

MEMORANDUM

THE RIGHTS OF LAND OWNERS IN RELATION TO THOSE OF HOLDERS OF RIGHTS IN TERMS OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT

Land owners and lawful occupiers of land (jointly referred to herein as “Land Owners”) are sporadically requested by Applicants for prospecting or mining rights (“the Applicant”) to be allowed access to their land in order to conduct prospecting or mining activities.

It regularly happens that Land Owners first become aware of such rights when the Applicant requests access to their land, when the right has already been granted. This situation creates tension as between the Land Owner, with surface rights, and the Applicant, with rights to the minerals on or below the surface of such land. Land Owners seldom have sufficient knowledge to deal with such a situation.

This document serves as a guideline to Land Owners, specifically in light of the Mineral and Petroleum Resources Development Act, Act 28 of 2002, as amended (“the Act”). Please note that the Land Owner as referred to herein does not necessarily have to be the former holder of the mineral rights in question. This memorandum is therefore applicable to all Land Owners, not only holders of mineral rights as at 30 April 2004.

Due to recent developments in the gas exploration industry (which is also governed by the Act) similar conflicts can be expected between Land Owners and Applicants for reconnaissance permits, exploration rights and production rights. This memorandum also relates to such Applicants.

1. NOTICE TO THE LAND OWNER

The relevant Land Owner should receive notice of the application for a prospecting right, mining right, mining permit, reconnaissance permit, exploration right or production right ("an Application") at the following stages:

1.1 Within 14 days after the Regional Manager has accepted an Application, he must give notice that the Application has been accepted by his office and invite all members of the public to provide commentary on the application or raise an objection within 30 days of such notice (Section 10). It must be noted that the date of acceptance is not the date of lodgement of the Application. Upon lodgement of the Application the Regional Manager is to determine whether the Application was lodged in the prescribed manner and that there are no current or pending mineral rights/permits in respect of the same land and the same mineral as the Application. If this is the case, the Regional Manager must accept the Application.

1.1.1 This notification must take place by displaying a notice at the office of the Regional Manager which is accessible to the public as well as by notice through one of the following methods:

- a) Publication in the relevant Provincial Gazette;
- b) Displaying a notice at the Local Magistrate's Court of the land in question;
or
- c) Publication in a local or national newspaper which is circulated in the area of the land in question.

1.1.2 If an objection as to the Application is received, the Regional Manager is obliged to refer the objection to the Regional Mining Development and Environmental

Committee to consider the objection and advise the Minister thereon (Section 10).

1.2 Within 14 days after the Application has been accepted by the Regional Manager, he must inform the Applicant to consult with the Land Owner and interested and affected parties in the prescribed manner. The result of such consultation must be submitted, together with the environmental reports to be prepared in terms of chapter 5 of the National Environmental Management Act 107 of 1998 ("the NEMA") to the Regional Manager within a prescribed time, which ranges from 60 to 180 days from date of the notice, depending on the type of right/permit applied for (Sections 16(4), 22(4), 27(5), 74(4), 79(4), and 83(4)).

1.2.1 However, there is no prescribed manner as to how, when and where the Applicant must consult with the Land Owner or in respect of what aspects need to be consulted on.

1.2.2 Some court cases have been decided in this regard and give guidance as to what is expected from the Applicant in respect of the consultation process. Land Owners should keep the following in mind when consulting:

- a) The consultations must take place after the Applicant has received notice from the Regional Manager that its Application has been accepted and before the Application is granted;
- b) The Applicant must act in good faith with the Land Owner and must provide him with sufficient information to make an informed decision with regard to the possible objection against the Application;
- c) The Applicant must provide at least the following information to the Land Owner:

- (i) Confirmation that their Application was accepted;
 - (ii) Detailed description as to what the activities will entail, in order for the Land Owner to assess the possible impact on its land and land activities;
- d) The Applicant must consult in good faith with a view to reach a mutually beneficial agreement, if possible. There is no requirement in the Act that an agreement must be achieved; and
- e) The consultation process is intended to alleviate possible serious inroads made on the Land Owner's rights.
- 1.2.3 The Land Owner should ensure that all aspects of concern are discussed and, ideally, an agreement must be reached as to how the Applicant will ensure the concerns are addressed.
- 1.2.4 Typically this would include the timing and manner of access to the property; new gates and repairing of boundary fences; new roads and rehabilitation thereof; compensation for loss of income should fields and grazing become unusable; the use of water and electricity; access periods; noise levels; security and costs relating to the employment of additional security; etc. It is recommended that legal advice be sought for purposes of drafting such an agreement. The framework of what such an agreement should contain is attached hereto as annexure "A".
- 1.2.5 It must, however, be noted that the process of consultation as prescribed in the Act requires a discussion as to the various issues and concerns a Land Owner may have in respect of the Application with the view of the Applicant and the Land Owner accommodating each other's interests. Actual agreement as to

such issues or concerns as between the Applicant and the Land Owner is not a requirement of the Act. In other words, an Application may still be granted even if an agreement has not been reached between the Land Owner and the Applicant as to the issues and concerns of the Land Owner. In this regard, please refer to the discussion in respect of Section 54 of the Act below.

1.2.6 In reality, the consultation process often does not take place, which means the Applicant did not comply with the Act when applying for the right and same stands to be set aside.

1.2.7 Notwithstanding the above, it is important to note that with effect from 8 December 2014, the Application must be accompanied with an application for an environmental authorisation in terms of the NEMA, which Act prescribes its own public participation process as is further discussed below.

1.3 If the Land Owner cannot be traced, and the Applicant has shown proof that he was unable to trace the Land Owner and that he (the Applicant) had met all the statutory requirements, the Regional Manager may grant the Applicant permission to display a notice on the property (Section 105). It often happens that such a notice is displayed as the only form of consultation. If the Applicant did not make every attempt to get hold of the Land Owner such a notice is not sufficient and should not constitute due compliance with the Applicant's obligation. The access which may be granted in terms of Section 105 of the Act refers to the access while an Application is pending and not when the relevant right/permit has been granted. In other words, access in terms of Section 105 of the Act does not entitle the Applicant to access the land for the purposes of undertaking prospecting, mining, reconnaissance, exploration or production activities and the relevant right/permit must still be granted in order to undertake such activities.

1.4 Before any prospecting, mining, reconnaissance, exploration or production activities may commence on the property, the holder of a right/permit ("a Right Holder") must give the

Land Owner 21 days' notice (Section 5A(c)). This notice simply serves to inform the Land Owner of the Right Holder's intended commencement date and does not require any consent by the Land Owner. Of course, if a proper agreement has been concluded between the Land Owner and the Applicant, this commencement date will not be a surprise to the Land Owner.

- 1.5 Accordingly, if a right/permit is issued without the Land Owner having had an opportunity to comment and to negotiate an agreement in respect of access and other aspects which influence his rights, such right/permit could be invalid on the basis of non-compliance with the provisions of the Act. In such instances, the Land Owner is entitled to lodge an appeal in terms of Section 96 of the Act. An appeal lodged in terms of Section 96 of the Act does not suspend the operation of the relevant right/permit and it is therefore vital that any appeal lodged in terms of such section includes a request for the suspension of the operation of the relevant right/permit pending the outcome of the appeal. If the request for suspension of the operation of the relevant right/permit is refused, the Land Owner is entitled to approach a court to obtain a court interdict to stop the mining, prospecting, reconnaissance, exploration or production activities until such time as the appeal has been finalised.
- 1.6 A holder of reconnaissance permission may access the property to explore the land on condition that he has given the Land Owner 21 days' notice of his intention to enter the land (Section 15(1)). Note that a reconnaissance *permission* is different from a reconnaissance *permit*. A reconnaissance permit is also subject to the process as discussed in paragraphs 1.2 to 1.5 above whereas a reconnaissance permission is not.
- 1.7 Any notice to be given in terms of the Act to the Land Owner must be delivered by hand, or sent per registered post to the Land Owner's last known business, postal or residential address (Section 97).

2. SECTION 54 OF THE ACT

- 2.1 If a Land Owner refuses a Right Holder access to the property or makes unreasonable demands on the Right Holder, or cannot be found to request such access, the Right Holder must inform the Regional Manager accordingly. The Regional Manager must then request the Land Owner to make written submissions regarding the dispute referred to by the Right Holder.
- 2.2 Should the Regional Manager be of the opinion that the Land Owner would incur losses or damages as a result of the prospecting, mining, reconnaissance, exploration or production activities on the property, he must request that the parties attempt to reach an agreement for compensation for such loss or damage.
- 2.3 If the parties are unable to reach such an agreement, compensation shall be determined through arbitration or by a court of law.
- 2.4 Should the Regional Manager, however, be of the opinion that further negotiations would be contrary to the objectives of the Act, he may recommend that the Minister expropriate the property.
- 2.5 If the Regional Manager determines that the parties' failure to reach an agreement is due to the fault of the Right Holder, he may prohibit the Right Holder from commencing its activities until the dispute has been resolved by arbitration or by a competent court.
- 2.6 If the Land Owner suffers or is likely to suffer loss or damage as a result of the prospecting, mining, reconnaissance, exploration or production activities by the Right Holder on the property, the Land Owner must notify the Regional Manager and the process as set out above will be followed with the necessary changes. In such instances, where it is determined that the failure to reach an agreement as to the compensation for

the loss or damage is due to the fault of the Right Holder and the Regional Manager does not prohibit the Right Holder from commencing with its activities, the Land Owner is entitled to approach a court to obtain a court interdict to stop such activities until such time as the dispute has been resolved by arbitration or by a competent court.

3. **RIGHTS OF THE LAND OWNER IN TERMS OF THE ACT**

- 3.1 The Act does not explicitly confirm any right to the Land Owner in respect of compensation or whether it may deny the Right Holder access to its land in certain instances.
- 3.2 Case law, as referred to above, has secured some protection of the Land Owner's rights in the land, but not to the extent that prospecting, mining, reconnaissance, exploration or production activities can be prevented.
- 3.3 The Land Owner is given an opportunity to negotiate the conditions subject to which the Applicant shall be allowed access the property as well as the compensation payable by the Applicant for losses and damages suffered as a result of the use of the property (Sections 16(4), 22(4), 27(5), 74(4), 79(4) and 83(4)). It is important that the Land Owner negotiates terms in this agreement according to which he would be compensated for any loss or damage. In other words, the Land Owner should be in the same position as he would have been had no mining, prospecting, reconnaissance, exploration or production activities occurred on the property. This includes loss of income that might be suffered.
- 3.4 If no agreement can be reached and the Regional Manager finds that certain negotiations would be contrary to the objectives of the Act, he may recommend to the Minister that the property be expropriated (Section 54(5)). The objectives of the Act could therefore carry more weight than the Land Owner's property rights. Expropriation must, however, take place in terms of the Constitution and the Expropriation Act and fair compensation

shall be payable (Section 55).

- 3.5 It is also possible that the proposed activities will cause such significant limitation of the Land Owner's property rights that he would never again be able to use that part of his land. In such a case there is a further remedy available for the Land Owner in addition to compensation as referred to above. In terms of item 12 of Schedule 2 to the Act, a claim may be lodged for expropriation. That portion of the property that can never again be utilised for agricultural purposes (or for the purposes the Land Owner used it for) has been effectively expropriated. The compensation payable in terms of an expropriation claim could include all damages incurred, even for pain and suffering and the cost in respect of re-establishment, and is therefore not limited to compensation for access to the property. An attorney with knowledge of the Act and expropriation should be approached to assist the Land Owner with such a claim. The procedure as set out Section 54 of the Act as discussed above should, however, still be followed to determine compensation for losses incurred as a result of the activities and to mitigate damages.
- 3.6 It is even possible that the portion of the property on which mining or production activities take place may become unusable due to depletion of natural resources or irreparable damage to the land. In such a case the Land Owner has the right to rely on the provisions of item 12 of Schedule 2 to the Act which states that the Land Owner must be fully compensated for the expropriation of the land as a whole. The compensation in terms of item 12 of Schedule 2 to the Act is more comprehensive than compensation under section 54 of the Act and the Land Owner must seek legal advice in order to be placed in the best possible position to fully protect his rights.
- 3.7 As far as could be established, it appears as if the Minister has never expropriated any land in terms of this Section 54 of the Act.

4. **PROCEDURE TO BE FOLLOWED BY THE LAND OWNER**

- 4.1 When a Land Owner receives notice of an Application, he must, as soon as possible, and in any event, within 30 days after the Application is announced by the Regional Manager, notify the Regional Manager that he objects to the Application and briefly set out the reasons for such objection.
- 4.2 When a Land Owner is approached by an Applicant to consult, he must attempt to reach an agreement with the Applicant with regard to all aspects that affect his rights as Land Owner, including compensation payable for the losses or damages to be suffered or which are likely to be suffered as a result of the prospecting, mining, reconnaissance, exploration or production activities.
- 4.3 If the Applicant fails to consult with the Land Owner prior to registration of the right/permit, such right/permit shall be invalid as the requirements of the Act have not been complied with. The Land Owner must immediately inform the Regional Manager that the requirements of the Act had not been complied with and that the validity of the right is disputed. In this regard, it is recommended that the Land Owner lodges an appeal in terms of Section 96 of the Act together with a request for the suspension of the operation of the relevant right/permit pending the outcome of the appeal. It would be advisable at this stage to contact an attorney in order to examine the validity of the right. The attorney shall have to, among other things, ascertain whether the Land Owner had been given due notice in terms of the provisions of the Act but had merely neglected to respond, or whether it was a case where the Applicant was unable to provide proof that he had contacted the Land Owner in terms of Section 97 of the Act. If the Applicant is at fault, the Land Owner would be entitled to refuse access to his property, pending finalisation of the dispute, however, a decision in this respect will need to take into consideration the risks associated with potential expropriation of the property as is provided for in Section 54(5) of the Act.
- 4.4 The Land Owner is entitled to view the relevant documentation, such as the

environmental management programme, and is also entitled to provide input towards such programme. The documents should be available at the Regional Manager's office and information can be obtained by means of an application in terms of the Promotion of Access to Information Act. In certain instances it may be advisable to instruct environmental consultants to scrutinise the environmental management programme and to comment thereon on behalf of the Land Owner.

4.5 Where the Land Owner is willing to allow the Right Holder access to his property but the parties cannot agree on the amount of compensation payable, the matter shall be referred to the Regional Manager in terms of section 54 of the Act. See discussion in paragraph 2 above.

4.6 The Land Owner should also be mindful of the Applicant's obligations as far as rezoning of property is concerned. The Applicant may have obligations in this regard and it would act unlawful if it did not comply with those obligations. The Land Owner can rely on these obligations to prohibit the Applicant from conducting mining activities on the property. For a detailed discussion on this topic we refer to AgriSA's memorandum titled "Implications of the Constitutional Court judgment in the case of Maccsand v City of Cape Town and Others."

5. **NATIONAL ENVIRONMENTAL MANAGEMENT ACT**

5.1 With effect from 8 December 2014, no prospecting, mining, reconnaissance, exploration or production activities may be undertaken without an environmental authorisation granted in terms of the NEMA (Section 5A).

5.2 An application for an environmental authorisation in terms of the NEMA ("EIA Application") also provides the Land Owner with an opportunity to raise any objections or concerns as to the proposed activities of the Right Holder, which process is set out in

Chapter 6 of the Environmental Impact Assessment Regulations published under GNR 982 on 4 December 2014 ("EIA Regulations").

- 5.3 The Land Owner should be made aware of the EIA Application in the following manner –
- 5.3.1 The person undertaking the public participation process must fix a notice board at a place conspicuous to and accessible by the public at the boundary, on the fence or along the corridor of the property;
 - 5.3.2 The Land Owner of the property and the Land Owners of land adjacent to the property must be given written notice as to the EIA Application;
 - 5.3.3 An advertisement must be placed in one local newspaper or in any official Gazette; and
 - 5.3.4 If the impact of the proposed activity extends beyond the boundaries of the metropolitan or district municipality in which it will be undertaken, an advertisement must be placed in at least one provincial newspaper or national newspaper,
- 5.4 Upon becoming aware of an EIA Application, the Land Owner must register as an interested and affected party, which can be done by contacting the relevant environmental assessment practitioner who has been appointed by the Applicant to make the Application ("EAP"). Once registered as an interested and affected party, the Land Owner is entitled to comment, in writing, on all draft and final reports or plans submitted in respect of the EIA Application and to raise any issues in respect of the application (Regulation 43). The Applicant must ensure that any comments received from interested and affected parties as well as the response from the Applicant/EAP to such comments are submitted to the competent authority (Regulation 44).

5.5 Therefore, once a Land Owner becomes aware of an EIA Application he must register as an interested and affected party. In such instances, he will be entitled to raise any issues as to the proposed activities and to comment on any reports or plans in respect of the EIA Application. In this regard, the Land Owner will have an opportunity to comment on both draft and final versions of the relevant reports or plans. Comments on draft version are submitted to the EAP while comments on final versions are submitted to the relevant competent authority. It may be advisable for the Land Owner to appoint an attorney as well as an environmental specialised so as to ensure that the comments submitted by the Land Owner place him in the best position possible.

5.6 In the event that an EIA Application is granted and the Land Owner was never aware of such application, the Land Owner is entitled to lodge an appeal in terms of Section 43 of the NEMA on the basis that the Applicant did not follow the requirements of the NEMA. An appeal in terms of Section 43 of the NEMA suspends an environmental authorisation.

6. **CONCLUSION**

6.1 The Act, NEMA and reported case law offer the Land Owner sufficient protection to protect his rights in the land when being confronted with a request for access by an Applicant.

6.2 Land Owners must under no circumstances ignore any notice but must immediately seek legal advice in order to protect their rights.

6.3 If the Applicant is unable to prove that the legal requirements have been met, the right/permit/environmental authorisation shall be invalid and could be set aside by a competent court.

6.4 Should the losses or damages suffered due to granting of a right/permit be extensive, the Land Owner should be compensated in full for the effective expropriation of his property. Section 25 of the Constitution provides protection to all property owners who have been deprived of their property rights.

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1 October 2015

ANNEXURE "A"

DRAFT FRAMEWORK FOR AGREEMENT BETWEEN LAND OWNERS AND RIGHT HOLDERS IN RESPECT OF THE RIGHT HOLDER'S USE OF LAND FOR PROSPECTING, MINING, RECONNAISSANCE, EXPLORATION OR PRODUCTION ACTIVITIES

1. DURATION AND TERM OF THE AGREEMENT

Parties must agree on when the works will commence, the duration thereof and at which stages the Right Holder would require access to the land, etc.

2. COMPENSATION

The Land Owner must determine what his/her losses and damages would be as a result of the works. This will include loss of pastures or fields, loss of income as a result thereof, and the appointment of additional security, if necessary, etc. The Right Holder must compensate the Land Owner for any loss and damage incurred or claims emanating from the works.

3. MINING EQUIPMENT

Set out the particulars regarding the type of mining equipment the Right Holder will bring onto the land so that adequate preparations can be made in terms of roads and the relocation of livestock, should noise pose a problem, etc.

4. WATER AND ELECTRICITY

From where will the Right Holder get the water and electricity they may require? Quantities and compensation in this respect must be determined, if applicable.

5. REHABILITATION

Adequate provision must be made for rehabilitation of all the new roads and the holes and other damage to parts of the land where the Right Holder will carry out their activities, as well as for the repair of boundary fences. The Land Owner should assess whether the guarantee required by

the Department is sufficient and must reserve the right to require the Right Holder to submit an additional guarantee.

6. **ACTIVITIES AND THE RIGHTS GRANTED TO THE LICENCE HOLDER**

The scope of the work and the Right Holder's rights must be set out in detail. This should include the number and location of holes or trenches that will be dug; the time of day and week when they will access the land; the parts of the land where they will do prospecting or mining; where the roads will be laid, and whether fences would be damaged to install new access gates, etc.

7. **STATUTORY REQUIREMENTS**

The Right Holder must provide evidence that he/she is in fact in possession of a registered right/permit and must guarantee that he/she had met all the statutory requirements of the Act and the NEMA.

8. **EVACUATION OF THE MINERAL**

It must be agreed that the land would be properly cleared and restored after completion of the activities.

9. **INDEMNITY**

The Right Holder must indemnify the Land Owner from any damage or claims for damage emanating from the works. The Land Owner must ensure that any agreement contains a clear indemnity of any contamination which may occur as a result of the activities of the Right Holder.

10. **BREACH BY THE RIGHT HOLDER**

Should the Right Holder be in breach of the terms of this agreement, the Land Owner should have the right to suspend access to the land with immediate effect until such time that the dispute has been resolved. In such a case, the Regional Manager would probably have to be approached to settle the dispute.

11. **CONTACT DETAILS**

Both parties must provide full contact details where the other party can reach them.