PARLIAMENT OF THE PROVINCE OF THE WESTERN CAPE

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ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS

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WEDNESDAY, 13 MARCH 2024

COMMITTEE REPORTS

1. ***(Negotiating mandate stage)*** **Report of the Standing Committee on Finance, Economic Opportunities and Tourism on the Upstream Petroleum Resources Development Bill [B 13B - 2021] (NCOP)(S76), dated 8 March 2024, as follows:**

The Standing Committee on Finance, Economic Opportunities and Tourism, having considered the subject of the Upstream Petroleum Resources Development Bill [B 13B - 2021] (NCOP)(S76) referred to it in terms of Standing Rule 217, confers on the Western Cape's delegation in the NCOP the authority to not support the Bill, and recommends that the Bill be redrafted in its entirety.

The National Council of Provinces is requested to note the following:

1. Procedural concerns:

1.1 Socio-Economic Impact Assessment System (SEIAS) Integration

- The procedural concern remains that the SEIAS report provided to the Committee is a draft report from December 2019, which may not reflect the latest socio-economic context and that it may point to improper legislative processes being followed.

- The Department of Mineral Resources and Energy (the Department) needs to ensure the final SEIAS is updated, publicly available, and reflects an in-depth analysis of the Bill's impact which was completed in the necessary period.

- This should include an assessment of how the Bill promotes the interests of various groups of black persons and provides evidence for the clause's alignment with the Bill's objectives as stated in clause 2(d).

- The Department must ensure that the SEIAS report informs the legislative process with updated socio-economic impact data, adhering to best practices for

transparency and accountability. Any procedural shortcomings must be addressed to reflect compliance with assessment procedures.

1.2 Public Participation Enhancement

- The public commenting process should be strengthened, particularly for underrepresented communities, to ensure a diversity of voices contributes to the policy-making process. This should encompass workshops and hearings beyond formal comment periods. During its public participation process, the Committee received complaints that some communities were consulted but that the National Department did not follow-up with them regarding their concerns about the Bill.

- The turnaround time for the processing of this Bill was very short, given the importance of its content, which put the entire value chain under pressure to process the Bill adequately.

- The Committee also observed the lack of representation in respect of the different major languages in the provinces. Members of the public expressed dissatisfaction that the Bill and presentation on the Bill were presented in English when the majority of the affected communities were Afrikaans and isiXhosa. As a result, many of the members of the public struggled to understand the Bill.

2. Substantive concerns:

2.1 Definitions in the Bill and Regulations:

- Clause 1: It is not clear whether the definition of “development” is inclusive of “upstream petroleum infrastructure”. The relationship between these two terms should be clarified in the Bill. While the Department's response to the Committee indicated that the term "development" inherently includes "upstream petroleum infrastructure," clarity is needed to eliminate ambiguity. It is proposed that the Bill explicitly defines "upstream petroleum infrastructure" within the context of "development" to ensure comprehensive understanding and to avoid potential misinterpretations that could impact regulatory and compliance matters. This will ensure all stakeholders have a uniform understanding of the terms as they relate to operational and environmental obligations.

- Clause 21: The name of the committee established by section 21 should be revised to exclude "Environmental" to prevent overlap with existing National Environmental Management Act, 1998 (Act 107 of 1998) frameworks and clarify its distinct function.

- Clause 54 and 14: The definition of appraisal and the relevant provision (clause 54) does not clarify whether, or how, the petroleum resources, produced in the process leading to and during the appraisal process, should be managed and disposed of, or whether it can be used for commercial gain. Also, clarity must be provided on the management and disposal of petroleum that is extracted during the exploration phase of applications, especially considering that rights related to the exploration phase can be as long as nine years - see clause 14(2). It is also recommended that regulations be drafted and implemented with the Bill to ensure that inappropriate use and its associated impacts are managed during exploration and appraisal operations. While the commitment to developing regulations is noted, clarity on the immediate implications and management of appraisal outputs is needed. Regulations could be drafted concurrently with the Bill to provide

clarity and assurance on the management and commercial use of resources produced during appraisal.

- Clause 84: To ensure the long-term protection of water resources, it is essential to establish a specialised workforce within the Petroleum Agency South Africa for the continuous monitoring of well casings and groundwater conditions. This team should have the authority to enforce accountability and remediation measures when environmental baselines are threatened, as well as to adjust operational practices to prevent long-term environmental degradation. This provision should be added to the Regulations of the Bill.

2.2 Climate Change Mitigation:

- The Department should address the global urgency of climate change by embedding carbon reduction targets within the Bill and strategies for a sustainable energy transition. The Bill should emphasise South Africa's commitment to its international obligations, such as the Paris Agreement, and recognise the necessity for a long-term sustainable energy policy.

- A revision of the Bill is necessary to integrate climate considerations, ensuring alignment with international energy transition goals and the safeguarding of local economic development within a sustainable and environmentally conscious framework.

- Clause 3: To ensure that the Bill aligns with South Africa's climate change commitments and the constitutional mandate for environmental stewardship, Clause 3 should be amended to explicitly state the state's responsibility in the sustainable development and custodianship of petroleum resources. This should include specific provisions for the reduction of greenhouse gas emissions and the assessment of the impact of carbon tax implementation. The amended clause should articulate that environmental considerations, including climate impact assessments, are integral to the granting of any exploration or production rights and must be in compliance with both national commitments and international environmental agreements.

2.3 State Participation Scrutiny:

- The Department should critically evaluate the proposed State Petroleum Company Framework. Advocate for mechanisms that ensure its operations enhance transparency and deter corruption, drawing lessons from the challenges faced by other State-Owned Entities.

- The current clause 34 indicates that the State has a right to a 20% carried interest in petroleum rights, including in both the exploration and production phase. This requirement may be a concern for investors. The committee recommends that this clause be removed from the Bill.

2.4 Black Economic Empowerment Policy Appraisal:

- Black Economic Empowerment (BEE) provisions should be reassessed to prevent deterring investment while promoting broad-based economic empowerment and transformation.

- While ensuring that the country's mineral wealth directly benefits South Africans is an important policy objective, these provisions could deter investors with

stipulations that every company applying for mining rights must be owned by a BEE-partner. As such, it is recommended that Clause 31 is removed from the Bill.

2.5 Environmental Legislation Compliance:

- The Department must ensure compliance with the National Environmental Management Act (NEMA), 1998 (Act 107 of 1998) and its regulations, particularly regarding Environmental Impact Assessments (EIAs) and environmental management plans. The Bill should align with NEMA's requirements for conducting EIAs and mitigating environmental impacts.

- Clause 44: There is a need for clarity and consistency in financial requirements across all phases of operation. The Bill should ensure that the terms for financial provisioning for rehabilitation, decommissioning, and latent impacts are transparent, inclusive, and do not grant the Minister excessive discretion that could lead to uncertainty or arbitrary decision-making. We propose that these provisions align closely with the best practices and standards outlined in NEMA to ensure environmental and financial accountability without compromising investment attractiveness and operational efficiency.

- Clause 46: The Bill should be amended to necessitate the re-evaluation of environmental risks and impacts for each new application or renewal, taking into account technological advances and changing operational contexts. It should mandate a specific assessment to address risks associated with high-impact geological structures. These amendments would help mitigate potential environmental damage and ensure that changes in operation do not inadvertently escalate risks.

- Clause 50: The legislation should be amended to require that detailed information on drilling additives, waste material volumes, and environmental measurements be published on a government-sanctioned public platform (Gazette), ensuring adherence to the Promotion of Access to Information Act (PAIA), 2000 (Act 2 of 2000) for accountability and public engagement.

- Clause 52: It is not clear if the application for a drilling permit will only be issued once an environmental authorisation (or an amended environmental authorisation) has been issued. The wording of clause 52(3) seems to suggest that a drilling permit must be issued "… within 60 days from the date of receipt of the application", regardless of whether the Environmental Impact Assessment process was finalised. The clause should be revised to unambiguously state that environmental authorisation is a prerequisite for the issuance of a drilling permit.

- Clause 88: Suspension or cancellation of permits should be predicated on clear criteria that protect the investment while ensuring compliance with NEMA's rehabilitation provisions, ensuring that the cancellation does not undermine financial security or environmental commitments.

2.6 Labour Standards Adherence:

- The Department must ensure adherence to the Labour Relations Act, 1995 (Act 6 of 1995) and the Basic Conditions of Employment Act, 1997 (Act 75 of 1997). The Bill should include provisions that uphold labour rights, fair employment practices, and safe working conditions for workers in the petroleum sector.

2.7 Mining Regulations Consistency:

- The Department must ensure consistency with the Mineral and Petroleum Resources Development Act (MPRDA), 2002 (Act 28 of 2002) in terms of licensing, rights allocation, and regulatory oversight. The Bill should align with MPRDA provisions related to exploration, production, and the exploitation of petroleum resources.

2.8 Constitutional Compliance and Alignment to Legislation:

- The Department must ensure alignment with the Constitution of the Republic of South Africa, 1996, particularly regarding fundamental rights and principles such as environmental protection, socio-economic rights, and the promotion of equitable access to resources. The Bill should not infringe upon constitutional rights and should promote the realisation of constitutional objectives.

- Clause 91: The language should be revised to obligate the holder of petroleum rights to provide fair and timely compensation to landowners and occupiers affected by extraction activities. This amendment will align the Bill with constitutional rights and expropriation laws, ensuring those impacted by oil and gas operations are justly compensated. For the administrative penalties section, the Bill should be amended to set penalties based on a percentage of the annual turnover of the oil and gas operations, to ensure they act as a true deterrent. Funds collected as penalties must be explicitly earmarked for environmental restoration and support community development projects impacted by the industry's activities. Regarding state liability, the Bill must stipulate that state-owned entities are equally subject to the full force of the law for environmental infractions. This accountability ensures no legal exemptions for state entities, maintaining equitable enforcement across all operators within the industry.

- Clause 92: A redrafting of this clause is required to ensure expropriation for petroleum activities is aligned with the Constitution, balancing property rights with the public interest and affirming the necessity of proportionality evaluations for any property deprivation.

- Clause 99(4): The application of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) should be unequivocal in the Bill, ensuring that all relevant sections are applied to court proceedings, thus avoiding any legal ambiguity, and ensuring that administrative actions are fair, reasonable, and procedurally sound.

3. Additional Recommendations:

3.1 Public Participation Framework:

- There must be a call for a robust framework for comprehensive stakeholder engagement that underscores transparency, inclusive dialogue, and environmental impact assessment.

3.2 SOE and BEE Framework Reconsideration:

- There must be a reassessment of the frameworks governing state participation and BEE to ensure they promote a conducive investment environment while advancing equitable participation.

3.3 Environmental Compliance Enhancement:

- The Committee proposes the inclusion of rigorous environmental compliance standards and safety regulations reflective of both national interests and international benchmarks within the Bill.

3.4 Skills and Infrastructure Investment:

- The Department must highlight the importance of investment in industry-relevant infrastructure and skills development as pivotal to the sustainability and growth of the petroleum sector.

3.5 Market Dynamics and Economic Sustainability:

- There must be a thorough analysis of the Bill's implications on job creation, economic growth, and South Africa's competitiveness in the global energy market.

4. Conclusion

The Committee's negotiating mandate drew upon extensive stakeholder feedback, including inputs from the Western Cape Government (WCG), Life After Coal/Impilo Ngaphandle Kwamahle (LAC) coalition, The Green Connection, the Mossel Bay Socio-Economic Collective (CBO), Treasure Karoo Action Group (TKAG), and considerations from the draft Socio-Economic Impact Assessment System (SEIAS). This mandate will articulate a comprehensive strategy reflecting the multifaceted nature of the Bill.

The need for a holistic approach to legislating the upstream petroleum sector is paramount to align with both domestic priorities and global energy trends. This negotiating mandate endeavours to encapsulate the wide array of feedback and construct a cohesive, informed, and forward-looking legislative direction.

Given the current form of the Bill, coupled with the highlighted concerns, the draft negotiating mandate suggests the Western Cape's delegation in the NCOP withhold support for the Bill until substantial revisions are made.

These proposed revisions should strive to embed environmental sustainability, economic viability, and equitable benefits for all South Africans. The reformed Bill should consider the imminent energy transitions globally and position South Africa as a leader in sustainable energy practices.

2. (*Negotiating mandate stage*) Report of the Standing Committee on Mobility on the Transport Appeal Tribunal Amendment Bill [B 8B–2020] (NCOP), dated 11 March 2024, as follows:

The Standing Committee on Mobility, having considered the subject of the Transport Appeal Tribunal Amendment Bill [B 8B–2020] (NCOP) referred to the Committee in accordance with Standing Rule 217, confers on the Western Cape's delegation in the NCOP the authority to support the Bill. The Committee further proposes the following:

Comments on specific provisions		
Clause	**Comment**	**Recommendation**
Clause 1(*a*)	**Definition of 'act, direction or decision' in (*c*):**	It is proposed that this subclause be amended as follows:

	It is proposed that the word “permit” be added to the text of this intended amendment since not all permits have been converted to operating licences.	“*(c)* a decision to cancel an operating licence or permit in terms of section 78 of the National Land Transport Act;”. It is proposed the definition of ‘act, direction or decision’ 1 be expanded to include the following: “A decision of a Provincial Operating licensing Board where a Provincial Regulatory Entity has not yet been established in relation to a decision to grant, amend or transfer an operating licence or to convert a permit as well as decisions relating to the cancellation or withdrawal of permits or operating licences.
Clause 1 *(b)*	The definition of “board” can only be deleted if all provinces have established Provincial Regulatory Entities and disestablished Provincial Operating Licence Boards. Section 93(3) of the National Land Transport Act, 2009 (Act 5 of 2009) **(“the NLTA”)**, which provides for transitional provisions, allows an operating licensing board to perform the functions of the Provincial Regulatory Entity until such time that the latter has been established.	Consider the deletion of the definition of “board” in light of the comment in column 2. It is proposed that the definition of ‘act, direction or decision’ be expanded to include the following: “A decision of a Provincial Operating licensing Board where a Provincial Regulatory Entity has not yet been established in relation to a decision to grant, amend or transfer an operating licence or to convert a permit as well as a decision relating to the cancellation or withdrawal of a permit or operating licence.
Clause 4	The proposal in this clause seeks to replace the power of the chairperson of the Tribunal to determine when, where and for how long the Tribunal will sit with the power of the Director-General to determine these matters. The Tribunal should operate independently from the Department. It is unclear why this has been proposed, as the chairperson will be familiar with the case load, the nature of the cases, the availability of members of the Tribunal and is best placed to estimate, in conjunction with the members of the Tribunal, the amount of time	It is suggested that section 9(1) of the Act be retained. It is further suggested that clause 4 be amended by the insertion of a subsection (4) as follows: *“(4) The Director-General, in consultation with the chairperson of the Tribunal, must determine the number of sittings of the Tribunal for the next financial year, the estimated number of hours per sitting and the*

	that will be required for the Tribunal to complete its work. It is thus suggested that the current version of section 9(1) be retained. At best, if the Director-General is to have any role in the business of the sittings of the Tribunal, it would be to ensure proper financial planning for the coming financial year by planning, in consultation with the chairperson of the Tribunal, the number of sittings for the year, the estimated number of hours per sitting and the estimated preparation time for sittings. This can be based on statistics from previous years of the number of cases heard *per annum*. It is therefore suggested that the chairperson of the Tribunal is to retain the power to determine where, when and for how long the Tribunal will sit, but that the Director General, in consultation with the chairperson, determine a year plan for the number of sittings for the upcoming year, the estimated number of hours per sitting and the estimated preparation time for sittings.	*estimated preparation time for sittings.".*
Clause 5	See the proposed wording in column 3.	In relation to the proposed wording: "or any relevant transport legislation", the following wording is the preferred wording: "any relevant national or provincial transport legislation". This would apply to the other instances in the Bill where this wording is proposed in clause 6.
Clause 7	Although the operation and execution of an appeal usually suspends the outcome of a decision that is the subject of the appeal, has the question of prejudice to applicants been considered in light of the proposed amendment to section 13*(b)* of the Act, which would allow the automatic suspension of an act, direction or decision if the appeal is lodged within 30 days?	Consider whether there ought to be exceptional circumstances which an applicant could utilise as a procedural tool to argue against the automatic suspension of a decision.
Clause 8*(b)*	There is an error in the wording in line 37.	It is proposed that the error be corrected as follows: "…delays or **[actions]** could cause substantial prejudice…".

Clause 9	The proposal in this clause is <u>not supported</u>. As previously stated in these comments, the independence of the Tribunal is essential for purposes of overseeing the acts, directions or decisions of regulatory entities and Regulatory Committees. It is concerning that the Director-General is proposed to be empowered to designate officers in the Department of Transport to carry out "*<u>any investigations required by the Tribunal that are necessary for the taking of its decisions</u>*" without the need to consult the Tribunal in this regard. The Tribunal's investigations ultimately affect the outcome of its decisions. The Tribunal's investigatory powers must therefore be exercised independently of the executive. If it is necessary for operational reasons that Department of Transport officials be designated to carry out investigations, then the Tribunal must also be consulted on the matter. **The removal of the words *'after consultation with the Tribunal'*** 1. Section 3 (2) of the Principal Act, states that '*the Tribunal must be impartial and must perform its functions without fear, favour or prejudice*.' 2. The words 'must' when applying a plain grammatical meaning to the provision shows that there is an obligation that is placed on the Tribunal to discharge their duties impartially, that is the objective. 3. Section 16 of the Principal Act reads that '1*) The Director-General must, after consultation with the Tribunal, designate such officers in the Department of Transport as may be necessary to perform the administrative and secretarial work of the Tribunal*.' 4. The intended amendment reads '(1*) The Director-General must [, after consultation with the Tribunal,] designate such officers in the Department of Transport as may be necessary to perform the administrative and secretarial work of the Tribunal and to perform any investigations required by the Tribunal that are necessary*	It is strongly suggested that the requirement to consult the Tribunal be retained. It is proposed that section 16 be expanded to allow **the Tribunal** to, from time to time, request the Director-General to designate officials of the Department to perform any investigations required by the Tribunal that are necessary to take decisions on appeal.

	for the taking of its decisions.' 5. The removal of the words '*after consultation with the Tribunal'* would compromise the impartiality of the Tribunal. 6. When a court applies the constitutional principle of rationality to a legislative provision, it is obliged to decide whether the provision is irrational or arbitrary, if the court so decides, then it declares it to be unconstitutional and invalid. [see: Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others ZACC 45] 7. In this instance the intended amendment of removing those words although for a seemingly legitimate reason, does not fulfil the rationality test. 8. In other words, there is no rational link between the objective of the principal act to create an impartial Tribunal and the intended amendment to remove the requirement of consultation with the Tribunal. 9. Accordingly, that amendment would not pass constitutional muster. **The insertion of the words '*and to perform any investigations required by the Tribunal that are necessary for the taking of its decisions.'*** Interpretation is the process of attributing meaning to the words used in a document, be it legislation having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the light of the ordinary rules of grammar. The context in which the provision appears. The apparent purpose to which it is directed.	

	[see: Auction Alliance (Pty) Ltd v Wade Park (Pty) Ltd 2018 (4) SA 358 SCA; Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)] 1. The difficulty with the words '*and to perform any investigations required by the Tribunal that are necessary for the taking of its decisions'* is that the provision does not provide sufficient particularity and is coached in a manner that is too wide. 2. If a judge is seized with determining a case in terms of this provision, nowhere does it appear **expressly** in the principal Act and the Bill, the context in which the provision appears. There is nothing to contextualize the insertion of those words. 3. Nowhere does it appear **expressly**, the subject matter of those investigations and the scope of those investigations. Therefore, a judge will be left to draw inferences that may lead to the incorrect interpretation.	