



63 Hout Street,
Mercantile Building,
Cape Town, 8000,
South Africa.
Tel: +27 21 426 1633

ALOIS MUGADZA,

Programme Officer

Email: Alois@naturaljustice.org

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TO: MR ARICO KOTZE

PORTFOLIO COMMITTEE ON ENERGY 3RD FLOOR,

WS 3/107, 90 Plein Street,

Cape Town, 8001,

EMAIL: akotze@parliament.gov.za

TEL: (021) 403 3662 or cell 083 709 8470

For the attention of the Portfolio Committee on Energy.

**NATURAL JUSTICE COMMENTS TO THE UPSTREAM PETROLEUM RESOURCES
DEVELOPMENT BILL (B13-2021)**

UPSTREAM PETROLEUM RESOURCES DEVELOPMENT BILL (B13-2021)

Natural Justice: Lawyers for Communities and the Environment (NJ) welcomes the opportunity to submit written comments in accordance with the invitation from the Department of Mineral Resources and Energy (DMRE). NJ has read and considered the implications of the Upstream Petroleum Resources Development Bill (the Bill) and submits the following comments and recommendations to the DMRE. NJ's submission sets out a) background to the organisation and its work; b) comments on the Bill and c) recommendations – including factoring in climate change in the Bill.

NATURAL JUSTICE

Natural Justice: Lawyers for Communities and the Environment is a non-profit organisation, registered in South Africa since 2007. Our vision is the conservation and sustainable use of biodiversity through the self-determination of indigenous peoples and local communities.

Our mission is to facilitate the full and effective participation of Indigenous peoples and local communities in the development and implementation of laws and policies that relate to the conservation and customary uses of biodiversity and the protection of associated cultural heritage.

Natural Justice works at the local, national, regional, and international levels with a wide range of partners. We strive to ensure that community rights and responsibilities are represented and respected at a broader scale and that gains made in international fora are fully upheld at lower levels. Given the importance of the Bill, also within the context of climate change and environmental degradation, NJ wishes to submit its comments to the DMRE. We further express our request to make a verbal submission or participate in any meaningful engagements with the Department when an opportunity arises.

PURPOSE OF THE BILL

The purpose of the Bill: to provide for orderly development of petroleum resources; to provide for equitable access to, and sustainable development of, the nation's petroleum resources; to provide for active State and black persons' participation in the development of the nation's petroleum resources; to provide for a petroleum right that integrates the right to explore and to produce; to provide for the facilitation of acquisition of petroleum geo-technical data; to provide for a controlled application system through licensing rounds; to create an enabling environment for the acceleration of exploration and production of the nation's petroleum resources; to provide for third party access to upstream petroleum infrastructure; to provide for a petroleum right holder to sell a percentage of petroleum to the State for strategic stocks requirements; to designate a state-owned company as an entity responsible for managing the State's carried interest in petroleum rights; to provide for the advancement of national developmental imperatives by the state-owned company through the development of petroleum resources; to provide for the holder of a petroleum right to retain its empowerment status after the exit of black persons under circumscribed circumstances; to provide for local content as a development strategy to enable skills development, local recruitment and national participation through supply of goods and services; to designate the Petroleum Agency of South Africa (PASA) as the regulatory authority for the upstream petroleum sector; and to provide for matters connected therewith.

LEGISLATIVE PROCESS

- By failing to provide adequate time and resources to determine the range of interests and conflicts relating to land and petroleum resources, the rights of interested and affected parties to fair administrative action are violated, and the need for decisions to be appealed or reviewed increases. We recommend that the Bill includes an overall application and objection process and ensures that the constitutional right to lawful, reasonable, and procedurally fair administrative action is honoured. During this process, we recommend that the following principles of meaningful consultation be followed:
 - a) meaningful consultation should be defined as consulting in good faith, giving the landowner, lawful occupier and/or interested and affected persons all the relevant information, and reasonable time and opportunity to make an informed decision regarding the impact of the proposed activities. It is the applicant's obligation to have taken all the necessary, reasonable, and appropriate measures in the specific circumstances of its application to engage all interested and affected parties. Therefore,

merely informing or notifying the landowner, lawful occupier and/or interested and affected persons of a pending course of action or position, cannot equate consultation;

- b) applicants take all reasonable steps to ensure that interested and affected parties understand the information provided and how the Bill specifically affects them, so that they can make an informed decision;
- c) Information should include providing text translations into the predominant language that is spoken and understood within the area, and through media that is easily and readily accessible, as well as ensuring that scientific or otherwise technical language is translated into plain language; and,
- d) a revised process of meaningful consultation should also include an obligation on applicants to collaborate with interested and affected parties.

(a) PARTICIPATORY DEMOCRACY

- The principles which inform and govern the consultation process, as outlined in the National Environmental Management Act of 1998 (NEMA) and the Environmental Impact Assessment (EIA) Regulations, should be used to inform the role and function and way public participation is to be facilitated within this legislative framework. For example, the current EIA Regulations provide a detailed description of what constitutes adequate notice and meaningful consultation, with the goal of removing barriers to participation such as disability or literacy. Furthermore, the regulations prescribe mandatory conditions by which notice must include: posting a notice board on the site for exploration, construction, and alternative sites which are reasonably accessible to interested and affected parties; personal notification of parties such as landowners, lawful occupiers, and holders of informal land rights in terms of Interim Protection of Informal Land Rights Act (IPILRA); placing advertisements within government gazettes or local newspapers in local languages; advertising public notices through radio adverts in languages that are accessible to the local population; publishing advertisements in both provincial and national newspapers where the activity may have an impact beyond municipality; and other forms of notice to overshadow the municipality.

(b) PUBLIC PARTICIPATION

- While reconsidering the consultation processes within all stages of applications for permits dealing with exploration, reconnaissance, and production, we urge the Minister of Mineral Resources and Energy to prescribe regulations and provisions that promote the incorporation of the internationally

accepted principle of free, prior, and informed consent (“FPIC”). Applying the internationally recognized principle 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. FPIC is integral to the control indigenous peoples and local communities exercise over their lands and territories, the enjoyment and practice of their cultures, and their right to make choices over their own economic, cultural, and social development. This right to free, prior, informed consent, to be meaningful, must include the acknowledgement of the right to withhold consent to the development projects or proposals to which this Bill intends to give effect. The right to free, prior, informed consent while fully consistent with norms of democratic consultation, is not equivalent to, and should not be reduced to, individual participation rights. FPIC is fundamentally a collective right, and entails the exercise of choices by peoples, as rights-bearers and legal persons, about their economic, social, and cultural development. FPIC cannot be weakened to consultation of individual constituents about their wishes, but rather must enable and guarantee the collective decision-making of the concerned indigenous peoples and their communities through legitimate customary law, agreed processes, and their own institutions. This principle should thus inform how public participation, within the various application processes and proposals, is facilitated as part of the objectives of the Bill.

(c) ADMINISTRATIVE JUSTICE

- The Bill should advance and apply the principles of administrative justice at all stages of the application process for exploration, production, and reconnaissance permits. Administrative action by all persons performing a public function must be lawful, reasonable, and procedurally fair based on the principles of accountability, responsiveness, openness, and transparency. The right to just administrative action in the Constitution recognizes the importance of justification.¹ Those tasked with performing a public function in accordance with the Bill must ensure that all concerned persons who will be adversely affected by the administrative action, are provided with written reasons to that effect, particularly written reasons concerning the facilitation of decisions granting exploration, reconnaissance and exploration permits in all stages of the application process. This must be in accordance with section 33 of the Constitution.

¹ S 33(1) provides a right to ‘reasonable’ administrative action that is ‘procedurally fair’. For example, a decision affecting someone should not be made before hearing what that person has to say; and S 33 (2) gives people the right to be given reasons for administrative action that affects their rights.

- Inadequate time allocation can result in the administrative actions being taken in an unjustifiable and unreasonable manner and prevent consultation or public participation in the objection and application process, which, we argue, would allow companies to operate or launch reviews and appeals against refusals without the knowledge of interested and affected parties.
- Furthermore, the timeframes offered in the Act must be justifiable in their operation and must support fair procedures and processes for consultation that we believe are necessary to give effect to lawful, reasonable, and procedurally fair administrative action. These will be critiqued in further detail below.

GENERAL COMMENTS

1. CLIMATE CHANGE

- We are facing a climate emergency and challenge. We need international, regional, and national solutions. South Africa has ratified the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, which impose obligations to set and pursue nationally determined greenhouse gas (GHG) reduction targets, as well as to increase investment in climate adaptation programmes. Thus, to meet these international obligations, South Africa must reduce greenhouse gas emissions using its laws, regulations, and policies. However, Bill in its current draft does not adequately address South Africa's commitments to significantly reducing the environmental costs specifically associated with the oil and gas and petroleum industry which produce considerable pollution and greenhouse gas emissions. Methane emissions are the second-leading cause of global warming. They are produced by a variety of artificial and natural sources, including oil, natural gas, coal, and bioenergy.² According to research, while assessing the environmental implications of the gas supply chain, the total lifespan emissions must be included. While gas combustion produces less carbon dioxide emissions than coal combustion, research indicates that gas is neither good for the climate nor for the environment when emissions from all stages of the gas supply chain are considered, such as during exploration, extraction, and the manufacturing of energy conversion technology.³ Therefore, the Bill must provide for a well-

² IEA (2021), Global Energy Review 2021, IEA, Paris <https://www.iea.org/reports/global-energy-review-2021>. Accessed on 28 July 2022.

³ Anderson, K. & Broderick, J., 2017. Natural gas and Climate Change, Manchester: s.n.

coordinated climate response strategy through empowering provisions applicable across all government bodies at all levels. The current draft of the Bill ought to incorporate a well-coordinated climate response strategy and outline the measures which will result in the following: encouragement of the adoption of renewable energy alternatives thereby reaching net zero emissions at an increased rate; improved socially efficient outcomes in that social and economic costs of overcoming excessive production of GHG emissions are significantly reduced for the state and its citizens; and lastly, protection and improvement of the integrity of the environment for future generations. Government, institutions, and industrial sectors must outline through specific provisions within the current draft language, target setting emission reduction obligations to reduce GHG emissions across the entire petroleum and gas value chain through measures which factor in key considerations for effective long-term planning and decision making. The Upstream Petroleum Resources Development Bill does not recognise these objectives as it sets sights on exploring more fossil fuel, increasing South Africa's greenhouse emissions.

- Moreover, there is a need for an independent scientific committee that focuses on climate change and liaises with the National Treasury for funding. This independent scientific body needs to provide the government with the best available and latest science on climate change and the responses required to address it. Many of the targets of this Bill are political in nature and do not conform to the findings of current climate science. For example, the Bill does not address the impacts of methane from oil and gas combustion or the rate at which methane emissions exacerbate climate change, nor does the Bill address the long-lasting implications of methane production as it relates to increasing the country's greenhouse gas emissions. Methane has a global warming potential of around 85 times that of carbon dioxide over a 20-year period⁴. It can escape into the atmosphere along the gas value chain (extraction, phase transitions, transportation, and storage). The leaking of methane has been greatly underestimated, and the gas sector contributes substantially more to climate change than previously assumed.⁵ According to Alvarez *et al.*⁶ around

⁴ Myhre, G., Shindell, D. Bréon, F.-M., Collins, W., Fuglestedt, J., Huang, J., Koch, D., Lamarque, J.-F., Lee, D., Mendoza, B., Nakajima, T., Robock, A., Stephens, G., Takemura, T., & Zhang, H. (2013). Anthropogenic and natural radiative forcing. In T. F. Stocker, D. Qin, G.-K. Plattner, M. Tignor, S. K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex & P. M. Midgley (Eds.). *Climate change 2013: The physical science basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, pp. 659–740. Cambridge University Press.

Turner, A., Jacob, D., Benmergui, J., Wofsy, S., Maasackers, J., Butz, A., Hasekamp, O., Biraud, S., & Dlugokencky, E. (2016). A large increase in US methane emissions over the past decade inferred from satellite data and surface observations. *Geophysical Research Letters*, 43. <https://doi.org/10.1002/2016GL06798>.

⁶ Alvarez, R. A., Zavala-Araiza, D., Lyon, D. R., Allen, D. T., Barkley, Z. R., Brandt, A. R., Davis, K. J., Herndon, S. C., Jacob, D. J., Karion, A., Kort, E. A., Lamb, B. K., Lauvaux, T., Maasackers, J. D., Marchese, A. J., Omara, M., Pacala, S. W., Peischl, J., Robinson, A. L., Shepson, P. B., Sweeney, C., Townsend-Small, A., Wofsy, S. C., & Hamburg, S. S. (2018).

2.3 percent of natural gas extracted in the United States leaks into the atmosphere. Busch and Gimon discovered that poorly managed facilities can cause leakages of up to 4 percent.⁷ The Bill must require decision-makers to stay abreast of the ever-evolving scientific knowledge in this field and to ensure that all decisions made pursuant to this legislation and corresponding regulations are grounded in the best available climate science. The Bill must also explicitly incorporate the precautionary principle, which requires decision-makers to adopt a cautious and risk-averse approach to decision-making and which dictates that lack of scientific certainty does not absolve government officials from their duty to act against climate change.

- **1.1 INCOMPATIBILITY**

- This fossil fuel project is incompatible with the commitments announced by the government to combat climate change. Since the energy sector and the petroleum industry are already well known for fugitive emissions, including carbon dioxide and methane emissions, the Bill as drafted is incompatible with the dictates of the Climate Change Bill (B9-2022). All adaptation and mitigation efforts should be based on the best available science, evidence, and information.
- Further, the Bill conflicts with international and regional climate targets and obligations. In the coming years, South Africa will need to continue to adopt stricter nationally determined contributions (NDCs) with respect to greenhouse gas emission reductions pursuant to the requirements of the Paris Agreement. These increasingly stringent targets must be aligned with the principles of shared contributions to climate change mitigation and adaptation efforts. The Bill fails to recognise the fact that South Africa's emissions reduction obligations will continue to evolve and become ever-increasingly stringent. For instance, Bill provides for long license periods, which will allow continued production of petroleum resources long after South Africa's international emissions reduction obligations should allow.
- Furthermore, by stating that the Minister must allow projects to move from the exploration phase to the production phase so long as basic requirements are met (including compliance with the environmental authorisation for exploration), the Bill does not leave sufficient opportunity for the Minister to determine that petroleum or gas production is no longer needed, desirable or compliant with environmental laws and international obligations. The Bill must provide the Minister more

Assessment of methane emissions from the U.S. oil and gas supply chain. *Science*, 361(6398). 186–188. <https://doi.org/10.1126/science.aar720>.

⁷ Busch, C., & Gimon, E. (2014). Natural gas versus coal: Is natural gas better for the climate? *The Electricity Journal*, 27, <https://doi.org/10.1016/j.tej.2014.07.007>.

flexibility in determining whether a project should be allowed to move from the exploration to the production phase. The Bill should dictate that all projects must undergo a new environmental impact assessment process, including a new need-and-desirability analysis, when applicants apply to move from the reconnaissance phase to the exploration phase or from the exploration phase to the production phase.

2. JUST ENERGY TRANSITION

- As a transition toward a sustainable, low carbon and clean equitable energy system that is better for people and the planet, South Africa needs to transition from where we are at – 90% coal-generated electricity – to a system that is transparent, equitable, and incorporative of clean energy. South Africa’s transition from coal to clean energy has been beset by difficulties. South Africa is currently the most industrialised economy in Africa, and the biggest source of carbon emissions. At this point of the energy transition, introducing a new fossil fuel and spending on infrastructure increase the danger of lock-in. It is difficult to calculate the cost of this lock-in, but when infrastructure is developed, there is an incentive to utilize and expand the infrastructure even when less expensive alternatives are available. The energy system and the people who pay the bills are burdened with additional costs because of this strain. To further complicate matters, while an expansion of the oil and gas industry will temporarily increase the demand for labour, real wages will gradually decline over time. There will be a long-term shift toward skilled rather than unskilled labour, and employment in the agricultural sector will experience a decline.
- Evidence from the United States, for instance, demonstrates that manufactured employment advertised as an indirect benefit of the oil and gas business does not exist.⁸ In other circumstances, evidence even points to an increase in unemployment in oil and gas regions.⁹ Gas and coal industries both face similar challenges in the power sector, including pressure to phase out, losing market share to alternatives, advancements in those alternatives, and asset stranding. Moreover, the lack of guaranteed inexpensive supply adds another risk to the gas industry. Therefore, investment in gas-to-power could result in a short-lived industry and expose the communities and individuals dealing with gas to a replay of the current coal industry's transitional challenges. Therefore, given

⁸ Concerned Health Professionals of New York; Physicians for Social Responsibility, 2020. Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction), New York: s.n.

⁹ See note above.

the risk in a just transition, considerations and adoption of renewable energy become ever relevant and increasingly necessary.

- Renewable energy options, such as wind and solar power, create more jobs than gas while lowering electricity costs and emissions. In comparison to gas-to-power, solar PV and off- and onshore wind together generate over ten times as many employments annually per MW during building, installation, and manufacture, as well as eleven times as many jobs annually per MW during operation and maintenance.¹⁰ Unsubsidized renewable energy such as wind or solar has already been successfully developed in South Africa and is significantly less expensive than any gas-to-power options. It also offers advantages such as increased job creation per unit of energy, decreased environmental impact, decreased GHG emissions, and immunity from volatile fuel prices. Renewable energy is a good starting point for a just transition. Therefore, there is no need for gas as a bridging fuel.

- **2.1 FOSSIL FUEL DEPENDENCY**

- Pushing for a gas-to-power business to help jumpstart local gas supply through extraction and production may have unintended consequences. A substantial body of evidence suggests that a sudden rise in resource exploitation can result in a "resource curse," which has a variety of severe socioeconomic consequences. A sudden rise in resource exploitation can involve rising inequality, mainly because of wealth concentration by industry and foreign investors, a higher social conflict that disproportionately affects the poor, and decreased economic growth. Before using gas-to-power business to motivate other investments (such as developing gas supplies), national energy planning must first demonstrate that gas-to-power investment is optimal in terms of its core function (generating electricity).
- Investing in fossil fuel infrastructure will also South Africa into fossil fuel dependence, making the transition to cleaner energy difficult.
- In terms of bulk supply aspirations for energy production, renewable energy sources such as wind and solar represent an immediately available solution to the current energy crisis. They can be utilized and dispatched to provide cheaper electricity. Renewables are the most cost-effective solution for addressing the supply constraint, meeting additional demand, and replacing the coal fleet as it retires. Based on LCOE research, new renewables (wind, solar and battery) were expected

¹⁰ Teske, S., Dominish, E., Briggs, C., Mey, F., & Rutovitz, J. (2019). Outlook on employment effects of a global energy transition. Greenpeace. <https://www.greenpeace.org/static/planet4-africa-stateless/2019/04/6cd35f47-jt-global-employment-report.pdf>.

to be 56% and 78% cheaper than power from new CCGTs and OCGTs respectively, in South Africa by 2016.¹¹ As gas becomes less competitive in the future, less power will be purchased from gas projects over their lifetime (unless the purchase amount is contractually guaranteed), raising the lifetime unit cost of what is produced.¹² Alternatives such as renewables give more employment than gas, in addition to lower electricity costs and emissions. The country's main strengths therefore lie in its sunshine and wind capacity, making energy projects in solar and wind energy more lucrative, economically viable and environmentally sustainable solutions to address climate change and its impact.

3. GHG EMISSIONS

- Fossil fuels are known to increase greenhouse gas emissions. Science has repeatedly proven that fossil fuels emit carbon emissions, thus increasing the likelihood of climate change. South Africa should impose plans to reduce emissions as stated in its climate obligations under the UNFCCC and the Paris Agreement. The Bill will only increase the exploration of petroleum. Adversely, this will only undermine South Africans' obligations to reduce emissions.

4. PUBLIC CONSULTATION AND PARTICIPATION

- There has not been proper consultation and participation of communities in the process leading to the writing of this Bill. Public participation and consultation are a constitutional right in South Africa (§ 33 Constitution of the Republic of South Africa, 1996). The government must ensure meaningful public participation in the Bill for all citizens, including those in remote, rural, and/or poor communities who are the most vulnerable to the impacts of climate change. There should have been public hearings in every district of South Africa for the public to share their views. The public should be given further reasonable and adequate opportunities to understand and engage with the Bill, and a safe platform to effectively participate.

¹¹ Wright, J. G., Bischof-Niemz, T., Calitz, J., Mushwana, C., van Heerden, R., & Senatla, M. (2017). Formal comments on the integrated resource plan (IRP) update assumptions, base case, and observations 2016. The Council for Scientific and Industrial Research. https://www.csir.co.za/sites/default/files/Documents/20170331CSIR_EC_DOE.pdf. Accessed on the 28th of July 2022.

¹² Dorr, A., & Seba, T. (2020). Rethinking energy 2020–2030. 100% solar, wind, and batteries is just the beginning. RethinkX. <https://www.rethinkx.com/energy>. Accessed on the 28th of July 2022.

5. BIODIVERSITY CONSERVATION

- South Africa is losing its biodiversity at a rapid speed. Many indigenous species to South Africa are low in numbers (threatened) or facing extinction. There is a considerable need for more protected land to avoid human-nature conflicts. There is no need for South Africa to continue drilling and digging when there are better options and clean energy.
- Further, the Bill does not explicitly explain how the biodiversity counterbalance is offset, and how the Biodiversity Action Plan will be implemented to restore degraded lands.

5.1 ENVIRONMENTAL AUTHORISATIONS

- The Bill does not state how regulators will use EIAs to minimize potential biodiversity impacts and environmental degradation. EIAs are crucial for protecting biodiversity, as they can reduce biodiversity loss and environmental pollution. Furthermore, the Bill does not make provisions for developing a high-level strategic planning mechanism, such as a country-wide Strategic Environmental Assessment (SEA) that is effective and useful for identifying suitable areas where environmentally sustainable blue economy development can be prioritized and incentivised. There is a recognizable benefit in utilizing such broad assessments, which will cover not only a single industrial, but also multiple sectors. The assessments will utilize broad analyses of environmental and socioeconomic impacts of development plans. Prescribing a mandatory development of a SEA within the current draft language as part of all relevant application processes for exploration, production, and reconnaissance, will adequately enable the Department in identifying feasible development options that can achieve both sustainable use of natural resources and national and international conservation, and climate change goals. Assessment methods (e.g., legislative mandate, objectives, process, and level of detail) should involve the compilation of regional baseline data, identification of environmental sensitivities, and determination of where future hydrocarbon exploration could take place or should avoid. It is worth considering incorporation of an obligation by applicants to undertake regional multi-sector assessments analyzing the environmental and socioeconomic implications of various offshore and onshore sectors, as well as an obligation to develop a set of integrated management plans for South Africa's maritime and inland areas. The management plans should consider information on potential cumulative effects from various sectors, potential user conflicts, and significant knowledge gaps. Management plans should also identify areas that should be exempt from further hydrocarbon exploration due to their ecological value and sensitivity to potential effects from both offshore and onshore drilling.

6. LAND ISSUE

- Land issues are complicated in South Africa. The petroleum industry takes a considerable amount of land, as well as infrastructure. These issues need to be communicated and consulted with the communities. Participation processes need to be facilitated and enabled to educate communities on how they will be affected by the issues.

- **6.1 LAND POLLUTION**

- The Bill does not have a clear plan for dealing with land pollution. As stated above, there is a need for coordination of laws and departments. There is also a need for greater cooperation between the Department of Water and Sanitation, Department of Health and the Department of the Environment, Forestry and Fisheries (DEFF) to reduce land pollution. NJ recommends that the Department of Water and Sanitation continue to critically monitor the water quality within the sewage pipelines, small streams or rivers and land discharges. Additionally, the Bill should have set out a plan to educate the future generation about land pollution. NJ recommends implementing awareness programmes in South African schools and communities around general waste and pollution.

- **6.2 PROPERTY EXPROPRIATION**

- The exploration fields will affect many communities. On this end, the Bill has not yet developed a scale of scenarios on how they can best compensate the families affected. Such expropriation of land and property will need to be in line with the Bill of Rights and section 25 of the Constitution of South Africa. The Bill will affect the properties of vulnerable communities; thus, the plans need to meaningfully address how these communities will be compensated. Public participation will be crucial for the vulnerable communities to voice their opinions regarding their land and property security.

7. IMPLEMENTATION AND CO-OPERATIVE GOVERNANCE

- The Bill is weak on training and funding local, provincial, and national government bodies to implement effective climate response measures. The Bill does not make adequate provisions for interdepartmental cooperation or policy cohesion among various interrelated laws with which the Bill will intersect. The Bill also failed to provide clear inter-departmental cooperation across

ministries. As the economy of South Africa is diverse, all sectors must engage in a well-coordinated and collective effort to mitigate and adapt to climate change. All government departments must work to reduce GHG emission in line with South Africa's international obligations and facilitate effective climate adaptation responses in communities throughout the country. There must be clear requirements to ensure that the DEFF carries out its duties with respect to protecting the environment and natural resources, particularly in respect of biodiversity conservation, pollution prevention and meeting South Africa's international GHG mitigation obligations. Furthermore, the Bill must impose clear and enforceable obligations on other relevant government industries and provide the DEFF with clearly defined oversight duties ensuring compliance with the objectives. The Bill must provide more effective interdepartmental cooperation to ensure that no departments and policies undermine the objectives of the Bill and to facilitate sustainable economic development for South Africa.

- **7.1 COORDINATION**

- There is a failure to reference NEMA provisions on financial provisions, as well as NEMA provisions regulating environmental rehabilitation. Energy policies must be read in a manner capable of advancing the section 24 environmental right, which protects the right to an environment 'not harmful to health or wellbeing' The right embodies principles, including sustainable development, environmental justice, and intergenerational equity, and requires the legislature and executive to undertake 'reasonable legislative and other measures' to realise this right.
- Furthermore, Section 2 of NEMA ('national environmental management principles') expands on the principles of the environmental right. These principles are of particular importance to understanding the rehabilitation obligations of mineral rights holders and the rights of mining-affected communities. The extent of managing the process of rehabilitation, decommissioning, and lapsing of licenses should be conducted through NEMA. Moreover, the financial provision constitutes an important part of a statutory scheme to incentivize the sound management of environmental impacts and encourage rehabilitation. Only the enabling legislation and the relevant state department should do so.

- **7.2 EXCLUSIVE POWER AND PLANNING AUTHORITY**

- The Bill bestows the Minister with overall decision-making powers. This change undermines principles of cooperative governance and will likely lead to disjointed policy decisions and pricing

structures in the future. Therefore, this change providing sole decision-making discretion to the Minister without the obligation to integrate decision making with other relevant stakeholders such as the Minister of Environment, Forestry and Fisheries, Minister of Water Affairs and Minister of Land and Rural Development, conflicts with the principle of integrated environmental management as espoused by s 24 of the Constitution. This exclusive decision-making mandate should not be included in the current text.

8. LIMITED SCOPE

- The Bill leaves much to be desired with respect to ensuring a swift and just transition to clean energy sources, compliance with South Africa’s international obligations and emissions mitigation targets. The Bill lacks a broader vision or plan for achieving sustainability, equity, and security with respect to fuel and energy in South Africa.
- Furthermore, this disjointed approach limits the public’s ability to provide meaningful commentary on the proposed amendments, as it is currently unclear how the Bill sits with the Climate Change Bill. Policy certainty in the energy sector is necessary to attract investment and allow for small-scale energy projects to survive, so the Bill must better incorporate other policy instruments, including the Climate Change Bill, South Africa’s Nationally Determined Contribution under the Paris Agreement, and the Presidential Climate Commission’s Draft Framework for Just Energy Transition (Just Energy Transition Framework). The limited scope and the lack of integration with other key legislation and policy instruments in the current proposed Bill represent a failed opportunity to articulate some of the “well-defined structures and responsibilities” that the Just Energy Transition Framework calls for.

9. ECONOMIC RISKS

- The Bill proposes many possibilities of risks. These risks seem to be not explained or given scenarios on how the Department and Ministry will deal with them. One obvious risk is that fossil fuel is traded in US dollars per barrel, and the prices fluctuate every day. It is noted that the Ministry should have planned on how to deal with the international market. Thus, any product produced in the future with fossil fuel will have higher tariffs (considering the EU trade with South Africa). The Bill does not engage with the increasingly volatile fossil fuel prices. These petroleum price shocks seem to have been left without address, detailed plans are required. There seems to be a reduction in financing fossil fuel projects around the world.

- One of the consequences of the Bill's failure to address climate change and situate the exploitation of South Africa's petroleum resources within the context of South Africa's greenhouse gas mitigation obligations. The potential economic benefits of fossil fuel exploitation are undermined by the challenge of stranded assets, as well as the economic costs associated with climate change and climate adaptation measures.¹³ The foreseeable reduction in demand for petroleum resources, as markets at large transition into electric vehicles and renewable energy, will result in carbon border adjustment taxes imposed by large economies such as the European Union, and increased legal restrictions on the protection of and trade in petroleum resources at the domestic and international levels. The issue of stranded petroleum resources and assets is an inevitability in South Africa. Stranded fossil fuel assets have significant and long-term cascade effects on both upstream and downstream, due to the interconnectivity of carbon-intensive sectors and activities.¹⁴ The cost of dismantling the fossil fuel infrastructure enabled by the Bill will become a major economic burden to South Africa, and thus to taxpayers.¹⁵ The Bill must address the issue not only from a need and desirability standpoint but also by ensuring that adequate protections are in place to prevent taxpayers from bearing the financial burden of stranded petroleum resources and assets.

• 9.1 FINANCIAL IMPLICATIONS

- The energy sector will have a huge financial implication since most of the proposed infrastructure expansion will be done from scratch. Fossil fuel projects could be a boom for South Africa, yet their environmental and social costs often outweigh their benefits. Partnerships between project developers, governments, and local communities are crucial for projects to create lasting developmental impacts. Numerous climate litigation cases challenge creditors and governments to reduce funding for fossil fuel projects. The South African government needs to explain where fundings for these projects will come from. If fundings are from the treasury the public must be noted that it stands surety to some of these projects. Concerns remain surrounding funding

¹³ Kyra Bos & Joyeta Gupta, *Stranded assets and stranded resources: Implications for climate change mitigation and global sustainable development*, Energy Research & Social Science (2019), <https://www.sciencedirect.com/science/article/pii/S2214629618305383>.

¹⁴ Kyra Bos & Joyeta Gupta, *Stranded assets and stranded resources: Implications for climate change mitigation and global sustainable development*, Energy Research & Social Science (2019), <https://www.sciencedirect.com/science/article/pii/S2214629618305383><https://www.sciencedirect.com/science/article/pii/S2214629618305383>.

¹⁵ Council for the Environment and Infrastructure (Rli), *International Scan 2016: Emerging Issues in an International Context*, Rli, The Hague (2016).

allocation and, in general, the funding sources for the projects. There are concerns that the government will increase certain taxes or use people's pensions to fund fossil fuel projects.

- Furthermore, the Bill seems to have ignored the environmental consequences of fossil fuels; these consequences are also fiscal.

10. TRANSPARENCY AND ACCESS TO INFORMATION

- The Bill is weak or silent on fundamental transparency and access to information on climate change. The Bill should make express provisions making data and reported generated under the Bill available online upon request.
- To fulfil the Constitutional requirement, section 31 concerns the right of access to information and states that information must be provided subject to the provisions of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013). The Bill is unclear on how information will be shared in the arms of the government or communities. Information related to greenhouse gas mitigation and climate adaptation must be freely available to all interested communities, organisations, and individuals. In South Africa, every citizen has the right to be informed when a decision affects them or their rights; the Bill must include specific provisions to guarantee the realisation of this right to information.
- In addition, the National Treasury must also play a significant role in funding most of the mitigation and adaptation programmes. It is also vital that the National Treasury provides oversight to reduce corruption and misuse of funds.

SPECIFIC COMMENTS

1. THE STRUCTURE OF THE BILL

- The Bill follows a more chaotic structure than any other Bill released this year. It looks like the Minister has tried to put together three bills into one. It lacks a structured arrangement to make it more understandable. The communities living in South Africa will need to participate in the legislative processes of this Bill. That is, they will partake in public participation in the form of consultations and hearings. Because the communities are unfamiliar with legal terminology, reading this lengthy and comprehensive Bill will be difficult. This bill for an ordinary citizen is difficult to follow.

2. THE OBJECTIVES OF THE BILL (section 2)

- Section 2(f) and s 2(g) detail how the Bill intends to promote economic growth and social and economic welfare for all South Africans through petroleum resource development. However, the above objective of the Bill is incompatible with another objective that the state is currently pursuing, namely, the potential growth in the economy and social welfare through the marine 'blue' economy which is premised on eco-marine tourism, aquaculture and the fishery industry.¹⁶ The link between oil-related environmental effects and small-scale fisheries (SSFs) livelihoods is not addressed nor explored within the objectives of the Bill, and therefore the link is poorly understood. A key concern for Natural Justice is that the objectives of the Bill, particularly section 2, indicate the government's prioritization of oil development over fisheries due in part to the relative size of the uncertain revenues anticipated from the petroleum sector. The prioritization will exacerbate current conflicts with fishers, territorial disputes, and social consequences for coastal communities.
- Artisanal or "small-scale" fishing employs the most people of any marine sector, employing an estimated 260 million people worldwide.¹⁷ This includes about 30 million coastal Indigenous peoples who rely on artisanal catch for sustenance and cultural traditions, as well as a considerable number of women in the fishing and fish processing sectors, who can account for 50 percent of fishing employment in some locations.¹⁸ In addition to providing jobs, livelihoods, and cultures, SSFs contribute significantly to the global seafood economy, accounting for over half of the global catch.¹⁹ Despite receiving a significantly smaller fraction of global fisheries subsidies, artisanal fisheries are frequently a higher contributor to net national revenues from fishing.²⁰
- The oil industry's contribution to the development of communities' livelihoods, particularly those adjacent to the resource, remains inequitably distributed in many oil and gas-rich countries. For example, because the oil business in Ghana is offshore and heavy on capital and technology, it does

¹⁶ South Africa's rich and fertile coastline waters support thousands of employments and provide millions of rand to the national economy each year, with coastal goods and services contributing up to 35% of the country's GDP (GDP).

¹⁷ U.R. Sumaila, A. Khan, L. Teh, R. Watson, P. Tyedmers, D. Pauly, Subsidies to high seas bottom trawl fleets and the sustainability of deep-sea demersal fish stocks, *Marine Policy* 34 (3) (2010) 495–497.

¹⁸ S. Harper, M. Adshade, V.W. Lam, D. Pauly, U.R. Sumaila, Valuing invisible catches: Estimating the global contribution by women to small-scale marine capture fisheries production, *PloS One* 15 (3) (2020).

¹⁹ FAO. (2018). *The State of the World Fisheries and Aquaculture*. Rome: Food and Agriculture Organization of the United Nations.

²⁰ A. Schuhbauer, R. Chuenpagdee, W.W. Cheung, K. Greer, U.R. Sumaila, How subsidies affect the economic viability of small-scale fisheries, *Marine Policy* 82 (2017) 114–121 and see U.R. Sumaila, T.C. Tai, V.W. Lam, W.W. Cheung, M. Bailey, A.M. Cisneros-Montemayor, S.S. Gulati, Benefits of the Paris Agreement to ocean life, economies, and people, *Science Advances* 5 (2) (2019) eaau3855.

not give employment prospects for locals, particularly women.²¹ Although policy formation is important in achieving growth in the oil and gas sector, favorable effects may not be realized where the oil and gas businesses are dominated by foreign companies, and local material input and labor are underutilized. The economic effects of oil development result in a "double deprivation" for small-scale fishers and coastal communities, including exclusion from both the ocean as a source of sustenance and livelihood (e.g., through exclusion zones around offshore rigs) and the promised economic benefits of oil extraction (e.g., through exclusion from employment in the offshore petroleum sector). Enclosures of maritime and coastal space for offshore development; conservation reserves that marginalize small-scale fishers; effects of climate change; dwindling fish stocks in the ocean; and increasing competition and conflicts over marine resources and coastal areas - including large-scale tourism and port infrastructure - can all undermine the sustainability of resource-based livelihoods and the resilience and well-being of coastal communities. These high pressures arise from what is known as the "coastal squeeze." A phenomenon in which communities living near oil and gas infrastructure developments face converging forces that make livelihood difficult. The beforementioned pressures already compounded impacts on communities whose livelihood and welfare depend on utilizing the blue economy. A further proliferation of an enabling legislative framework which prioritizes the development of non-renewable fossil fuels will further compound these converging pressures and creeping enclosures. Similarly, the above scenarios apply to land-based communities as well. The protection of oil and gas-related activities and infrastructure has resulted in zones of exclusion, which prohibit or limit the presence and livelihoods of residents, frequently creating disputed spaces between local communities and companies.²² This is a real risk associated with the passage of this measure, particularly for offshore and land-based oil and gas activities and infrastructure construction. These contentious places have the potential to pit oil and gas firms against residents in both offshore and onshore territories, as well as government interests.²³

- Lastly, overlaps between artisanal fishing and hydro-carbon activities such as oil and gas exploration or production can, and will, result in conflicts. Further, conflicts easily arise with limited spatial extent, poor quality of the eco-sensitive marine biodiversity, increasingly vulnerable environs, and environmental and climate change impacts caused by activities at each stage of oil

²¹ J.R. Boyce, J.C. Emery, Is a negative correlation between resource abundance and growth sufficient evidence that there is a "resource curse"? *Resources Policy* 36 (1) (2011) 1–13.

²² A. Zalik, Zones of exclusion: offshore extraction, the contestation of space and physical displacement in the Nigerian Delta and the Mexican Gulf, *Antipode* 41 (3) (2009) 557–582.

²³ M. Watts, Petro-violence: Community, extraction, and political ecology of a mythic commodity, *Violent Environments* (2001) 189–212.

and gas development. These actions, at each phase, are likely to cause a variety of environmental stresses, which will obstruct.

- Therefore, given the above realities, it is highly unlikely that the development of the petroleum resources industry, overlapping with the "blue" marine economy, can be considered compatible with the overarching objectives outlined in ss 2(e)(f)(g) and (i).

3. THE INTERPRETATION OF THE BILL (section 4)

- Despite the governance of the Bill falling within the purview of the Department of Mineral Resources and Petroleum and the Petroleum Agency, whose main mandates are to regulate and promote the development of mineral resources and petroleum they are still obligated to ensure that the interpretation of the Bill and its objectives must remain consistent with a reasonable interpretation of NEMA, particularly with regards to the principle of integrated environmental management in line with NEMA and s 24 of the Constitution. This means that any act, conduct, or decision performed by any public official performing a public function under this Bill, must be done in line with the principle of integrated environmental management, particularly where such decision, conduct or act will impact the environment.

4. FUNCTIONS OF THE PETROLEUM AGENCY (section 10)

- Section 10(f), 10(g) and 10(m) detail the role of PASA in regulation and compliance regarding applications for permits for all related oil and gas development processes. It must be noted with concern that PASA has traditionally been mandated to perform its primary mandate in accordance with the objectives of promoting the petroleum industry and facilitating its growth. Its personnel are technically well equipped and suited to performing such functions. However, the bill in its current draft seems to prescribe a mandate which PASA is not technically suited or best equipped to perform, namely, the function of regulation and compliance in accordance with s24 and NEMA. According to the constitution's mandate, the Department of Environment, Forestry, and Fisheries is the appropriate and best equipped in terms of expertise to perform its constitutional mandate of regulating, monitoring, and enforcing compliance of activities which impact the environment. Activities related to the petroleum industry are well known to affect the environment. Therefore, related regulation, monitoring and compliance should be left squarely with the constitutional mandate of the DEFF as the approving body for environmental authorization applications.

- There should be an impartial agency that is not PASA (which operates as oil and gas paid experts), which receives mandates from NEMA and obtains the requisite expertise in environmental management. The impartial agency should not only monitor, enforce compliance and report to the Minister in respect of compliance and regulation with such permits, but this impartial agency should also review and independently evaluate the conclusions of scoping reports, Environmental Impact Assessments (EIA), Environmental Management Plans/Programs (EMP/EMPrs), permit compliance conditions and advise the Minister accordingly. Such designation would maintain objectivity and ensure that the environmental issues raised during these exercises and application phases are monitored and reported rather than ignored.

5. ACCEPTANCE OF APPLICATIONS (section 17)

- Advanced technologies utilized for seismic surveys should be precisely defined in the definitions section to enable interested parties to remain aware of the type of technologies being utilized and how they may impact the environment. Man-made sonic phenomena like seismic surveys and bathymetric multibeam sonar collections are avidly sought after for their potentially potent properties.
- However, it has been shown that the strong sonic energy produced by these technologies has an adverse effect on the environment, notably on marine mammals. Where "advanced technologies" are specifically defined, appropriate and relevant measures can be taken or applied to address any adverse effects.

6. CONSULTATIONS (section 19 and 20)

- It is noted with concern the use of the word "may" within the scope of s 19(2) denotes PASA's discretion to decide when it will conduct public hearings when consulting with interested and affected parties. This discretion is contrary to the principles of openness, transparency, and procedural fairness when decisions are made subject to the discretion not to provide affected persons with a fair opportunity to raise their concerns before making the decisions. The discretion does not comply with the notion of procedural fairness. Therefore, the use of "may", which suggests discretion, should be replaced with the word "must" to ensure that interested and affected parties' rights to reasonable and procedurally fair administrative actions are secured and given effect to during all public participation processes, including public hearings.
- In s 20(1)(a), the requirement to consult must further prescribe the requirement to obtain consent from any landowner, lawful occupier and affected party. Consultation does not equate to acquired

consent, particularly in circumstances where communities govern their affairs by virtue of their customary law. Consultation and consent obtained according to the communities' own decision-making process require observance of the customs and practices. Communities with traditional land tenure are acknowledged as valid occupiers with unofficial land rights. Even though the MPRDA explicitly exempts the requirement of consent, these unofficial rights are still safeguarded by the IPILRA.

- According to the ruling in *Baleni v. Minister of Mineral Resources*, the necessity for obtaining consent under the IPILRA must be read alongside the consultation requirement included in the application procedures of the MPRDA and this Bill. According to the IPILRA, a person's informal right to land cannot be taken away from them without their consent. IPILRA further stipulates that, if the land is retained on a communal basis, any deprivation of an informal right to the land shall be done in conformity with local customs and usages. Recent decisions, such as *Maledu v. Itereleng Bakgatla Mineral Resources (Pty) Limited (Maledu)*, *Baleni*, and *Bengwenyama*, emphasize the enhanced importance that customary law enjoys within the constitutional regime. Therefore, genuine participation in communities' customary decision-making processes is essential to completing the legally mandated processes of consultation and consent.
- Communities may be denied the right to participate and consequently have their rights and interests impacted by applications lodged in sections 15, 16, 38, and 64 if there are no additional requirements to support their rights and interests. A requirement may include community members' engagement in deciding aspects of consultations and acquiring consent. The Bill does not mention any additional requirements, implying that the applicant won't need to meet these extra requirements.
- Lastly, with regards to notification and consultation, the Bill must enable the creation of opportunities for interested and affected parties to influence applicants' decisions which directly impact their livelihood. Therefore, notification to facilitate consultation should be done in a manner that will ensure all interested and affected parties can receive notice in the format and language and that will best secure their attendance at public participation processes. Examples include the use of radio adverts, questionnaires, free local newspapers, and focus group meetings.

7. TRANSFERABILITY AND ENCUMBRANCE OF THE PETROLEUM RIGHT (section 28)

- Whenever a petroleum right or interest is to be ceded, transferred, or assigned to another party, in addition to requiring written consent from the Minister, an additional obligation of publishing the above transactions within local and regional newspapers and the government gazette should be

imposed. This requirement will ensure that concerned, interested, or affected parties whose rights will be impacted by such transactions, are afforded reasonable opportunities to raise their concerns. As such, transactions are free from any actual or apparent bias or prejudice, thereby ensuring accountability and transparency.

- Furthermore, the Bill has placed a burden on companies wishing to transfer and/or encumber a petroleum right. Listed companies are no longer subject to this provision, and the Minister's written consent is only required to transfer or encumber a controlling interest in an unlisted company.
- The reference to "controlling interest" has given rise to much controversy under section 11 of the MPRDA (the provision on which the Bill is largely based). Fortunately, the Bill includes a definition of "controlling interest," providing that it is "most of the voting rights attached to all the classes of shares in a company" or, where the holder is not a company, "any interest that enables the holder to exercise directly or indirectly any control over the activities of the assets of the business or the petroleum."

8. THE PETROLEUM RIGHT

- Much of the Bill focuses on rights, permits, approvals, and administrative procedures. There is a need to develop this petroleum right with connection to some of the innovative mechanisms provided in the Gas Master Plan, the Climate Change Bill, the Electricity Regulation Act Amendments, and the Just Energy Transition Framework. The petroleum right needs to recognise various issues affecting South Africa, such as energy democracy and justice. In addition, the right has been centered in this bill with no mention of climate change adaptation and mitigation. Carbon tax has not been given a platform in this Bill. In South Africa, it appears that petroleum right has been given a higher priority than socioeconomic and environmental rights. We are facing a climate and biodiversity emergency, and the Bill should have provided innovative ways to counter and address some of these challenges.

9. POSSIBLE NEW TAXES?

- The Bill should have introduced a new windfall tax, bonus structures, and production-sharing mechanisms for petroleum products. Such a tax could be useful in alleviating poverty, cleaning up the environment and compensating communities affected by petroleum production and exploration in South Africa. The Minister of Finance must introduce a tax regime for the upstream petroleum industry. The National Treasury and the DMRE have not published anything on these potential new

tax reforms and introductions. As new taxes can only be introduced by way of a so-called "money bill", we expect consideration of these taxes and possible variations to the current royalty regime to be left to the National Treasury. While the existing fiscal framework allows oil and gas rights holders to enter into fiscal stability agreements with the Minister of Finance, no new fiscal stability agreements have been concluded in the last seven years. The current uncertainty regarding what a new tax regime would entail and how it would impact the rights of existing rights holders are detrimental to the industry.

10. OPEN LICENSING ROUND (section 37)

- The opening licensing round will be published in the Government Gazette. This application process will give preference to black people. Therefore, Ministry must do more to support black applicants in understanding the phases and authorisations they must go through. NJ recommends that the targeted outreach focuses on black-owned enterprises.

11. STATE INTEREST AND PARTICIPATION (section 34)

- State interest in the petroleum industry remains high, as noted by the overarching powers of the Minister and the State Petroleum Company. State carried interest in the petroleum right remains regionally high. This is a huge disappointment since President Cyril Ramaphosa talks about reducing state participation and red tape, and, of course, increasing private company participation.
- In addition, the Bill states that the holder may recover the State's share of expenses from the State's proportionate share of production or revenue.
- More details are required here, and NJ recommends that the Ministry provide detailed scenarios on cost recovery in regulations as well as in the terms and conditions of the petroleum right itself.
- Furthermore, this recovery plan seems to be a welcome addition on paper. Still, it needs proper investigation, monitoring, and evaluation before any payout since it can open channels for corruption and state capture. How this participation will be structured is yet to be seen, but more important is the question of how any proposed cost of the State's involvement will be accounted for and recovered by the carrying commercial parties. It would seem challenging for any national oil company to participate as a technical and financial JV partner across all the new petroleum rights. NJ recommends that ambiguity surrounding the structure of the State's participation be clarified.

12. BLACK PEOPLE'S PARTICIPATION IN PETROLEUM RIGHTS (section 31)

- The Bill has set out resolutions to increase South Africa's black majority population's participation in the petroleum industry. This resolution is a welcome addition that should have been made in the early 1990s. However, the Bill does not state clearly how it will achieve the resolution, considering that petroleum machinery is expensive, and the industry needs a scarce skill pool of black graduates (skilled). The Bill has not taken a state position or plan to equip young black people for the petroleum industry. The Bill needs to clarify certain issues resulting from black people's exit from a petroleum right and the empowerment credentials of the specific right.

13. GRANTING AND DURATION OF A PETROLEUM RIGHT (section 44)

- Section 44(1)(g) provides an obligation on the applicant to provide proof of the application for a water use license. However, it is silent on the obligation to provide proof of the application for an environmental authorisation. An application for granting a petroleum right must not proceed in the absence of evidence and documentation of environmental authorisation, which must be reviewed by the independent agency tasked with environmental regulation, monitoring, and compliance.

14. MINIMUM WORK COMMITMENTS AND ANNUAL PLANS (section 45)

- Section 45 states that petroleum rights must include a clause outlining a minimum work commitment, together with a corresponding minimum expenditure amount to be met by the petroleum right holder during the exploration phase or production phase. This commitment must be accompanied by an annual work plan and a corresponding budget. Unusually, the notion of "minimum work commitments" extends beyond the exploration phase to the production phase. Ordinarily, such minimum work obligations link to the right to continue holding the exploration rights to the area. At the same time oversight during production would normally be maintained through the submission of annual work programmes. Failure to comply with minimum work commitments constitutes a breach of the terms and conditions of the petroleum right and may result in a fine or imprisonment. This repercussion is also unusual. Ordinarily, a failure to comply with minimum work obligations would be sanctioned by paying a penalty (for example, equivalent to the minimum expenditure obligation).

15. APPLICATION PROCESS FOR A DRILLING PERMIT (section 52)

- It's not clear in the wording of section 52 whether the application for a drilling permit is subject to an environmental authorisation application process. The provision is silent on this matter. However, given it is a separate activity which will have environmental impacts/ramifications, the drilling application should be subject to its own environmental authorization process. It must be subject to public scrutiny via public participation processes, all in terms of NEMA.

16. APPLICATION PROCESS TO PROGRESS TO THE NEXT TERM (PRODUCTION PHASE) (section 62)

- Under this provision, those applying for exploration, production or reconnaissance permits must be obliged to provide reports on previous delinquent findings against them or make known any ongoing environmental noncompliance or criminal investigations or proceedings against them. This must be disclosed to the independent agency, the independent scientific committee, and the Minister.

17. THIRD PARTY ACCESS TO UPSTREAM PETROLEUM INFRASTRUCTURE (section 68)

- The provision must be clear in indicating that the conditions of the environmental authorization issued in respect of the petroleum right remain in force on third parties who seek access the upstream infrastructure. This effect should be included within this provision, so it binds all users of the infrastructure.
- This will surely result in disputes and conflicts of interest.
- The Ministry will have to clarify if the petroleum right is exclusive or infringeable by third parties, which can strangely interfere with the right holder. NJ recommends that the Ministry clarify whether s68 is a limitation of the right, servitude, or usufruct. Furthermore, to avoid frivolous litigation, PASA must first consult with the affected petroleum rights holder before making such a decision.

18. DISCLOSURE OF INFORMATION AND DATA (section 80)

- The Bill is weak or silent on fundamental transparency and access to information.
- The Bill as currently drafted undermines South Africa's Constitutional right to access to information (§ 32) and must be amended to provide for automatic public access to all upstream

petroleum product information and records provided for in the Bill. The Bill should make express provision for data and reports generated under the provisions of the Bill to be available online upon request.

- Section 31 concerns the right of access to information and states that information must be provided subject to the provisions of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013). The Bill does not make it clear how information will be shared in the arms of the government or communities.
- The Bill must ensure that the information provided is easily accessible and conveyed in a language, manner, and medium that makes the information understandable and usable for all South Africans, including speakers of all languages, as well those who cannot read. In South Africa every citizen has a right to be informed when a decision is to be taken that affects them or their rights; the Bill must include specific provisions to guarantee the realisation of this right to information. The Bill does not state any procedure or processes that can be used to access information.

19. THE PROCESS FOR THE ISSUING OF A CLOSURE CERTIFICATE (section 84)

- Sections 84(11) and 84(12) provide a discretionary power to the Minister to consult with the Minister responsible for environmental affairs in matters concerning environmental management of cumulative impacts. With regards to these two provisions, the text must be clear in prescribing the exercise of public power in accordance with obligatory and not discretionary language. The Minister must, in both instances, consult with the Minister of environmental affairs to ensure the integrity of the environment where petroleum operations are interconnected with other vulnerable or sensitive areas.

20. THE PROCESS FOR THE APPROVAL OF JOINT OPERATING AGREEMENTS (section 86)

- Any amendments to joint operating agreements should be published or made readily available by way of a government gazette or by notice on PASA's website to ensure any interested and affected parties remain aware and that affairs remain transparent and subject to public scrutiny.

21. THE PROCESS FOR RESTRICTIONS OR PROHIBITION OF EXPLORATION AND PRODUCTION ON CERTAIN LAND OR BLOCKS (section 89)

- Areas that should be included in this provision are areas declared as MPAs, CBAs, or ESAs, as development is incompatible with any reconnaissance, exploration, or production activities. The provision should also include lands currently subject to a land claims process facilitated by the Department of Land and Rural Development.

22. PROCESS FOR AMENDMENT OF RIGHTS, PERMITS, WORK COMMITMENTS, PROGRAMMES AND PLANS (section 105)

- This must follow an amendment application process. The amendments must be publicized to all interested and affected parties and must be subject to comment by interested and affected parties. This includes making public commentary on the amendments of rights, permits, work commitments, and programmes. It also includes plans available for comment within 30 days, with notice published in all public spaces including local and national newspapers.

23. POSTPONEMENT OF THE DEVELOPMENT OF A PETROLEUM FIELD

- PASA "may, having regard to national interests, after consultation with the Minister and the holder, postpone the development of a petroleum field." As such, the term of the production phase under the relevant petroleum right will be extended for the period of such postponement. The petroleum right holder is obliged to lodge an amendment to the petroleum right (relating to the extended term) with the Mineral and Petroleum Titles Registration Office.
- Such a right to postpone development is somewhat unusual; it is not clear what factors or issues would be considered under "national interests." NJ recommends that the Ministry make use of the consultation obligation and the fact that the term of the petroleum right is extended for the period of such postponement.

24. TRANSITIONAL PROVISIONS

- The Bill should provide a clear transitional provision for existing right holders. The provision should allow any reconnaissance permits, exploration rights (for the exploration and production phases), production rights, social and labour plans, permissions to remove and dispose of, and technical co-operation permits that are in force immediately prior to the promulgation of the Bill to remain in force until their expiry. Pertinent applications lodged in terms of the MPRDA but not finalised before the 2021 Bill should take effect but must be finalised in accordance with the

mechanism set out under the MPRDA. Such a transitional provision clarifies the uncertainty ensuing from the Bill as to whether an applicant is required to supplement a previously lodged application to comply with obligations set out in the Bill that were otherwise inapplicable under the MPRDA.

25. SANCTIONS AND PENALTIES

- The Bill lacks adequate compliance and enforcement provisions. The Bill should include stronger enforcement and compliance measures to deter companies and individuals from environmental degradation. Penalties could include, among other measures, withdrawal of operating licenses or permits and personal liability for corporate officers.
- While other areas of law provide available sanctions to deter degradation, such as criminal, tort, or administrative law, those sanctions are not stringent enough. There is a need for the Bill to introduce other innovative sanctions and corporate social responsibility strategies to reduce environmental degradation in South Africa.

<h2>CONCLUSION</h2>

- We request that the Bill be amended in line with the above comments and suggested revisions.
- We trust that the Portfolio Committee will give due consideration to these comments and work to ensure that the Bill so amended is promulgated as soon as possible given the urgency of climate change mitigation and adaptation, biodiversity conservation, employment opportunities, and ancillary business in South Africa.