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

MC Walters
Chairperson of the Standing Committee on Agriculture & Environmental Planning
Western Cape Provincial Parliament
7 Wale Street
Cape Town

Care of:
Shareen van Niekerk
Committee Coordinator
By email: svanniekerk@wcpp.gov.za

Your ref: 11/4/1/5/8
Our ref: CER/MF/RH
Date: 19 August 2013

Dear Mr Walters

**NATIONAL ENVIRONMENTAL MANAGEMENT LAWS SECOND AMENDMENT BILL [B13-2012]**

1. In this document, the Centre for Environmental Rights (CER) and the Centre for Applied Legal Studies (CALS) jointly submit comments on the National Environmental Management Laws Second Amendment Bill [B13-2012] ("the Bill"). These submissions focus on amendments proposed to section 24G of the National Environmental Management Act, 1998 (NEMA).

2. CALS is a civil society organisation based at the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through empowerment of individuals and communities and the pursuit of systemic change. CALS' vision is a country where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice.

3. The CER is a non-profit organisation established in October 2009 by eight prominent civil society organisations (CSOs) in South Africa's environmental and environmental justice sector to provide legal and related support to environmental CSOs and communities. Its mission is to advance environmental rights in South Africa, and its vision is to facilitate civil society participation in environmental governance that is stronger, more streamlined, and better legally and scientifically equipped.

4. The CER and CALS are interested in making submissions on the Bill based on our experience in applying the legislation in question, both in our own name and on behalf of numerous civil society and community clients.

223 Lower Main Road,
Observatory, 7925
Cape Town, South Africa
Tel 021 447 1647, Fax 086 730 9098
Email info@cer.org.za, www.cer.org.za

Centre for Environmental Rights NPC is a non-profit company with registration number 2009/020736/08, NPO Ref 075-863, PBO No. 930032226 and a Law Clinic registered with the Law Society of the Cape of Good Hope I Directors: Carolyn Elizabeth Ah Shene, Joanna Amy Eastwood, Mohamed Saliem Fakir, Melissa Fourie (Executive), Stephen Mark Law, Louis Johannes Smith I Attorneys: Melissa Fourie, Catherine Horsfield, Robyn Elizabeth Hugo, Marthán Theart I Candidate Attorney: Matome Lethabo Kapa

5. Below, we make submissions regarding clause 9 of the Bill – the amendments proposed to section 24G of NEMA. Before doing so, we make some introductory comments regarding section 24G and its application in practice.

6. <u>Section 24G: background and practice</u>

6.1. When first included in legislation, section 24G was only ever intended to be applicable as a provision applicable to the transition from authorisations under the Environment Conservation Act, 1989 to environmental authorisations under NEMA, for a brief six month period. This section has now morphed into a monster with a range of unintended consequences that are undermining the very environmental management regulatory regime of which it forms part. Its penalty mechanism has also created a system of perverse incentives within the departments implementing it, ensuring that a section 24G application is effectively never refused, and thereby creating a mechanism for violators to buy themselves out of criminal prosecution. The Department of Environmental Affairs (DEA) itself has observed and commented on a trend of companies budgeting for the section 24G administrative fine and then commencing with an activity without an environmental authorisation.

6.2. In summary, section 24G has led to:

6.2.1. abuse by companies, who budget for fines rather than obtaining environmental authorisation;

6.2.2. inappropriate implementation by authorities, who accept all applications and grant all authorisations; and

6.2.3. undermining of environmental management regime as a whole.

6.3. Some of the biggest problems with the use of section 24G in practice have been:

6.3.1. uncertainty as to consequences of rectification, particularly in relation to criminal liability for the period between illegal commencement and the date of "rectification" in terms of section 24G;

6.3.2. uncertainty about the admissibility of evidence given in a section 24G application in other proceedings;

6.3.3. failure of section 24G to distinguish between innocent, negligent or intentional contraventions, which means that innocent violators are punished too harshly, and intentional violators too mildly;

6.3.4. interpretation by authorities that they are obliged to accept all applications under section 24G, likely motivated by ring-fencing of fines paid;

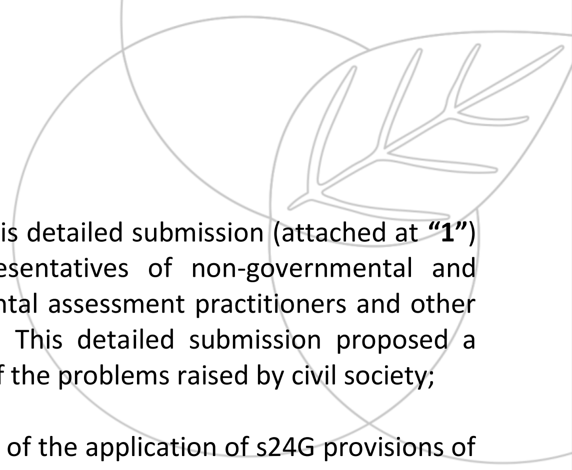
6.3.5. unwillingness of authorities to refuse rectification application once the fine has been paid, and since payment of the fine always precedes the decision, approval is therefore a *fait accompli;*

6.3.6. unwillingness of authorities (and courts) to order demolition of illegal developments;

6.3.7. failure to make the section 24G procedure as far as possible the same as for an Environmental Impact Assessment (EIA) application before commencement - effectively creating a "shortcut" procedure for EIAs; and

6.3.8. fines that are not significant enough to deter illegal activities – the fines are well below the cost of following EIA process and well below the maximum penalties for the criminal offences in section 24F.

6.4. We also refer you to:



6.4.1. a submission made by the CER to the DEA on 12 May 2011. This detailed submission (attached at **"1"**) summarises the concerns of various stakeholders – representatives of non-governmental and community organisations, academics, experienced environmental assessment practitioners and other consultants who work with section 24G on a regular basis. This detailed submission proposed a significant amendment to section 24G to try to address some of the problems raised by civil society;

6.4.2. a Master's thesis by Lea September, entitled "A critical analysis of the application of s24G provisions of the National Environmental Management Act (NEMA) (attached as "**2**"). The Gauteng Province Experience". September found that "*most of the concerns relating to S24G have actually materialised and S24G has in some cases resulted in a big step backwards in terms of sound environmental management and governance*". She found that the section "*has seriously undermined the overall compliance and enforcement effort by opening the door to abuse and providing a mechanism which effectively accommodates environmental crime*"; and

6.4.3. a joint submission on the Bill made by the CER and the Legal Resources Centre on 18 July 2013 (attached as "**3**") to the Parliamentary Portfolio Committee on Water and Environmental Affairs (PCWEA). Section 24G is addressed from paragraph 21. It was argued in these submissions that section 24G should either be amended urgently to attempt to remedy some of its perverse incentives and unintended consequences, or should be scrapped in its entirety - there may already be sufficient existing legislative tools in existence to regularise unlawful activities.

6.5. Following submissions to the PCWEA, several changes were made to improve section 24G, for which we are grateful. However, a number of concerns with the proposed draft remain. These are addressed in more detail from paragraph 7 below.

6.6. Our preference would be for a regime where, if it is discovered that a company has commenced illegally with listed activities, that that company stops and mitigates the damage, and accepts punishment (in the form of criminal prosecution and/or administrative penalty). Thereafter the company can apply for authorisation after completion of enforcement action. In that case, it is appropriate for the fact of the full disclosure, the section 24G fine payment, steps taken by the company in mitigation, and similar factors to be taken into account as mitigating factors in the determination of a criminal sentence and/or an administrative penalty.

7. <u>Concerns with the current section 24G proposal</u>

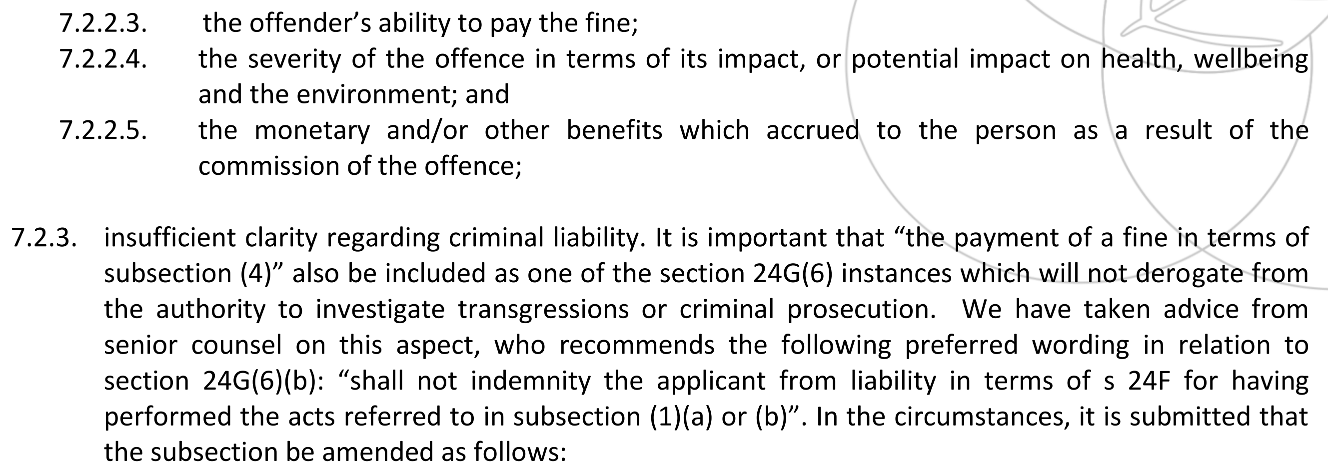
7.1. Instead of curbing the impacts of s24G, we see in the Bill and more recent draft legislation, the proposed expansion of section 24G to waste and air quality legislation.

7.2. Our main concerns with the current proposal in the Bill are:

7.2.1. it is still not made clear that acceptance of the application is discretionary, i.e. that there are some offences so egregious that they cannot be rectified and should never be considered for rectification;

7.2.2. the maximum administrative fine for section 24G is still too low, and should ideally be imposed by an independent tribunal (though in several other jurisdictions, including the United Kingdom and the Netherlands, the fine is imposed by the relevant authority and not a tribunal). Moreover, the section should, as in other jurisdictions, prescribe factors to be considered when determining the appropriate fine, such as:

7.2.2.1. the extent of the intention or negligence of the person who committed the offence;
7.2.2.2. the behaviour of the person who committed the offence;



7.2.2.3. the offender's ability to pay the fine;

7.2.2.4. the severity of the offence in terms of its impact, or potential impact on health, wellbeing and the environment; and

7.2.2.5. the monetary and/or other benefits which accrued to the person as a result of the commission of the offence;

7.2.3. insufficient clarity regarding criminal liability. It is important that "the payment of a fine in terms of subsection (4)" also be included as one of the section 24G(6) instances which will not derogate from the authority to investigate transgressions or criminal prosecution. We have taken advice from senior counsel on this aspect, who recommends the following preferred wording in relation to section 24G(6)(b): "shall not indemnity the applicant from liability in terms of s 24F for having performed the acts referred to in subsection (1)(a) or (b)". In the circumstances, it is submitted that the subsection be amended as follows:

> *"(6) The submission of an application in terms of subsection (1) or the granting of an environmental authorisation in terms of subsection (2)(b)* <u>or the payment of a fine in terms of subsection (4)</u>:
>
> *(a) shall in no way derogate from the environmental management inspector's or the South African Police Services' authority to investigate any transgression in terms of this Act or any* ***[special]*** *<u>specific</u> environmental management Act; <u>and</u>*
>
> *(b) <u>shall not indemnity the applicant from liability in terms of s 24F for having performed the acts referred to in subsection (1)(a) or (b);</u>*

7.2.4. in order for the proposed discretion for the Ministers or MECs to "defer" the decision to issue an environmental authorisation while a criminal investigation is underway to be a proper disincentive for illegal commencement, this needs to be an automatic, non-discretionary suspension of the section 24G process. Since the decisions made in the criminal prosecution and those made in the section 24G application affect each other, they cannot run concurrently; if the offence justifies criminal prosecution, then this more serious enforcement process must take precedence. This will encourage speedy prosecution by authorities, and plea and settlement agreements with offenders who would like access to rectification. In the circumstances, we propose that "may" in section 24G(7) read "must":

> *"(7) If, at any stage after the submission of an application in terms of subsection (1), it comes to the attention of the Minister, Minister for mineral resources or MEC, that the applicant is under criminal investigation for the contravention of or failure to comply with section 24F(1) or section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008), the Minister, Minister responsible for mineral resources or MEC* ***[may]*** *<u>must</u> defer a decision to issue an environmental authorisation until such time that the investigation is concluded and—*
>
> *…."*.

8. We thank the Committee for the opportunity to provide comment on the Bill and to make oral submissions at the public hearings. We hope that our concerns can be addressed.

9. Should you require more information or more detailed comments on any aspect of these submissions, please advise us accordingly.

Yours sincerely

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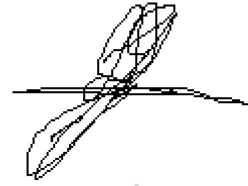
**Centre for Environmental Rights**

Per: Melissa Fourie
Executive Director
223 Lower Main Road
Observatory
Cape Town
Tel: 021 447 1647
Fax: 086 730 9098
Email: mfourie@cer.org.za



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**Centre for Applied Legal Studies**

Per: Louis Snyman
Attorney
Centre for Applied Legal Studies
University of the Witwatersrand
Johannesburg
1st Floor, DJ du Plessis Building, West Campus
1 Jan Smuts Avenue, Braamfontein
Tel: 011 717 8600
Fax: 011 717 1702
Email: Louis.Snyman@wits.ac.za