, similarly to community engagement can be manufactured[20] and emphasise the importance of informed consent which is given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.[21]

[18] United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, A/RES/61/295.
[19] See Ibid Article 10. See also Indigenous and Tribal Peoples Convention, 1989, ILO C169.
[20] See https://www.sowetanlive.co.za/news/south-africa/2019-01-17-xolobeni-residents--to-vote-on-mining/ last accessed 28 January 2020.
[21] Ibid.

Inadequate monitoring and implementation processes with regards to regulations of Social and Labour Plans ("SLP")

13. Despite having strong laws in place, the reality is that the SLP system has been in force for over 12 years and most communities affected by mining still live in extreme poverty. SLP's has been seen as a corrective measure to address disparity of wealth among community members and mine workers on the one hand and mining companies and shareholders on the other hand, by improving the daily lives of mine affected communities and properly collaborate with the Integrated Development Plans ("IDP") of the applicable municipalities. The Mining Charter emphasises the need for consultation with municipalities, mine communities, traditional authorities and affected stakeholders to identify developmental priorities of mine communities which must be contained in the SLP's.

14. However, a significant contributor to the ongoing issues with SLP's is that monitoring and uniform implementing mechanisms are not clearly regulated. One of the key findings in CW's research study into the vulnerabilities identified in the mining application processes was the deficiencies of the monitoring of SLP's by the DMR.[22] The lack of transparent and effective monitoring mechanisms results in mining companies' tendency to determine their own social and economic development targets and a subsequent failure to adhere to them without being held to account. The fundamental issue is that there is no capacity within the DMR to ensure consultation takes place prior to the formulation of the SLP's so as to ensure relevant and progressive targets are set, furthermore there is no monitoring of the implementation of the targets nor clear and effective penalties to hold mining companies to account. In our study, we recommended that the Department of Planning Monitoring and

[22] See note 3 page 9.

Evaluation ("DPME") be tasked to ensure that mining companies honour their SLP commitments to communities. In addition to this recommendation, we submit that the amendments provides a good opportunity to encourage mining companies' accountability through legal reform.[23]

15. We note that failure to adhere to SLP's obligations can lead to delicensing in that, a right or license can be revoked in the event of non-compliance. However, the implementation of such rules remains non-existent. We therefore submit that in addition to public sector monitoring – communities must be given an active role in ensuring compliance of SLP's by mining companies where the set targets must take effect. SLP's by nature are public documents and access to them must be made easy and efficient.

16. We note the amendments states that SLP's must be in English and one or two other languages commonly used within the mine community. We further submit that the amendments must mandate the DMR to be proactive in providing SLP's to communities, and community members should not have to request access to them nor should they only be accessible at either the offices of the DMR or mining companies. All relevant stakeholders involved in the formation of the SLP's, or implicated in their plans, must be provided with copies of the SLP's - this includes: the mining contractors; trade unions; traditional authorities; affected communities; and local government, over and above the DMR and mining companies. In this way, the community will have access to and have accurate information about the targets that have been set in the SLP's and be able to engage more effectively with regards to issues of compliance.

[23] Ibid page 13-15.

Environmental impact assessment vulnerabilities

17. The potential harmful impact of the mining sector on the environment is critical including acknowledging the growing concerns around climate change. Generally, the responsibility of multi-national mining corporations in mitigating climate change and where their responsibility begins and ends remains unclear. In most cases, because of mismanagement, corruption and ineffective regulation many of these costs are borne by the state and by taxpayers while local communities suffer air quality and water contamination.[24]

18. Even though there is no single Corporate Social Responsibility ("CSR") standard, mining companies should adhere to ethical performance standards and not put profits before people, the planet and the general well-being of others – in addition to due consideration of the Environmental, Social and Governance standards of measuring sustainability.[25] It is therefore pivotal for environmental clauses in the amendments to not only be stated but to be properly implemented.

19. According to the Draft amendments, part iii *'Environmental Regulations for Mineral Development and Petroleum Exploration and Production'*, a large part of the regulations have been repealed. It is not stated as to which body or department shall ensure compliance. We submit that the legislation must make it clear as to the how mining related implementation of environmental impact assessment reports will be

[24] See https://www.fin24.com/Companies/Financial-Services/focus-turns-to-frozen-mine-funds-as-bank-of-baroda-exits-sa-20180212
[25] See https://reporting.unpri.org/Download.aspx?id=1e888ce3-d538-4453-b516-d853292a8d87 last accessed 27 January 2020.

conducted and under which government department the reports will fall. We further submit that the '*Guidelines for Environmental and Social Impact Assessment*' be embedded within the licensing and rehabilitation regulations phase of the MPRDA.

20. During our research into the vulnerabilities of the application process, we noted a series of applications which included inadequate rehabilitation and mine closure plans. We further noted the concerning trend of the mineral right holders transferring rights at the stage of rehabilitation.[26] We therefore submit that the amended regulations must include a clause which prohibits the transfer of obligations for reparation and restoration of the environment during mine closure and/or rehabilitation.

Appeals

21. Chapter 3 of the amendments makes provision for appeals against administrative decisions. We are encouraged that the amendments include clear steps and time frames which allows for fair adjudication and processing of administrative decisions. This is a welcome step towards certainty and movement away from the previously ambiguous appeal processes and differing methods used to ascertain compliance.

22. However, we submit that the appeal process must be clarified to designate which official and department is managing the appeal process, and what his/her functions and powers are in relation to the appeal process.

23. We note the appeal fee and further submit that with regards to a non-refundable appeal fee – that a means test must be applied so as to not hinder most affected

[26] See RD Krause & LG Synman, "Rehabilitation and Mine Closure Liability; An assessment of the accountability of the system to communities", Center for Applied Legal Studies, University of Witwatersrand.

groups to have access to the appeal process and challenge irregular administrative decisions. This is with particular reference to the fact that the MPRDA does not have a reporting/complaints mechanism, which renders the appeal, processes the only mechanism available to report irregular decision-making.

24. We hope our submissions are useful to the Committee. Further, kindly note our request to participate in the parliamentary hearings and to make oral submissions before the Committee.

Submitted by Corruption Watch on 30 January 2020

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