



**African Energy & Minerals
Management Initiative (AEMI)**

WRITTEN COMMENTS ON THE SOUTH AFRICAN DRAFT UPSTREAM PETROLEUM RESOURCES DEVELOPMENT BILL, 2019

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These comments have been submitted by: Dr. Victoria R Nalule;¹ Mr. Ayebare Rukundo;² Ms. Nduta Njenga;³ and Ms. Alaka Lugonzo.⁴

1. Introduction

Many African countries including South Africa are still reliant on fossil fuels to meet the ever-increasing energy demand and consumption. There have been various developments in the energy sector globally which undeniably have had an impact on petroleum investments on the African continent. For instance, the global move to transition to a low carbon economy and the need to tackle climate change, have left many experts question the future of fossil fuels. The comments in this document take into consideration these developments, specifically highlighting how the South African Petroleum Bill can be improved to ensure that the people in the country benefit from their oil and gas resources.

Each consultant's comments are marked in this text with their initials. In this respect, Dr. Victoria Nalule's comments are marked with VN; Mr. Ayebare Rukundo marked with AR; Ms. Nduta Njenga marked with NN; Ms. Alaka Lugonzo marked with AL. The consultants' short biographies, profiles and contact details are provided at the end of this document.

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2. Comments to specific Sections of the Petroleum Bill

Section 2: Objects of Act

Comments by VN

- Include the need to tackle energy access and energy poverty challenges in South Africa as an objective in Section 2.
- This is because, with the global move to tackle climate change and reduce reliance on fossil fuels, experts often undermine the fact that fossil fuels are still needed to address the various energy access and energy poverty challenges in African countries. For a full discussion on Energy Access and Energy Poverty in Sub-Saharan Africa, refer to my book (Nalule, V.R., 2018. *Energy Poverty and Access Challenges in Sub-Saharan Africa: The Role of Regionalism*. Springer. <https://www.palgrave.com/gp/book/9783319954011>)
- Include the need to attain energy security as an objective. Note that, there is a difference between energy access and energy security. Many countries in Europe, America and some parts of Asia emphasize energy security in all their relevant legislations.
- Include an objective of promoting investments in the petroleum sector. This is important considering the decline in oil and gas projects which is triggered by climate change threats. South African policymakers should be able to react to this decline. For more information on this, see my paper on, 'Managing the Decline in Investments of Fossil Fuels in Africa (Link, <https://www.extractiveshub.org/resource/view/id/13673>)

Section 3: Custodianship of nation's petroleum resources

Comments by VN

- Include a provision on Transparency and Accountability in this section. As a custodian of the resources, the State through the Minister should act transparently and should give accountability to the people of South Africa of how the resources are being managed.

Comments by AR

- There is need to include a dedicated section spelling out the functions of the Minister under this act. This will facilitate smooth delivery of the mandates of the respective institutions and limit conflict. Additionally, this should be aligned with the various provisions citing the powers of the Minister to take specific actions such as expropriation, restriction of rights, suspension of permits or rights.

Section 5: Legal nature of exploration right or production right

Comments by VN

- Emphasis should be put on the need to exercise the above rights taking into consideration the rights of other neighbouring land users and local communities. This is due to the massive environmental impacts associated with petroleum activities including oil spills and gas flaring. In this respect, the holder of a licence should be considerate of the local communities and put measures in place to ensure that he/she doesn't indirectly make it impossible for them to use their land.

Section 9: Establishment of Petroleum Agency

Comments by AR

- The petroleum agency should have data custodianship to all petroleum data and not restricted to petroleum geotechnical data. This is of utmost importance in the industry as the value of rights is largely driven by the petroleum data available.

Section 10: Functions of Petroleum Agency

Comments by AR

- The petroleum agency should receive, maintain, store, interpret, evaluate, add value to, disseminate or deal in all petroleum data.
- A function dispute resolution should be included. This will be particularly relevant when there are disputes between the various companies in a joint venture or on a development concept for two neighbouring fields.
- A function on ensuring optimal levels of recovery of petroleum resources should be included
- A function on ensuring optimal utilisation of existing and planned facilities should be included

Section 11: Funding of Petroleum Agency

Comments by AR

- The specific fees to be collected by the Agency should be clearly specified. Due consideration must be taken to ensure that no other law contradicts the funding sources for the Petroleum Agency.

Section 12: Appointment and functions of Chief Executive Officer

Comments by AR

- There is merit in indicating that the Chief Executive Officer shall be a person of high moral character and proven integrity. Additionally, minimum qualifications and experience in relevant disciplines such as; petroleum geosciences, petroleum engineering, petroleum management, petroleum law or petroleum taxation and finance; should also be incorporated.
- Consideration should also be given to include provisions that would not allow a person to be appointed as Chief Executive officer such as conflict of interest, bankruptcy, prior conviction, being a public officer or Minister among others.

Section 15: Composition of Board

Comments by VN

- This section should expressly specify the qualifications of the Board members including level of education and years of experience. This is important to ensure that the right and qualified people are added to the Board.
- The chairperson of the Board should have competitive qualifications, and these should be expressly outlined in this section

Section 17: Term of office of members of the Board

Comments by AR

- A three-year tenure may be too short given the long-term nature of the industry. A tenure of 5 years should be considered.

Section 23: Reports of the Board

Comments by AR

- The provision should cite the need for a submission setting out the activities of the **Petroleum Agency** and not limited to the **board** specifically.

Section 27 (3): Processing of applications lodged in terms of section 26

Comments by VN

- The financial and technical requirements should be able to promote local content and make it easy for black people to take part in petroleum projects. We must note that, oil and gas projects are capital intensive requiring large amounts of money which are often beyond the reach of the local firms. The law should take into consideration these challenges especially if they want to promote local content and black people participation in the sector.

Comments by AR

- The 60-day timeline provided for informing the applicant on the decision may be short especially for a production right application. Additionally, the criteria in 23(3) should be set out as the minimum expected deliverables and not as guaranteed criterion for approval.
- Details of the minimum contents of documentation required to support an application for an exploration or production right should be spelt out within this provision. For example, a petroleum reservoir report and a field development plan for a production right application.

Section 28: Consultation with interested and affected parties

Comments by VN

- Besides adverts in the Gazette, notices must be made available at the local/community level especially in areas where the petroleum project is likely to take place. This is because some people likely to be affected by the project might not have access to the Gazette. It is therefore important to consider other community focused forms of notices, especially for people in rural areas and those who are illiterate.

Section 30: Functions of Petroleum Development and Environmental committee

Comments by AR

- Section 30(b) mistakenly refers to section 80(5). However, there is no section 80(5) in the bill and from the text, reference should be made to section 79(5) and not 80(5).

Section 40: Domestic obligation requirements

Comments by AR

- There is need to provide for a reasonable notification period before delivery of the Domestic obligation volumes will be required.
- Clarity should be provided as to the exact definition of fair market value to limit the potential for eventual disputes.

Section 42: Issuing and duration of reconnaissance permit

Comments by AR

- The provisions in 42(1) should be indicated as the minimum requirements for the application as they are subject to the evaluation and recommendation from the Petroleum Agency.

Section 44: Issuing and duration of technical co-operation permit

Comments by AR

- The provisions in 44(1) should be indicated as the minimum requirements for the application as they are subject to the evaluation and recommendation from the Petroleum Agency.

Section 47: Granting and duration of exploration right

Comments by AR

- The provisions in 47(1) should be indicated as the minimum requirements for the application as they are subject to the evaluation and recommendation from the Petroleum Agency.
- Competitive bidding should be the mechanism for awarding exploration rights. This will enable the State to obtain maximum value from its petroleum resources

Section 52: Granting and duration of production right

Comments by AR

- The provisions in 52(1) should be indicated as the minimum requirements for the application as they are subject to the evaluation and recommendation from the Petroleum Agency.
- Details of the minimum contents of documentation required to support an application for a production right should be spelt out within this provision. For example, a petroleum reservoir report and a field development plan for a production right application.
- The 60-day timeline provided for informing the applicant on the decision is short for a production right application. This is due to the detailed technical evaluations that will need to be undertaken to inform the decision on the production right application.

Section 69: Removal of buildings, structures and other objects

Comments by NN

- A definition of what consists of production or exploration equipment may be useful especially to the extent that it may have domestic tax implications as well

Section 70: Minister's power to recover costs in event of urgent remedial measures

Comments by NN

With respect to 70 (1) (c), note:

- Where the holder of a right or permit is directed under 1 (a) above, measures will need to be put in place to independently verify that the investigation, assessment and report was done according to the domestic standards established by the NEMA or best international practice whichever offers a more thorough threshold

With respect to 70 (2) (a), note:

- Any measures which may be implemented must be fair and equitable giving regard to the Objects of the Act and the provisions of Section 7 of this Act i.e. the Principles of

Administrative Justice. Administrative justice must be delivered within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness. Any administrative action must also be in writing

With respect to 70 (2) (e), note:

- It should be clarified in the Act that in the execution of his/her duties, the Minister in charge of the mineral resources and energy docket does not act independently of the oversight and advice of the Petroleum Agency – a juridical person whose functions are envisaged by the Act.
- Sweeping powers vested in an individual should be avoided. The Petroleum Agency should act as an advisory body which also has the power to check-and-balance any potential ministerial misappropriation of power
- Any funds which are received for this purpose should be deposited within an escrow account and applied towards the intended purpose as overseen by the NEMA and according to any other relevant legal provisions pertaining to use of public funds

Section 72: Financial guarantee

Comments by NN

- In order to ensure the financial capability of a permit/license holder, the form of guarantee should be clearly stated – consider the suggestion to use a combination of Bank and Parent Company Guarantees which would need to be reissued periodically i.e. per year according to the work plan and obligations thereunder

Comments by VN

- Financial guarantee should also put into consideration the capacity of the company to decommission the oil and gas installations and ensure land rehabilitation at the end of the oil projects or upon abandonment. With the decreasing investments in fossil fuels due to climate change threats and global energy transition goals, many oil companies have resorted to abandoning their operations. The government of South Africa should set up a decommissioning fund where money is put aside to cater for decommissioning and abandonment in the petroleum sector. A land rehabilitation fund should also be set up to ensure that the local people easily use the land at the end of oil activities.

Section 75: Minister's power to prohibit or restrict exploration or production

Comments by VN

- There is a need to give some guidelines that may lead to the prohibition or restriction of exploration and production. This section is ambiguous as it fails to give some instances where such prohibition would be acceptable. This ambiguity is likely to lead to misuse of powers; corruption and bribery.

Section 76 (2): Optimal production of petroleum resources

Comments by NN

In relation to the technical and financial resources requirement, we should note that:

- In cases where one holder of a production rights does not have either the financial or technical capability to ensure optimal production or both, it may also be considered that different rights-holders may combine forces under the guidance of the Petroleum Agency so that they may maximize the economic returns from a particular field/block of fields.
- This is currently ongoing under the Maximum Economic Return (MER) plan in the UK.
- it does not have to lead to the award of new rights but if customized to fit the relevant context, a combined development plan consisting of different rights-holders may be a viable option in this regard
- I have co-authored an article on this which might provide some perspective - <https://www.palgrave.com/gb/book/9783030280758>

Section 78 & 79: Use of land surface rights and Compensation

Comments by NN

- Sections 78 and 79 need to be considered more thoroughly through the lens of the wider land reform process which is currently ongoing in South Africa to ensure that the provisions of any laws which are in effect or soon to be in effect in this regard are not working at cross-purposes

- Broadly, the Land Reform process in South Africa connotes the process of land restitution to farm workers (who now have the opportunity to become farmers) and reduce the systematic inequality which was established and enforced by the apartheid regime.
- The premise behind the land reform is to allow previously unemployed people to participate in the economy and better the country's economic growth. It also relates to restitution in the form of settling Land Claims of people who were forcefully removed from their homes in urban areas that were declared white, by the apartheid government under the segregationist Group Areas Act. It also includes restitution for people forcibly evicted from rural land because of apartheid policies.

Comments by VN

- There is too much power granted to the minister with respect to land use in this section. Such unchecked powers have often led to corruption and bribery with respect to land access and extractives in Africa. There is a need to involve other land institutes at the national and local level. There is also a need to ensure checks and balances of the minister's activities with respect to land use in this Act. Reference can be made to my research on 'Land Access and Extractives', <https://extractiveshub.org/resource/view/id/13673>
- In determining the owner of the land, the rights of women and children should be considered. Often, men get compensation for family land and these never share with their wives or children. It should be clearly stipulated in this Act that, where family land is involved, the consent of the wife and elder children should be expressly given. Consideration should also be given to polygamous families where a man might have more than one wife: how will the entire family benefit from this compensation?
- The Act should consider a land resettlement plan for families who have to relocate due to oil and gas projects.
- When calculating compensation, emphasis should be put on agricultural and farming land which is likely to be lost and polluted due to these petroleum activities.

Additionally, the negative impacts of oil and gas on neighbouring landowners and communities should be considered when compensating the local people. There are some lessons that can be learnt from the Nigerian experience with respect to oil spills and gas flaring.

Section 80: Minister's power to expropriate property for purpose of exploration or production

Comments by NN

The objects referred to in section 80 (2) (d), (e), (f), (g) and (h) are;

(d) Substantially and meaningfully expand opportunities for black persons, to enter into and actively participate in the upstream petroleum sector and to benefit from the exploitation of the nation's petroleum resources;

(e) promote economic growth and petroleum resources development in the Republic;

(f) promote employment and advance the social and economic welfare of all South Africans;

(g) provide for security of tenure in respect of exploration and production operations;

(h) give effect to section 24 of the Constitution by ensuring that the nation's petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development;

- In February 2018, the Parliament of South Africa passed a motion to review the property ownership clause of the constitution, to allow for the expropriation of land, in the public interest, without compensation on the grounds that the land was originally seized by whites without just compensation. In seeking to give effect to this motion, a draft Expropriation Bill 2019 was published for public comment - https://www.gov.za/sites/default/files/gcis_document/201812/42127gon1409s.pdf
- It aims to amend the Constitution to provide that, where land and any improvements on it are expropriated for the purposes of land reform, the amount of compensation payable

may be nil. However, the bill itself does not specify the circumstances when no compensation may be given.

- Instead, it states that a separate piece of national legislation must set out the specific circumstances where a court may determine that the amount of compensation is nil.
- This Bill does not define ‘land’ and ‘property’. Further, it is not clearly understood that land is confined to agricultural land. Potentially, this means that it includes any land, including in this case, that which has been set aside for activities within the energy and mineral sector.
- This law needs to be reviewed objectively with both the local context in mind as well as the global mineral and petroleum sectors. The trend is that expropriation laws significantly and adversely affect investment cycles in these sectors which ultimately inhibit growth and development

Section 82: Power to enter exploration, production or retention area

Comments by NN

- It is important to note that the functions of the ‘authorized person’ under Section 82 (4) and 83 are professional in their nature and can therefore not be done by anyone.
- To this end it might be important to provide guidance in terms of some minimum standards which would act as a threshold to determine fitness for the task. Some of these standards may include minimum academic training in relevant field, relevant professional qualifications, number of years of experience and any other qualification which may prove the person’s ability to perform the required tasks.
- It should also be explicitly stated whether this role can be undertaken by a juridical or legal person i.e. a company – and represented by an individual or individuals
- It is also important to clearly articulate the duration of the role of the authorized person – from commencement to expiry

Additional provisions that should be included in the Bill

Comments by NN

- Other petroleum institutions in addition to the Petroleum Agency
- Local content and training plan

- Environmental, health and safety provisions which are unique to the industry

Comments on General Provisions by AL

General Provisions are said to constitute one of the most important parts of any legislation since the rules highlighted here are applicable to other sections in the act and thus careful consideration should be affected while drafting. All contracts, agreements that shall be entered into during the life of any petroleum project must comply with the rules which is a contract to special provisions that apply to particular types of contracts.

General provisions also regulate the status of the legal entity that enter into agreements thus protecting the “rights and obligations”. The Upstream Petroleum Resources Development Draft bill of 2019 provides for General Provisions under Chapter Five. The bill covers the consequential impacts of the provisions in the bill such as Section 82. The power to enter exploration, production or retention area, Section 83. Routine inspections, Section 84. Orders, suspensions and instructions, Section 85. Prohibition of obstruction, hindering or opposing of authorized person Section 86. Prohibition of occupational detriment against employee, Section 87. Internal appeal process and access to courts, Section 88. Serving of documents, Section 89. Offences, Section 90. Penalties, Section 91. Administrative penalties, Section 92. Appointment of an operator, Section 93. Amendment of rights, permits, programmes and plans, Section 94. Delegation and assignment, Section 95. Regulations, Section 96. Proof of facts, Section 97. Act binds State, Section 98. Amendment of laws, Section 99. Short title and commencement.

Suggestions by AL on General provisions:

- The Bill should provide for miscellaneous provisions such as a dispute resolution clause which is prudent to resolve all disputes arising from upstream petroleum operations.
- The bill should also provide that the contractor shall keep the national government indemnifies against all claims and demands that may be brought against the government for any reason of anything done by the contractor.
- The Bill should contain repeals, savings and transitional provisions that allow for the provisions before the commencement of the act shall be deemed to be done under the draft bill, shall also covers subsidiary legislation taxes, profit petroleum and royalties

arising from upstream petroleum operations from the effective date of this Act shall be collected by the body responsible for collection of taxes and revenues.

3. Note about the Authors

1. **Dr. Victoria R Nalule** (victorianalule@gmail.com; v.r.z.nalule@dundee.ac.uk; +44 7490 395 399)

Victoria is an Energy and Mining professional & consultant, with extensive experience working on various projects in the different parts of the Globe. She is a holder of a PhD in International Energy Law and Policy; LLM in International Oil and Gas Law. Victoria is the Founder and Executive Director of the African Energy and Minerals Management Initiative (AEMI), an NGO based in Uganda, (www.afrienergyminerals.org). She is currently involved as a Research Fellow with the DFID-funded, Extractives Hub project, based at CEPMLP, University of Dundee. She has appeared as an Energy and Mining expert witness before the Commission of Inquiry into Land Matters in Uganda.

She is also involved with different universities as a visiting scholar and external examiner for energy and mining related LLM studies. Victoria offers extensive experience in the Energy and Mining sectors having worked with various organisations and institutions including assignments for: The Queen Mary University of London (EU Energy Project); The Energy Charter Secretariat in Belgium; The Columbia Center on Sustainable Investment in New York; the East African Community Secretariat (EAC) in Tanzania; the Southern African Development Community Secretariat (SADC) in Botswana; Extractive Resource Hub in the UK; International Arbitration Case Law in New York (editor); and NEM energy and mining consultancy in Uganda. She has also worked with both the private and public legal sectors of Uganda including Kakuru & Co. Advocates and the Anti-Corruption Court of Uganda.

Victoria is an author and has widely published on topics relating to oil, gas, renewable energy, climate change and mining in Africa. Her latest two books being, "Mining and the Law in Africa: Exploring the Social and Environmental Impacts" and another book on "Energy Poverty and Access Challenges in Sub-Saharan Africa: The Role of Regionalism". Victoria has an active YouTube Channel i.e. Victoria Nalule and Podcast i.e. Dr. Victoria Nalule, both focused on energy and mining discussions. She has also been invited as a guest lecturer, speaker and panellist in several forums, universities and conferences discussing topics

concerning oil and gas; climate change, renewable energy, mining, transitioning to a low carbon economy, energy poverty and access just to mention but a few.

2. Mr. Ayebare Rukundo (ayebaretom@yahoo.com / tom.ayebare@pau.go.ug; +256 782 191 982)

Mr. Ayebare Rukundo Tom is a Petroleum economist with over seven years' experience in cost, financial and economic aspects of Uganda's petroleum and development sectors executed in Uganda, France and U.K.

Currently, he works with the Petroleum Authority of Uganda as the Manager Economic and Financial analysis. Previously, he worked with the Ministry of Energy and Mineral Development in roles relating to the economic and commercial regulation of the oil and gas sector. He has also worked with National Housing and Construction company and Uganda National Roads Authority in various capacities.

He possesses a Master of Science in Oil and Gas Economics from University of Dundee and a Bachelor's Degree in Quantity Surveying from Makerere University.

3. Ms. Nduta Njenga, (nduta@envantagelaw.com; +254 712 160 021)

Ms. Nduta Njenga is currently engaged as a Fellow at the Oxford Policy Management as an Energy Advisor to the Ethiopian Ministry of Water, Irrigation and Energy.

She is a practicing Advocate, registered in Kenya with 8 years of Post-Qualification experience working in the Public Sector (Government) specifically in the area of Governance, Energy and Extractives Management.

Nduta has a Post-graduate LLM in Energy Law and Policy from the University of Dundee's Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP, UK) and is a member of a number of professional associations including the Law Society of Kenya (LSK); the East African Law Society (EALS); the Association of International Petroleum Negotiators (AIPN); the Energy Institute (EI); and Legal and Business Women for Africa (LABFA).

Nduta has received extensive training and on-the-job skills enhancement in various aspects of Natural Resources Policy-making and Management from various institutions in Australia, Norway, the Middle East, the United Kingdom and the United States. She is a published author on a myriad of issues within the wider natural resources sector and is also a consultant at Wairimu & Co.

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4. Ms. Alaka Lugonzo (lugonzoalaka@gmail.com; +254 710 311 595)

Alaka is a Legal and Governance Consultant with a specialization in Energy, Oil Gas and Mining aspects of the extractives industry. She is an Advocate of the High Court of Kenya and has an (LLM) in Energy Law and Policy from the University of Dundee in Scotland.

Her core interest and passion is in Legal Training, Local Content, Policy and Governance and Gender in the Extractives sector in Kenya as an emerging market.

She has extensive experience having worked with the Kenya Government, including the Ministry of Petroleum and Mining (MOPM) in Kenya, County Governments and the Community that have an economic base in extractives (such as Turkana, Kwale, Lamu and Taita Taveta Counties in Kenya), Development Partners and Funding organisations such as MEDA, Open Society and the Australian High Commission a fundraiser, International development partners such as the IFC, Civil Society Organisations such as Haki Madini, Kenya Civil Society Platform on Oil and Gas, academic institutions such as Strathmore Extractives Baraza, community representative groups and gender representative groups, banks and financial institutions such as Gulf Bank.

She has been actively involved in shaping the sector through speaking and training engagements in the areas of gender, local content and the legal and governance frameworks of the extractives sector in Kenya, Uganda, Tanzania, Botswana and Ghana.

She is currently a partner at **AKO Law** is a mid-size law firm, pre-eminent in providing specialized legal and regulatory advisory services, high-level dispute resolution and handling complex and big value transactions.

