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Mines department a mess of confusion

"We have a major problem with DMR [the department of mineral resources] ... there's nothing we can do now to regulate mines," said a provincial environmental affairs official. Changes in legislation prevent the department from stopping abuses in the mining sector.

The legality of Elandsfontein Exploration and Mining's bid to strip mine phosphate near Langebaan and the West Coast National Park will be debated in court. Western Cape officials say it is a perfect case study of the problems created by the new system.

This came into effect in December 2014, when Elandsfontein was applying for a mining right. Before that, mines had to apply separately to the environment and the mineral resources departments. Now, the mineral resources department is the one-stop shop for regulation.

Parties only get heard by the environmental department if they appeal decisions taken in favour of mining. But several officials – the *Mail & Guardian* spoke to four in the Western Cape and Mpumalanga, and two in national government – say this never happens because government departments are told they have to resolve disputes internally. The disputes are only aired in court documents, as is happening in the case of Elandsfontein.

The hundreds of pages submitted in this case show how the environmental, water and heritage departments of the Western Cape tried to get information out of the mineral resources department, and to guide its thinking. They failed.

In one email to the national environment department, Gerhard Gerber, the director of development facilitation in the Western Cape environment department, asked for help in interpreting the law. "It would be imperative for the correct legal interpretation to be confirmed as a matter of urgency."

Although he supported the need for the "one environment" system, he noted that "it is understandable that there would be a few implementation issues as we transition to a new system".

The provincial mineral resources department was copied in this email and responded to Gerber: "I want to plead with you that, if there are issues of interpretation during the transitional period the applicants and mining rights holders are raising with you, I would prefer that you refer them to us."

It said the Elandsfontein application would probably end in an appeal, which the environment department would have to adjudicate. "I want to avoid a situation wherein we send different messages."

Elandsfontein then responded to Gerber's email, saying: "The Elandsfontein mine is a high-profile, world-class project, and we are meticulous about legal compliance and adhere to the letter of the law."

The spat intensified to the point where the legal services department of the Western Cape premier intervened and met Gerber and the mine.

In the notes from this, counsel said: "As far as the stand-off between DEADP [provincial environment department] and DMR is concerned – regarding the need for environmental authorisation under Nema [the National Environmental Management Act] – it seems clear that it is DMR that is perhaps not in agreement with us on this and not Elandsfontein itself."

The counsel said they had explained to the mine the danger of the mineral resources department being "wrong in the law", to which the mine said they would approach the mineral resources department to understand what was happening.

The case to test whether the department is indeed “wrong in the law” will be heard in the middle of 2017. A group of residents affected by Elandsfontein is asking for a court order to set aside the mining right, which the mine is opposing.

But the mineral resources department has not entered a plea, which is par for the course, according to the people the M&G talked to. An attorney involved in another case against the department said: “The implementation of the one environment system has been such a mess and DMR says nothing when there are disputes or confusion. They stonewall you.”

Officials of three mining companies said they were often caught up in the fights between the departments. “With this new system, you go to DMR and you apply for all your permits. But then you get a provincial tourism authority tuning you, or the environmental department getting involved,” said one mining official in Gauteng.

Another in the same province said the biggest problem was the mineral resources department because it never gave certainty to mines when they were applying. “You think you’re ticking all the boxes but then someone objects and DMR gives you very little, if any, guidance. So you’re left fighting on your own and that gets you very little goodwill.”

It seems that everyone has a problem with the mineral resources department.

The mineral resources department has not responded to questions.

Elandsfontein’s response

Elandsfontein says the environmental sub-directorate said on November 27, 2014 that the updated environmental management plan which the mine had submitted in September “was not consulted by [the minerals department]”. This meant new information that the mine had submitted was not considered.

The recommendations that they made were therefore based on departmental comments, “some of which were incomplete and inaccurate”, according to the mine. The minerals department’s regional manager looks at these recommendations and makes a judgement based on their contents, without interrogating them.

Elandsfontein says: “As a consequence, reports may incorporate comments that are biased and factually not correct.”

But any issues were included in the conditions of the mining right granted to the phosphate mine in February 2015. The mine says: “Elandsfontein has complied and will continue to comply with these conditions.” That includes things such as continual rehabilitation during operations, where soil is put back into the operation so the natural environment can start getting back to its original state.

The mine also rejects the claims that it did not comply with NEMA and says that its understanding of the shift to the One Environment System is correct under law. Because the mining right was granted on January 30, 2015, it fell under the new system, it says.

“That said, the EIA process that Elandsfontein followed in terms of the MPRDA is in all material terms similar to that of a NEMA process.” The mine says it has followed this up by conducting more studies to address concerns raised by government bodies, such as SANParks.

The mine says that the EIA - and subsequent studies - found that the mine “has no impact on nearby users” and groundwater-based ecosystems in the region “will not be impacted”.

Once work starts, the mine says it will “make a significant contribution to the region by promoting economic growth and development”, employing 450 people. Over R1-billion of the R1.3-billion project costs has been spent, with much of that spent in the local community.