

Comments regarding the:

Proposed regulations pertaining to financial provisioning for rehabilitation and remediation of environmental damage caused by reconnaissance, prospecting, exploration, mining or production operations

1 July 2019

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A) INTRODUCTION

About the Centre for Applied Legal Studies and Its Work on Mining and Environmental Justice

1. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.
2. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS practices human rights law and social justice work with a specific focus on five intersecting programmatic areas, namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law. It does so in a way that makes creative use of the tools of research, advocacy and litigation, adopting an intersectional and gendered understanding of human rights violations.
3. CALS' Environmental Justice Programme works towards making the environmental right contained in Section 24 of the Constitution a tangible reality for all who live in South Africa. The work of the programme is driven by the need to facilitate access for affected communities to the processes available to combat unacceptable environmental degradation, with a primary focus on the extractives industry.
4. Focus areas of the Environmental Justice Programme have included public participation in the minerals regime, mine closure and the Social and Labour Plan (SLP) system.



B) PUBLIC PARTICIPATION IN DETERMINING THE FINANCIAL PROVISION

5. In the joint civil society comments endorsed by us, we noted the absence of express requirements for and procedural guidance over public participation in respect of the determination or review of the financial provision in the proposed regulations pertaining to financial provisioning for rehabilitation and remediation of environmental damage caused by reconnaissance, prospecting, exploration, mining or production operations (draft Financial Provision Regulations).¹ We also noted that DEA have argued that this is not necessary because this is already required in the regulations governing environmental impact assessment process and further argued that it did not favour participation requirements in relation to the yearly review and amendment of the financial provision.
6. In a mining sector in which exclusion of communities from participating is a systemic problem stemming from a power disparity, it is critical that obligations pertaining to public participation are spelt out in unambiguous terms. The consequences of the lack of unambiguous participation and transparency requirements in binding legislation or regulations can be seen in the social and labour plan system in which direct community participation is rare and companies in their own admission tend to view consultation with local government as sufficient. We therefore propose that the financial provision regulations should expressly state that the financial provision must be subject to the same public participation process set out in the environmental impact assessment regulations.
7. With regards to the absence of participation in the review of the financial position, it is our position that given the potential impacts of a significant revision of the financial provision, there should be scope for public input. We are, however, aware of the resource implications of an annual public participation process. We of the view that the three year period specified in the NEMLAB amendment bill is most appropriate for enabling a meaningful review and that these regulations should, if and when the bill becomes law, align with this time period. In the context of a review every three years, a public participation process would be less onerous.

¹ Comments by the undersigned civil society members and organisations on the proposed regulations pertaining to financial provision for prospecting, mining, exploration or production operations published for comment on 17 May 2019.



D) TRANSPARENCY OF THE FINANCIAL PROVISION

8. An aspect of the proposed regulations that is particularly progressive is the duty it imposes, in regulation 14, on the applicant and rights holder to make publically available information pertaining to the financial provision.
9. The importance of this provision cannot be overstated. The impacts of insufficient financial provision for rehabilitation and remediation of damage caused by mining activities are widespread and severe, and are therefore matters of the highest public interest. They are in particular born by mining-affected communities. South Africa has around 6000 ownerless abandoned mines, many which pose grave environmental risks, as a result of past failure to financially provide for closure.² Transparency and public participation are foundational principles of our environmental governance system under the Constitution and NEMA and are, in particular, required for financial provisions given the significance of the public interest.
10. This provision is also of vital importance due to the levels of secrecy that continue to prevail in the mining industry.
11. Importantly this provision clarifies the information that must be available, namely the determination, review and adjustment of the financial provision as well as audits as required by regulation 13. The outcome of the annual review of the financial provision required by regulation 12 must also be published.
12. It is also clear regarding the forms of access must be provided which are critically cumulative (and) requirements rather than in the alternative (either/or). These are on the public websites of the right holder, the site office and available to the public on request. In relation to the annual review, the rights holder is required to publish the outcome in a provincial newspaper as well as a newspaper for the specific area of the operation in question.

² See, especially the investigative reports by environmental journalist Mark Olalde and Oxpeckers on mine closure. <https://oxpeckers.org/2018/07/cleaning-up-mining/>



13. Further, this information must be included in the environmental management programme.
14. While these provisions constitute vital steps towards transparency, we suggest that they could be improved further. First, while with increasing internet access, the availability of information online will significantly increase the number of communities having access to the information; there will still be many community members who do not have internet access. Second, there will also be a proportion of community members who are not literate. We therefore recommend that further measures to pro-actively disseminate the information to directly affected communities be required. These could include the use of community radio stations to draw attention to this information as well as lodgement of copies at municipal buildings.
15. Third, language needs to be taken into account. The vast majority of mining-affected communities are not predominantly first language English speakers. While the formula and figures are in the universal language of mathematics, the factors and the items constituting the financial provision will be described in English. We therefore propose that in addition to English, the determination, review, adjustment and audit of the financial provision be available in at least one language predominantly spoken in the mining area.

E) INTEGRATION OF ENVIRONMENTAL, SOCIAL AND ECONOMIC POST-CLOSURE PLANNING

16. Rehabilitation of the physical impact of mining, though a task of great significance is only an aspect of closure. When the mine closes the most directly affected people, namely the erstwhile employees and affected communities remain. The withdrawal of investment by the mining company creates a depressed local economy with people being deprived of means of earning a livelihood to put food on the table. The result is a multifaceted crisis of which the environmental legacy is one component, and one in which the most vulnerable bear the greatest burden.
17. CALS and civil society and community partners have therefore been advocating for a comprehensive closure framework in which there is integration of planning



- on social, environmental and economic dimension to closure planning. This requires co-operation between a range of social partners, government entities and alignment between regulation and policy relating to different aspects of closure.
18. One of the potential vehicles for this is an expansion of the future forum to become a multi-stakeholder engagement, planning and compliance monitoring body. This is not unprecedented as multi-stakeholder environmental management committees have been established as license conditions in several instances, notably in relation to the Vele Colliery that is in close proximity to the Mapungubwe Cultural Landscape World Heritage Site.³
 19. The membership would need to be broadened. Along with representatives of workers and management, should also include mining-affected communities as well as relevant government departments and local government. The forum/committee could have several sub-fora/committees focused different social, economic and environmental issues including environmental rehabilitation and local economic development.
 20. To illustrate the links between issues, the environmental rehabilitation for which the financial provision is strictly reserved has a potential human development dimension. The task of environmental rehabilitation is a potential source of both employment and training opportunities for mine workers and members of surrounding communities where unemployment is often severe.
 21. Further, unregulated artisanal mining occurs on a significant scale when other means for meeting basic needs are closed to ex-mine workers and community members. In the absence of a supportive framework this can pose a threat to rehabilitation efforts. Ensuring successful rehabilitation requires both that the rehabilitation effort translates into livelihoods and training, and accessible processes by which ex-mine workers and community members pursuing artisanal mining can be formalised and capacitated, including in environmental management. The criminalisation of artisanal mining and the securocratic

³ For a history of the EMC for Vele Colliery see Centre for Applied Legal Studies *The Mapungubwe case study – a campaign for change* (February 2015).



approach of mining companies and government are not addressing the problems. The suggested, developmental, approach is, however, impossible without structured co-operation and integration of law, regulations and policy.

F) CONCLUSION

22. Thank you for your consideration. We look forward to participating further in engagements regarding the draft Financial Provisions Regulations. For queries and further information please contact Robert Krause (Researcher) at Robert.Krause@wits.ac.za or 011 717 8615 or Louis Snyman (Attorney) at Louis.Snyman@wits.ac.za or 011 717 8629.

