

Department of Forestry, Fisheries and the Environment
The Director-General
Attention: Dr Dee Fischer
Pretoria

By email: dfischer@environment.gov.za

06 October 2021

Dear Dr. Fischer

COMMENTS ON THE PROPOSED REGULATIONS PERTAINING TO FINANCIAL PROVISION FOR THE MITIGATION AND REHABILITATION OF ENVIRONMENTAL DAMAGE CAUSED BY RECONNAISSANCE, PROSPECTING, EXPLORATION OR PRODUCTION OPERATIONS, 2021

1. These comments are submitted by the undersigned civil society members and organisations on the proposed regulations pertaining to financial provision for the mitigation and rehabilitation of environmental damage caused by reconnaissance, prospecting, exploration or production operations published for comment on 27 August 2021 in Government Gazette 45058 under GN 765 (draft regulations).
2. The following organisations are signatories to the comments in this document:
 - 2.1. The Centre for Environmental Rights¹ (CER);
 - 2.2. The Centre for Applied Legal Studies² (CALs);
 - 2.3. The Federation for a Sustainable Environment³ (FSE);
 - 2.4. Lawyers for Human Rights⁴ (LHR);
 - 2.5. Endangered Wildlife Trust⁵ (EWT);
 - 2.6. Mining and Environmental Justice Community Network of South Africa⁶ (MEJCON);
 - 2.7. Khuthala environmental Activist group, Ermelo (Khuthala)
3. We submit these comments against the background of our work with mining-affected communities who often bear social, environmental and economic hardship during mining operations and after mining has ceased.
4. We commend the Department's efforts to emphasise in the draft regulations the importance of a sustainable end state and the efforts to require that this is conceptualised, consulted on and approved at the design stage. We submit that the regulations require revision around the notion of closure objectives which, we submit, must be approved by the regulator, rather than agreed between the applicant or holder and the regulator. We submit also that there is an imperative to develop predetermined and defined post mining land uses - including concurrent economic diversification planning to be done at the prefeasibility stage – because of how common it is that no economic activity is sustainable on mined land. The impact this has on aggravating poverty and inequality flies in the face of the objects of the MPRDA (to which the draft regulations relate) which include addressing historical social and economic inequality. This should therefore weigh heavily at the pre-feasibility and licensing stage.
5. We submit that a crucial objective of mine closure, in addition to a strategic approach to managing water and the other aspects mentioned, is a strategic approach to managing land. That objective should prioritise both land uses that support livelihoods and access to land and land reform as a political and economic imperative. Inequality in our country is sharply aggravated by the resettlement of communities to make way for mining. This practice perpetuates centuries of dispossession through slavery, colonialism and apartheid. Access to land and land reform in the first instance by and for those most affected by mining must be a central objective in conceptualising a sustainable end state.

¹ <http://www.cer.org.za/>

² <https://www.wits.ac.za/cals/>

³ <http://fse.org.za/>

⁴ <http://www.lhr.org.za/>

⁵ <http://www.ewt.org.za/>

⁶ <https://cer.org.za/programmes/mining/mining-environmental-justice-community-network-south-africa>

6. Communities should be able to participate in closure planning and implementation and the regulations should go further to describe what that participation should look like. Further, where a viable economic activity post-closure has been identified, the approved mine closure plan should make clear where ownership of those alternative economic activities lies. This includes but not limited to measures to promote the participation of women LGBTQI + persons and other marginalised groups. We submit that community ownership is important and that the notion of a sustainable end state should include the training of community members and retrenched mine workers in order for them to be able to adapt and work in the alternative economies created and assume ownership of those. It is further imperative that vehicles for community ownership and training opportunities also prioritise women, LGBTQI + persons and other marginalised groups, especially given the disproportionate manner in which mining negatively impacts women.
7. We look forward to the introduction of a binding requirement to develop predetermined and defined post mining land uses – including concurrent economic diversification planning at prefeasibility stage - in the regulations as a priority, acknowledging that diversification of economies is key to a just transition with poverty and inequality eradication at its core.
8. We have structured these comments under two broad headings. Part A which details general comments that we have on the draft the financial provisioning regulations and Part B which will address specific sections in the regulations.

PART A - General Comments on the Draft Financial Provisioning Regulations

9. Public participation in the range of processes contemplated by the draft regulations

- 9.1. We commend the department for the inclusion in draft regulation 16 of a requirement on applicants to subject the documentation contemplated in the specified subregulations to the consultation requirements prescribed in the EIA Regulations.
- 9.2. We are concerned, however, that important other processes that should trigger compliance with these the draft regulations are excluded from this requirement – namely, renewal of rights processes, section 11 transfer processes. While we address this issue below in our comment on the definition of “applicant”, in relation to public participation we reiterate comments we have submitted previously regarding the need to prescribe public participation processes where the trigger for compliance with the draft regulations is linked to the MPRDA and not to NEMA. Although the MPRDA mandates consultation in the application process for a mining right, mining permit and prospecting right, the MPRDA does not specifically prescribe public participation in respect of a renewal, amendment (which may be substantive and include massive expansions) or transfer, and the Department responsible for Mineral Resources does not require it and it does not happen.
- 9.3. We are also concerned about the various references in the draft regulations and their Appendices to such things as “agreed closure objectives” (e.g. reg 5(1)), “agreed sustainable end state”, “proposed final sustainable end state”, “preferred closure option” (e.g. Appendix 2), etc., and the concept of “revising” these. Our submission is that a sustainable end state and closure objectives must be as approved by the Regulator (not agreed) and that the process of such approval can only follow public participation. While Appendix item 2(3) refers to “regular consultation throughout the life of the mine...on closure objectives and the sustainable end state objectives”, that reference is in a section titled “Objective of the final rehabilitation, decommissioning and mine closure plan”. There is no monitoring or enforcement mechanism, and when regard is had to the fact that Regulation 16 deals with the responsibility to consult, and “regular consultation ...on closure objectives [etc.]” is not dealt with there, no enforceable obligation to do so arises.

10. Dump Reclamation Activities and the applicability of the Financial Regulations to tailings

- 10.1. With the gold mining industry in decline, a number of gold mining companies are reprocessing historic tailings storage facilities and extracting residual gold in order to prolong the lives of mines. The residues from these reprocessing activities are then deposited in open pits or on regional tailings storage facilities, commonly referred to as “super dumps”.

- 10.2. In past dump reclamation activities, a number of cases have been identified where the re-mining of the dumps was not completed, either due to a lack of funding on the part of the mining company or due to the heterogeneity in the dumps which were mined.⁷
- 10.3. Of additional concern is that some mining companies selectively extract values from portions of a site without ploughing some of the value back into the rehabilitation of the entire mining area.⁸
- 10.4. Radiometric surveys over previously reprocessed mine residue footprints have, in some cases shown elevated levels of residual radioactivity in the soils⁹.
- 10.5. The reclamation activities of the Mintails' Group of Companies is a good case in point. The Parliamentary Portfolio Committee on Mineral Resources¹⁰ found:
- 10.5.1. *It is clear that some mining companies are still operating without adequate financial provision for repairing damage caused to the environment by mining activities, if they suddenly close.*
 - 10.5.2. *Mintails Mining SA (Pty) Ltd has not saved all the money they were supposed to set aside under the law to pay for environmental rehabilitation. The shortfall is R460-million for Mintails.*
 - 10.5.3. *The state will inherit these liabilities if the mines are finally liquidated.*
 - 10.5.4. *The DMR has failed to implement effectively and carry out the intentions of Parliament to ensure that all mines rehabilitate the damage they cause.*
 - 10.5.5. *Changes to the mining law were made by Parliament after 2002 to ensure that in mining, as elsewhere, the polluter must pay.*
 - 10.5.6. *The new laws have not proven effective in avoiding this situation where the state and the taxpayer still ends up paying for the environmental harm caused by mining.*
 - 10.5.7. *There is a lack of clarity on the rules for the Department of Mineral Resources when it comes to Business Rescue Practitioners. It seems there is non-application of the law resulting in a free for all.*
 - 10.5.8. *The DMR allowed Mintails to operate between 2012 and 2018, despite the fact that the Department had never approved the environmental management plans of the mine and had never issued the company with a mining right under the law.*
 - 10.5.9. *There is a huge regulatory gap regarding the financial provision of environmental rehabilitation of a mine during the process of business rescue.*
 - 10.5.10. *There is a lack of standardization by the DMR on how to relax environmental obligations of a mine during the business rescue stage.*
 - 10.5.11. *The DMR must identify clearly and specifically the gaps between mining, insolvency and company law that have led to this ongoing situation, where the polluter does not pay, it is the state that ends up paying.*
 - 10.5.12. *DMR should get specific legal opinion on these complex issues.*
 - 10.5.13. *The DMR must report to the Committee in Parliament on what it will do [or needs to do] differently in future to ensure that this situation does not continue.*
 - 10.5.14. *DMR must report on what efforts they have made to hold directors and shareholders of Mintails liable for the environmental debts of these failed ventures.*
 - 10.5.15. *The DMR must actively ensure that the licensing of mines goes with responsibility and accountability.*
 - 10.5.16. *The DMR should further explore the regulatory gaps resulting from the business rescue process and come up with regulations that will ensure full environmental compliance during the period when a mines experiencing financial distress.*

⁷ van Tonder, DM, Coetzee, H, Esterhuyse, S, Msezane, N, Strachan, L, Wade, P, Mafanya, T & Mudau, S 2008, 'South Africa's Challenges Pertaining to Mine Closure — The Concept of Regional Mining and Closure Strategies', in A Fourie, M Tibbett, I Weiersbye & P Dye (eds), Proceedings of the Third International Seminar on Mine Closure, Australian Centre for Geomechanics, Perth, pp. 87–98.

⁸ Ibid

⁹ Ibid

¹⁰ Please refer to the Parliamentary Report on the oversight visit of the Parliamentary Portfolio Committee on Mineral Resources of Mintails' operations. The Report, titled 22 November 2018: ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS NO 174–2018. No 174—2018, FIFTH SESSION, PARLIAMENT. Pages 39 – 52) is attached hereto,

10.5.17. *The DMR should design and implement standardized approaches when dealing with the relaxation of environmental financial provisions for mines that are undergoing business rescue process.*

11. The relevance of the dump reclamation activities to the Financial Regulations is as follows:

11.1. In terms of the section 3(1) *“These Regulations apply to an applicant and a holder, notwithstanding the applicability of section 52(1) of the Mineral and Petroleum Resources Development Act.”*

11.2. We infer from the above section that these Regulations apply to an applicant for a mining right or permit or a holder of a mining right or permit.

11.3. Although the Regulations define *“mining”* as *“the extraction of a mineral from the earth or any residue deposit or stockpile...”* *“mine”*, used as a verb in the Mineral and Petroleum Resources Development Act (MPRDA), does not include extraction activities in residue stockpiles. Extraction of minerals from residue stockpiles constitutes processing that does not require a separate mining permit or mining right.

11.4. The MPRDA is silent regarding the ability of holders of mining rights and mining permits to transfer the ability to process stockpiles to others. However, nothing in the MPRDA indicates that holders of mining rights and mining permits are not permitted to dispose of, and allow another to process stockpiles, while their rights exist.

11.5. The judgement in the De Beers Consolidated Mines Ltd and Ataqua Mining (Pty) Ltd and others matter in the High Court of South Africa (Orange Free State Provincial Division - Case No.: 3215/06), established that reprocessing of tailings are not subject to the control of the MPRDA and does not require a mining right/permit.

11.6. Whilst Listing Notices 1, 2 and 3, of the EIA Regulations, include residue deposits and residue stockpiles, the intention of the MPRDA was to exclude tailings dumps according to the above judgment.

11.7. The Court found that there are several reasons why tailings dumps, are not subject to control by the MPRDA namely:

(i) The tailings dumps are movable, and the minerals/metals occurring in them do not occur “naturally in or on the earth”.

(ii) Tailings dumps do not occur naturally. They are formed by the placement of processed and partly processed materials, to be reworked in future years when technology improves.

11.8. It furthermore found that:

“The MPRDA did not want to regulate tailings dumps. “Mining” of a tailings dump is in fact “processing”.

“It is the winning of the mineral”.

“The MPRDA targets mining rights in unsevered minerals in the ground, not in tailings which have been mined”.

“Tailings are different: ... It is not part of the heritage to which section 3(1) of the MPRDA refers.”

11.9. In the light of the above-mentioned findings, we respectfully request clarification regarding the anomalies in the above definitions of *“mining”* and whether or not the proposed Financial Regulations are applicable to mining companies that are reprocessing tailings storage facilities and that are not required to apply for or to hold a mining right.

12. The importance of distinguishing between applicant and holder

12.1. The importance of the distinguishing between ‘applicant’ and ‘holder’ is further elaborated on under specific sections in these comments.

PART B – Comments on specific sections in the draft Financial Provisioning Regulations

13. We have structured Part B of these comments under the following headings:

- 13.1. Definition
- 13.2. Purpose of these Regulations
- 13.3. Application of these Regulations
- 13.4. The environmental obligation of an applicant and holder
- 13.5. Financial provisioning
 - 13.5.1. General requirements
 - 13.5.2. Purpose of financial provisioning
 - 13.5.3. Determining of the financial provision using the prescribed template, spreadsheet and master rates
 - 13.5.4. Availability of the financial provision
 - 13.5.5. Financial vehicles available for setting aside financial provision
 - 13.5.6. Audits and related requirements
 - 13.5.7. Withdrawal against a financial provision to facilitate decommissioning and final closure activities
 - 13.5.8. Responsibility of an applicant or holder to consult and disclose information
 - 13.5.9. Powers and duties of the Minister
- 13.6. Transitional arrangements

Definition

14. The following tables details our comments on the definition section and our proposed amendment or deletion.

	Definition	Comment
1	<p>“applicant” means a person who applies for—</p> <p>(a) a permit, right and permission in terms of the Mineral and Petroleum Resources Development Act, excluding permits, rights or permissions contemplated in regulation 3(2) and 3(3)(a) and (b);</p> <p>(b) a consent in terms of section 102 of the Mineral and Petroleum Resources Development Act relating to a mining permit or a prospecting, exploration, mining or production right, excluding any consent for amendment or variation of an environmental management programme or works programme where there is no change to the scope of the operation; and</p> <p>(c) an environmental authorisation in terms of the Environmental Impact Assessment Regulations for an activity for which the Minister has issued an exemption in terms of section 106(1) of the Mineral and Petroleum Resources Development Act;</p>	<ul style="list-style-type: none"> • We do not support the exclusion in part (a) of the definition to the extent that applicants referred to in regulation 3(3) would not be bound by the draft regulations. This proposed exclusion provides that applicants or holders of a reconnaissance or exploration permit for offshore operation, doing seismic surveys, do not need to comply with these Regulations. Seismic surveys risk environmental impact and the reference in regulation 3(3) to “separate arrangements” is so vague as to be of no force or effect. Certainly, no enforceable obligation is created. See para 19 below for more in depth comment. • We are concerned that the definition excludes applicants for Ministerial consent for the transfer of rights under section 11 of the MPRDA. Our experience, and that of our clients and partners, is that the transfer of rights in terms of section 11 of the MPRDA frequently serves as a gateway to mine abandonment and that the point of transfer is a critical one for the environmental liability to be reassessed and financial provision secured in respect thereof. This to ensure that the transfer of rights does not result in the State becoming liable for the costs of mitigation, rehabilitation and management of negative environmental impacts and environmental damage from operations conducted by previous rights holders. See our suggested amendment to subsection (b) below. • We support the inclusion of applicants for consent under section 102 of the MPRDA in the definition. We are concerned that applicants for the renewal of rights under the MPRDA are not included in this definition and submit that these categories must be included in the definition of applicant. • The following excerpt from Humby <i>“Facilitating dereliction? How the South African legal regulatory framework enables mining companies to circumvent closure duties”</i> bears reference: <i>“... One may argue that the criteria governing the granting of ministerial consent are sufficient to ensure that the person taking up the right, or assuming the controlling interest in an unlisted company or closed corporation has the requisite expertise, resources and experience to comply with the closure obligations set out in the EMP. In exercising this discretion, however, the only quality fettering the minister’s decision is that the person should be “capable” and there is no explicit requirement that the more detailed qualifications in regulation 59 would apply. Everything therefore rests on the integrity of the minister’s decision (or of the official to which the task is delegated). The ambiguous meaning of “capable” would make this decision difficult to set aside on judicial review. More importantly, however, liability for pollution, ecological degradation, the pumping and treatment of extraneous water, and latent and residual impacts, as well as the obligation to apply for a closure certificate, vests in the last holder of the right, in all likelihood the least well-resourced and most precarious corporate entity. This “pass-the-parcel” approach to the custodianship of the closure plan, where the “gift” ends up in the hands of the weakest, seriously undermines the value and integrity of the forward planning approach to mine closure. Where the last link in the chain of mining companies operating a site then fails to apply for a closure certificate, it also undermines the rule of law. In addition to legally transferring a prospecting or mining right with written ministerial consent, listed mining companies currently have the option of exiting a liability escalating venture by changing the controlling interest of the corporate entity holding the right. There is no state oversight of this process at present.”</i>

<p>2</p>	<p>“holder” means the holder of-</p> <p>(a) an environmental authorisation for an activity for which the Minister has issued an exemption in terms of section 106(1) of the Mineral and Petroleum Resources Development Act; and</p> <p>(b) an old order right, permission, permit and right issued in terms of the Mineral and Petroleum Resources Development Act for which no closure certificate has been issued, excluding permits, rights or permissions contemplated in regulation 3(2) and 3(3)(a) and (b);</p>	<ul style="list-style-type: none"> • It is unclear what the words “old order” mean in subsection (b) in this definition. This phrase generally refers to mining and related rights granted prior to the enactment of the MPRDA. The phrase is not defined in NEMA. In Schedule 2 to the MPRDA “old order mining right” means any mining lease, mynpachten, consent to mine, permission to mine, claim licence, mining authorisation or right [...] in force immediately before the date on which the MPRDA took effect and in respect of which mining operations are being conducted. However, it would seem that the definition may intend to refer to rights granted in terms of the MPRDA prior to the commencement of the one environment system. We suggest that either “old order” is defined in the Regulations, or subsection (b) is amended to clarify the meaning of old order rights, permissions or permits as per the MPRDA definition. It is essential that there is clarity as to which holders these regulations apply to. • The transitional arrangements deal with holders of rights and permits for operations identified in regulation 7(1) that were applied for after 20 November 2015 but do not deal with those identified in regulation 7(2) or 8(1) or 8(2) that were applied for after that date. There is therefore a lacuna in the transitional arrangements that is not understood and requires addressing or satisfactory explanation. If the transitional arrangements are amended to deal with these categories of holder, then the definition can stand as is. If the transitional arrangements provisions remain unchanged, then the lacuna described needs to be addressed in the definition of holder. • We do not support the exclusion, in part (b) of the definition to the extent that holders referred to in regulation 3(3) would not be bound by the draft regulations. Seismic surveys risk environmental impact and the reference in regulation 3(3) to “separate arrangements” is so vague as to be of no force or effect. Certainly, no enforceable obligation is created.
<p>3</p>	<p>“closure rehabilitation trust” means a trust provided for in section 37A of the Income Tax Act, 1962 (Act No. 58 of 1962) and which is set up in terms of the Trust Property Control Act, 1988 (Act No. 57 of 1988)</p> <p>“closure rehabilitation company” means a company provided for in section 37A of the Income Tax Act, 1962 (Act No. 58 of 1962) and which is set up in terms of the Companies Act, 2008 (Act No. 71 of 2008);</p>	<ul style="list-style-type: none"> • . According to section 37A of the Income Tax Act, funds in a closure rehabilitation trust or closure rehabilitation company must be used strictly in accordance with the requirements in section 37A. It appears that there is disparity in the tax treatment of these different financial provisioning vehicles: contributions to a closure rehabilitation trust or company are tax deductible while those in respect of financial guarantees are not. An article by Renmere advisory firm, dated August 2019, explains the problem with this disparity: • <i>“From a tax perspective, there is currently disparity in the tax treatment of the different financial provisioning vehicles. For example, whereas contributions to a section 37A rehabilitation trust or company are fully tax deductible (provided that the strict requirements of section 37A of the Income Tax Act No. 58 of 1962 (‘the ITA’) are met), contributions in respect of financial guarantees are typically not tax deductible. In other words, despite the fact that the Proposed NEMA Regulations provide for a variety of financial provisioning vehicles, the ITA in essence currently only incentivises rehabilitation by way of a section 37A vehicle.”</i> <p>The article further explains that:</p> <ul style="list-style-type: none"> • <i>“Despite the tax benefits of section 37A vehicles, the disadvantages include the punitive measures that may apply should the provisions of section 37A be contravened, as well as severe cash flow constraints. These constraints arise from the fact that these vehicles are required to be fully cash backed. Also, in practice, the funds may not be accessed for rehabilitation until after the rehabilitation has been completed (and first funded from the miner’s own pocket), subject to the DMR’s approval. Due to the abovementioned disadvantages of section 37A vehicles, miners tend to favour options which offer more cash flow flexibility, despite stricter access controls and oversight by a third party, most notably financial guarantees issued by insurers.”</i> We ask that the DFFE consider these issues. It would appear that the intention is that the Minister will establish a closure rehabilitation trust which it will administer and into which funds can be deposited, as opposed to the holder either providing cash to the Ministry itself (the previous option), or to establishing the holder’s own rehabilitation trust. However, it is unclear from the regulations whether

		<p>the Minister will in fact establish such a rehabilitation trust. Does such a rehabilitation trust already exist? If not, we submit that this should be explicitly provided for.</p>
4	<p>“independent” in relation to a specialist or auditor conducting tasks identified in these Regulations, means that—</p> <p>(a) such specialist or auditor has no business, financial, personal or other interest in undertaking such tasks excluding normal and fair remuneration for work performed in connection with such tasks; or</p> <p>(b) there are no circumstances that may compromise the objectivity of that specialist or auditor in performing such tasks; and</p> <p>(c) in the case of the oil and gas sector, such specialist or specialist team may be from a parent or affiliate company</p>	<ul style="list-style-type: none"> • In respect of subsection (c) of the definition, we strongly oppose the fact that a concession is given to specialists in the oil and gas industry and that an employee of a parent or affiliate company may act as an independent expert. Such a person can never be independent and this flies in the face of the purpose of the provision in the first place. • While we understand that it may be difficult to find specialists in the oil and gas industry, there is no bar from using specialists who live abroad. This is a particularly risky industry and the impacts when things go wrong are far reaching and devastating. <p>We submit that subsection (c) of the definition must be deleted.</p> <p>We also submit that the independence of reviewing experts is critical and that is lost if paid for by the developer. We propose that South Africa develops a system that ensures independent assessment of financial provision through an increased fee on application payable to the DMRE. Those fees should then be applied to state-appointed experts to review the financial provision assessments. This system is growing traction in other jurisdictions.</p>
5	<p>“latent environmental impacts” means impacts which are existing and defined but not yet developed and will manifest post-closure;</p>	<ul style="list-style-type: none"> • We support the requirement that latent environmental impacts are assessed and the potential financial liability associated with the management of latent environmental liabilities post-closure is determined. <p>We propose amending the definition as follows:</p> <ul style="list-style-type: none"> • Latent environmental impacts “means impacts which are existing and defined but not yet developed and <u>therefore obvious, but [and]</u> will manifest post-closure;”
6	<p>“low risk commodities” means minerals which pose a low latent environmental risk when mined and are (a) clay; (b) aggregate; (c) slate; (d) pebbles; (e) diamonds; and (f) sand; but excludes— (i) base metals; and (ii) minerals identified in (a) to (f) mined through underground mining methods;</p>	<ul style="list-style-type: none"> • We are concerned that what seems a low risk commodity isn’t always so and that there are factors other than and/or in addition to mineral type that must be considered for risk. For example, depth: the deeper the operation, no matter what the mineral: <ul style="list-style-type: none"> ○ the more risk is posed to groundwater ○ the more potential for toxins to be exposed (or just things that should not be exposed to oxygen) ○ the bigger the overburden, slimes dams, etc with all the knock-on impacts that these then have • Method and location also have a bearing on risk. For example, while the draft regulations list diamonds as a low risk commodity, this is certainly not the case for alluvial diamonds given where these are mined. • Sand mining is not at all low risk and we have seen devastating impacts where river beds have been destroyed and water courses altered to the detriment of downstream users and increased siltation due to sand mining. It is a cheap and easy form of mining and resource access and is often under the radar, it cannot be seen as low impact. • While we support the introduction of a dual system, what constitutes “low risk” and should fall into a draft regulation 7 process, is complex. We therefore propose the development of a screening tool the application of which is prescribed by the draft regulations. That tool should take spatial data into account as the environmental sensitivity and hydrological importance of the receiving environment are also relevant factors for risk.
7	<p>“market related” means the total cost of delivering goods or services to a customer, exclusive of VAT;</p>	<ul style="list-style-type: none"> • Definition of “market related” - requires redrafting, since it is an adjective, not an amount. <p>We propose amending the definition as follows:</p>

		<ul style="list-style-type: none"> • “Market related” means, in relation to the cost of provision of a good or service, the total cost that would be payable to an independent third party provider of that good or service dealing at arm’s length, excluding applicable VAT
8	<p>“master rate” means the prescribed rate applied to specific mitigation and rehabilitation activities for an operation identified in regulation 7, to be undertaken progressively, at decommissioning and closure and post-closure to manage post-closure impacts;</p>	<ul style="list-style-type: none"> • No prescribed Master Rate, templates or spreadsheets have been provided in the draft regulations. This is problematic because we are unable to determine the appropriateness of the financial provisions required by Regulation 7 without these. • Master Rate was previously provided for in the DMRE’s <i>Guideline Document for the Evaluation of the Quantum of Closure-Related Financial Provision provided by a Mine</i> when Financial Provisioning was regulated under the MPRDA in the previous regime.
9	<p>“mitigate” means to alleviate, reduce or make less severe;</p>	<ul style="list-style-type: none"> • In terms of the 2014 EIA Regulations “mitigation” means to anticipate and prevent negative impacts and risks, then to minimise them, rehabilitate or repair impacts to the extent feasible. We submit that there should not be varying definitions of this word between Regulations and that this definition should be deleted or it should mirror the definition of “mitigate” under the EIA Regulations. It should by no means water down the meaning or depart from the full spectrum catered for in the mitigation hierarchy.
10	<p>“parent or affiliate company guarantee” is a National Treasury approved, legally binding commitment, by the parent or affiliate company of the applicant or holder, registered in a country which is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (New York Convention) and has at least an investment grade credit rating from an international rating agency, who guarantees to fulfil environmental liability obligations for and on behalf of the holder or applicant in question;</p>	<ul style="list-style-type: none"> • We are concerned that this is not an appropriate tool - in the context of control of the funds, which should not be in the control of the right holder, or its parent company; and also in the context of an our experience, and that of our clients, of being passed from pillar to post when trying to ascertain what financial provision is set aside for a specific mining operation. If financial provision doesn’t attach to a particular mine, then accessing it for rehabilitation of that mine after it has been abandoned or sold proves impossible. • Additionally, we make three submissions: First, such a guarantee would only be acceptable, provided the entity giving it is of sufficient credit quality. It is certainly true that, for example, a guarantee from BHP Billiton is of greater financial comfort than a guarantee from, to use an example from the past, UBS Bank. However, the wording used around ratings is unclear and basically incorrect. It needs to be understood that there are several ratings scales, which are completely different. A national ratings scale rates an entity by reference to the sovereign – so if a South African company is seen as being as credit worthy as the SA government, it will be rated AAA (i.e. the highest rating) – this does not make it investment grade if the sovereign itself is not investment grade. Given that the SA sovereign rating is low, this should not be used. The other is a global scale rating, which is what should be used – this is the rating in relation to which SA has recently lost its investment grade rating. Only substantial companies get a global scale rating, because it is expensive to do so. In addition, there are short term and long term ratings (we need to use long term, obviously), and there are also some ratings agencies that are far more reputable than others. The simple truth is that where you are dealing with large amounts of money, the financial community <u>only</u> deals with ratings from Moodys Investors Service, Standard and Poor’s Ratings Services and Fitch Ratings. Accordingly, the wording “has at least an investment grade credit rating from an international rating agency” should read “<u>has, and maintains throughout the life of the guarantee, a long term global scale rating which is at least BBB- from one of Standard and Poor’s Ratings Services or Fitch Ratings, or Baa3 from Moodys Investors Service</u>”. Without this wording, there is significant room for low credit quality guarantees to be used. <p>A second issue is the fact that the definition appears to contemplate a performance guarantee rather than a payment guarantees. In other words, the parent or affiliate guarantees the fulfillment of the rehabilitation obligations, rather than undertaking to pay the necessary amount to the Minister, as would be the case with a financial guarantee. This is not an appropriate situation, since if the intention of the relevant group of companies</p>

		<p>was to perform the rehabilitation obligations, and it had the resources to do so, it should simply do so - there is no requirement for the Minister to call upon a guarantee in these circumstances. As such, any such parent or affiliate guarantee should also be a financial guarantee, and should also be issued for the benefit of the Minister – this does seem to be what is contemplated by draft reg 13(4). At present, there is a significant discrepancy between the definition of a financial guarantee and that of a parent or affiliate guarantee, and these definitions should be harmonized. Note also that the ratings issue identified above applies equally to the definition of financial guarantee.</p> <p>The third issue is the identification of the guarantee vis-à-vis the mine concerned. The parent company guarantee should be given on the same basis as a bank guarantee and, as such, the obligation of the parent should be easy to isolate. There is no cash involved, so it is simply a matter of relying on the creditworthiness of the parent, which is why the ratings language above is so important.</p>
11	“progressive rehabilitation” involves the staged mitigation and rehabilitation of disturbed areas throughout the life of the operation, as opposed to the large scale works at the end of the operation;	We support the regulation of progressive rehabilitation.
12	“rehabilitation” or “final rehabilitation” not defined	<ul style="list-style-type: none"> • We are concerned that there is no definition of “rehabilitation” or “final rehabilitation” and regret that there is no explanation from the Department for this exclusion. It appears that the definition of “sustainable end state” in the draft regulations is intended to replace a definition for rehabilitation, but there are problems with this. • A ‘sustainable end state’ could be either rehabilitation or restoration and for something like biodiversity the outcomes/ residual negative impacts would be very different, depending. (This also frustrates auditing compliance.) • The concept of “restore” is absent from the definition of “sustainable end state” and that definition refers to a “situation” rather than a “condition”. There is no mention of the “(state of) biodiversity”. • As “sustainability” also has meaning in the extractives industry that is not to do with environmental sustainability, and more to do with “feasibility” (which is viewed through the eyes of the developer), we submit that the regulations should leave no doubt about a restorative / protective intention from an environmental point of view in this definition. • We submit that our concerns could be addressed through including in the draft regulations a definition for “rehabilitation” or “final rehabilitation” and incorporating our submissions on the definition of “sustainable end state” which endorse the inclusion of “land, water and air” but motivate for the less nebulous concept of “sustainable end <u>use</u>”. • Corresponding changes should then be effected to sections 2 and 3 of Appendix 2.
13	“risk profiling” means to provide a non-subjective understanding of risks posed by a prospecting operation which includes the removal and disposal of a mineral and a mining, exploration or production operation by assigning numerical values to variables representing different types of environmental risks and the dangers they pose;	See comment below.
14	“risk threshold” means a determination of the environmental risk resulting from a prospecting operation which includes the removal and disposal of a mineral and a mining, exploration or production operation, which is regarded as being acceptable after the closure objectives	<ul style="list-style-type: none"> • We accept that it makes general sense to use these concepts and approaches as we understand that they are applied by practitioners and can align with safe minimum standards. However, risk is a relative term and, unless it is defined clearly, risk thresholds differ and can depend very heavily on individual judgement. Challenges associated with this heavy reliance on judgement are magnified when highly motivated, sometimes ruthless, applicants hold the purse-strings and pliant specialists, who make the majority of their income from servicing the mining sector and are not

	<p>have been implemented and the latent defects have been calculated and which is to be included in the environmental risk assessment report contemplated in these Regulations;</p>	<p>supported by the relevant environmental authorities (and are arguably encouraged by the DMRE to have a bias in favour of the extraction of the mineral or petroleum resource and therefore, the financial interests of the mining industry).</p> <ul style="list-style-type: none"> • We accept that it would not be realistic to take all judgement out of risk assessment. However, there are significant benefits associated with trying to define what an acceptable risk is as much as possible along with who gets to decide on whether something is acceptable, using what criteria and process. • We submit that the phrase “which is regarded as being acceptable” is problematic unless it is more clearly contextualised. It should not, for example, refer to the regard of the developer (or that of the specialist appointed by the developer). The determination referred to needs to be made by the regulator after meaningful consultation with stakeholders, including affected communities, particularly given the role the “risk threshold” plays in the definition of “sustainable end state”.
<p>15</p>	<p>“sustainable end state” the site specific situation for land, water and air at the time of reaching the risk threshold;</p>	<ul style="list-style-type: none"> • We support the inclusion of the state of land, water and air. However, we reiterate our previous submission that a “sustainable end use” is preferred and necessary. This submission is made in the context of our opening remarks regarding the imperative to develop predetermined and defined post mining land uses - including concurrent economic diversification planning to be done at the prefeasibility stage – because of how common it is that no economic activity is sustainable on mined land. The impact this has on aggravating poverty and inequality flies in the face of the objects of the MPRDA (to which the draft regulations relate) which include addressing historical social and economic inequality. This should therefore weigh heavily at the pre-feasibility and licensing stage. • We submit that a crucial objective of mine closure, in addition to a strategic approach to managing water and the other aspects mentioned, is a strategic approach to managing land. That objective should prioritise both land uses that support livelihoods and access to land and land reform as a political and economic imperative. Inequality in our country is sharply aggravated by the resettlement of communities to make way for mining. This practice perpetuates centuries of dispossession through slavery, colonialism and apartheid. Access to land and land reform in the first instance by and for those most affected by mining must be a central objective in conceptualising a sustainable end use. • Mining is widely documented to have a disproportionately negative impact on womens’ land rights, land-based livelihoods which contributes to the economic and social oppression/marginalisation of women. A sustainable end state must prioritise access to land for women and the inclusion of women in community controlled economic sectors. • In many situations, it is not possible to restore mined land to the state that prevailed before mining. This is particularly difficult for sensitive ecosystems but also for other land such as cultivated land where maize yields from rehabilitated land cannot be made to match maize yields prior to mining. We submit that it makes sense not to require the impossible (and augment rehabilitation with the use biodiversity offsets where restoration is not possible or is likely to be inadequate). However, it should be made clear what is most likely to be possible and acceptable post closure for ends states. If this is not done, then there is a risk of moving targets and society can’t really be reasonably sure what end state they are going to be left with.

Regulation 2: Purpose of these Regulations

15. We reiterate our commendation of the Department's efforts to emphasise in the draft regulations the importance of a sustainable end state and the efforts to require that this is conceptualised, consulted on and approved at the design stage. We submit that for an adequate interpretation of the purpose of these regulations to manifest, there is a need to reflect progressive realisation in the purpose of regulation 2(a) in order for the definition provided in the draft regulations for "progressive rehabilitation" to be actualised, to this end we propose the following insertion in regulation 2(a):

"establish the obligation of an applicant and holder to plan, implement and manage activities and procedures to mitigate and rehabilitate environmental damage caused by reconnaissance, exploration, prospecting, mining and production operations, from the outset of the operations, progressively as that environmental damage occurs;"

16. As indicated in the definitions section, it is curious that regulation 2(b) does not refer to undertaking "final rehabilitation".

17. In the absence of section 30 of the National Water Act being implemented by the department responsible for water affairs, in circumstances where the activities regulated by the MPRDA have significant impacts on water resources, we support the inclusion of regulation 2(3). We remain concerned that this provision is not rendered sufficiently implementable by the draft regulations.

18. We understand the intention of draft regulation 2(d) to be to reiterate the polluter pays principle, as provided for in NEMA, and we support an emphasis of that principle in the draft regulations, we are concerned that the wording of draft regulation 2(d) is awkward and risks watering down the legal position. The holder is always *liable* for the costs referred to and a purpose of the draft regulations is to ensure that the State (and affected communities and tax payers) do not *bear* those costs.

Regulation 3: Application of these Regulations

19. We support the express confirmation that in circumstances governed by section 52 of the MPRDA, applicants and holders remain bound by the draft regulations.

20. We take issue with draft regulation 3(3), providing that the draft regulations do not apply to the categories of applicants and holders referred to therein.

21. As mentioned in the definitions table above, seismic surveying presents risk of environmental impact.

21.1. In seismic surveys conducted onshore, the most observable effect of noise on wild animals is behavioral. Gillespie, in a report titled 'The Impacts of Seismic Exploration and International Law' writes that:

"Many animals learn to differentiate among acoustic stimuli and to adapt and live with different types of noise pollution while others have gone in the opposite direction and have shown strong sensitivities to noise pollution. This has been particularly well studied with regards to birds which, as has been known for decades, may have unique sensitivities. For example, in 1950 it was shown that adult condors were very sensitive to noise and abandoned their nests when disturbed by blasting sonic booms or even traffic noise.¹¹ Since then, additional recorded (albeit subtle) changes showed that some bird species have either changed their singing patterns to compete with other noise, or the times when they sing, such as at night. Some birds, unable to compete with other noise sources, especially those species reliant on their song, have seen their pairing success rates fall by up to 15 percent."

21.2. In seismic surveys conducted offshore, depending on the conditions of depth, temperature, salinity and surface and bottom conditions, sound can travel four times faster in water than in air. Thus, depending on the variability of conditions, sound velocity reaches speeds of up to 1600 m/s in seawater as compared with

¹¹ Gillespie, A (2011) *The Impacts of Seismic Exploration and International Law*. Page 5. See at: https://oceancare.org/wp-content/uploads/2016/07/Paper_L%C3%A4rm_Gillespie_The-impacts-of-seismic-exploration_EN_2011.pdf

350 m/s in air. Moreover, transmission loss in water is much lower which results in noises being heard at great distances. Thus, in some instance, it makes no difference in terms of impact if noise is heard 450 metres from the source, or 12 kilometres from the source. Current seismic exploration techniques using air guns radiate sound directly into the water through the rapid expansion of compressed air. This creates a short duration impulse with high peak amplitude; spectral content can extend to many thousands of Hertz (Hz). The useful frequency range for seismic exploration is typically 5-100 Hz, and as such air guns (and other seismic sources) produce 'extra' sound at frequencies that may be of concern to animals.

Gillespie writes that, in various studies conducted, "the ranges of effects to marine wildlife have spanned from negligible to fatal. At the fatal end, a few cases of beaked whale strandings appear to have coincided with seismic surveys. Indeed, the stranding of two Cuvier's beaked whales in the Gulf of California in 2002 coincided with seismic reflections. Likewise, three seismic surveys conducted off Brazil in 2002 may have been responsible for an increase in the stranding rate of adult humpback whales. However, as it currently stands, there is no conclusive evidence of a link between sounds of seismic surveys and the direct mortality of any marine mammals. There is, however, a substantial amount of research which suggests that seismic surveys do create behavioral responses (in terms of avoidance reactions, such as change in abundance, change in direction, change in speed, as well as change in blow interval and dive time) abandonment of habitat and/or 'masking' or the obscuring of natural sounds. The migration to new areas not only affects the marine diversity balance but indirectly affects humans too." A decreased catch in many fish species like herring, cod and blue whiting especially in areas susceptible to noise pollution from ships has been noticed.

Many fish (rockfish, herring, san eel, cod, blue whiting etc.) also show signs of extensive damage to their ears upon exposure to seismic air guns even up to several kilometers. Exposure to noise during embryonic stage increases sensitivity of fish to noise impact, increasing the mortality rates at time of birth and development of genetic anomalies.

22. We submit that although noise pollution in the ocean is difficult to assess, especially those of low-frequencies, the detrimental impacts that seismic surveys have on marine life cannot go unassessed and not provisioned for. We therefore propose that the definition of applicant and Regulation 3(3) are amended.
23. Additionally, the reference in regulation 3(3) to "separate arrangements" is so vague as to be of no force or effect. Certainly, no enforceable obligation is created, rendering the regulation meaningless.

Chapter 2: The environmental obligation of an applicant and holder

24. We propose that regulation 4 should be amended as follows:

"Every applicant and holder has an obligation to plan, finance, implement and manage such procedures, **[and]** requirements, activities and measures in respect of mitigation, progressive rehabilitation, final rehabilitation, decommissioning, closure and post-closure activities related to reconnaissance, exploration, prospecting, mining and production operations as identified in these Regulations".

Chapter 3: Financial Provisioning

25. Regulation 5: General requirements

- 25.1. We are concerned that the draft regulations should unequivocally prescribe that closure objectives and the sustainable end state (or end use, as motivated herein) are not left in the developer's hands, but are rather arrived at through a process of meaningful consultation and approval by the regulator (not agreement).
- 25.2. Regulation 5(1) currently reads "provide for the costs of mitigating, rehabilitating and managing the negative environmental impacts and risks associated with reconnaissance, prospecting, exploration, mining and production operations, determined against *agreed* closure objectives designed to achieve an approved sustainable end state". We submit that the reference to "agreed" in the reading of Regulation 5 (1) pertaining to closure objectives is incorrect. Such objectives are not agreed, rather they are approved by

the regulator. As such we submit that the word “agreed” should be replaced by the word “approved/authorised”

25.3. Therefore, we submit that regulation 5(1) should be amended as follows:

*“Financial provisioning is an iterative process of impact assessment and risk profiling to identify, calculate, predict and provide for the costs of mitigating, rehabilitating and managing the negative environmental impacts and risks associated with reconnaissance, prospecting, exploration, mining and production operations, determined against **[agreed]** approved closure objectives designed to achieve an approved sustainable end **[state]** use, in the short, medium and long term.”*

25.4. Regulation 5(3) purports to place responsibility on an individual Chief Executive Officer (CEO). We submit that whilst there may be some merit in trying to pin responsibility on an individual CEO, it is incorrect in law to do so. When dealing with a company, the Companies Act is very clear that control of a company vests in its board of directors.¹² The CEO only ever has delegated authority from the board. Likewise, a liquidator and business rescue practitioner would take over the authority of the board, not the chief executive officer. As such, the responsibility should rest on the board.

25.5. We propose that regulation 5(3) should be amended as follows:

*“The board of directors (and each director individually) **[Chief Executive Officer]** of the applicant or holder, or person appointed in a similar position, or, where liquidation or business rescue proceedings have been initiated, the liquidator or business rescue practitioner of the operation is ultimately responsible for implementing the requirements of these Regulations and signing off on all documentation submitted to the Minister.”*

25.6. We further note that regulation 5(3) *“The Chief Executive Officer of the applicant or holder, or person appointed in a similar position, or, where liquidation or business rescue proceedings have been initiated, the liquidator or business rescue practitioner of the operation is ultimately responsible for implementing the requirements of these Regulations and signing off on all documentation submitted to the Minister.”* However, since the closure requirements of the MPRDA are unclear whether the liquidator is obliged to apply for a closure certificate where the company itself has failed to do so or whether the liquidator(s) would be responsible for environmental damage occurring during the liquidation phase, we submit that the draft regulations do not address this gap. It is not clear whether the financial provision for rehabilitation already “made” would be regarded as an asset of the liquidated company available for distribution to the creditors.

25.7. We find that in practice, Chapter 14 of the Companies Act require that the liquidator notifies employees, trade unions and SARS of the company’s intention to initiate winding up proceedings (s 346A Companies Act, 1971) but it is not requirement for the liquidator to notify the DMRE, the DWS or the DFFE. In practice these Departments are frequently caught on the back foot, becoming aware of a company’s pending liquidation after a winding-up order has already been granted by a court. This gap is also not covered by the regulations and we propose that this be considered.

25.8. In terms of the MPRDA environmental obligations are linked to a holder of a mining or prospecting right and this in turn is defined with reference to a “person”. If no “person” legally exists these obligations by extension cannot be enforced.

26. Regulation 6: Purpose of financial provisioning

26.1. We submit that this regulation must sufficiently articulate that financial provision must also guarantee the availability of sufficient funds for offsets.

26.2. We reiterate that it is curious that “final rehabilitation” is seemingly not contemplated by this draft regulation.

¹² section 66, Companies Act 71 of 2008.

- 26.3. We submit that the purpose of financial provisioning must be to guarantee sufficient funds to ensure that all impacts of the operation are rehabilitated, and not only those impacts on the “area” over which the relevant reconnaissance, exploration, prospecting, mining or production was authorised or occurred. While the MPRDA defines such areas to be the right or permit areas specifically, frequently these activities have impacts beyond the authorised area and the purpose of the draft regulations must be to address these also.
- 26.4. We reiterate our submission above that a “sustainable end use” should be regulated by the draft regulations.
- 26.5. Accordingly, regulation 6(i) should be amended as follows:
- “the impacts of a reconnaissance, exploration, prospecting, mining or production [area] operation –can be rehabilitated and brought to approved sustainable end [state] use at the scheduled or unscheduled closure of operations;”*
- 26.6. The purpose of financial provisioning according to 6(c) is inter alia for “(c) the mitigation and management of latent environmental impacts including the ongoing pumping and treatment of polluted or extraneous water, where relevant.”
- 26.7. The MPRDA Regulations of 2004, in particular Regulation 62, similarly prescribed the “mitigation or management strategy proposed to avoid, minimise and manage residual or latent impacts”.
- 26.8. In this respect Latent and Residual impacts have been defined in the Regulations as follows:
- 26.9. “Latent environmental impact” means any environmental impact that may develop from natural events or disasters after a closure certificate has been issued.
- 26.10. “Residual environmental impact” means the environmental impact remaining after physical closure and before a closure certificate has been issued.
- 26.11. Currently, very few mines receive final closure status in South African and the key issue hinges on the abovementioned latent and residual risks and how to manage it.
- 26.12. We are of the view that from the DMRE’s side, the issue is that, while the short term success is evident, there is concern that long term issues will emerge that will pose a severe and ongoing load on the fiscus. There is therefore reluctance to issue closure certificates because of lack of certainty as to how these issues will be managed in perpetuity.
- 26.13. For example, the pumping and treatment of Acid Mine Drainage (AMD) in the Witwatersrand gold fields and the coal fields of Mpumalanga e.g. will have to continue – a significant cost - for many years after mine closure. In this regard, we report: Surface and groundwater will continue to find its way into underground workings in the Eastern, Central and West Rand goldfields. Continuous pumping of underground mine drainage is a prerequisite. It was previously assumed that in time poor quality water will separate (stratify) from the better quality water and will stay deep in the Basins, while the water closer to surface will be of a better quality. Depth profile monitoring has found this not to be the case. It was found that there is not an improvement in the raw AMD within the Central and Eastern Basins. These monitoring results therefore confirm that mine water cannot be allowed to flood the mine voids and decant since it will have significant impacts on downstream water users.
- 26.14. Whilst the organisations herein have advocated for more than a decade for the polluter pays principle including the retrospective application of the polluter pays principle, and thus welcomes the above provision in the proposed Financial Regulations, we have also observed the strategies of mining companies to relieve them of the responsibility and liability of dealing with the problems of closure (and the resultant pumping and treatment of extraneous or polluted water and latent and residual impacts).

- 26.15. the most common practice for mining companies avoiding their mine closure commitments is that of selling mines close to closure on to less well-resourced companies who will relieve them of the responsibility and liability of dealing with the problems of closure. This “pass-the-parcel” approach to the custodianship of the closure plan, where the mines inevitably end up in the hands of the weakest companies who neither have the resources, will or intention to manage closure responsibly, seriously undermines the intention of the proposed Financial Regulations. Mining companies also use complex corporate structures to obfuscate responsibility for closure. In addition to legally transferring a mining right with written ministerial consent, listed mining companies currently have the option of exiting a liability escalating venture by changing the controlling interest of the corporate entity holding the right. There is no state oversight of this process at present.
- 26.16. We provide as an example the bankruptcy case of the Mintails Group of Companies provides an excellent example of the abovementioned practice, leaving the State and the local communities around the mines with the burden of uncovered post-mining environmental rehabilitation costs¹³. In light of this we ask the following questions, have the drafters of the proposed Financial Regulations considered the above challenges and do the Financial Regulations address these challenges?
- 26.17. In the light of the aforementioned, we recommend that clearer guidelines be provided to guide the assessment of the latent and residual impacts and to clearly define what the end land and water uses must be. We refer in this case to the cumbersome process of Sibanye-Stillwater’s Ezulwini Mine to obtain closure.
27. Regulations 7 and 8: Determining of the financial provision using the prescribed template, spreadsheet and master rates and using the plans and report system
- 27.1. We support the introduction of a dual system for financial provisioning. However, we are concerned that the categories of operation that fall into draft regulation 7 are not sufficiently limited and that currently, significant environmental damage will be caused without sufficient attention to guaranteeing sufficient funds to ensure that all impacts of the operation are addressed to an acceptable standard.
- 27.2. We reiterate our comment on the definition of “low risk commodity”: we are concerned that what seems a low risk commodity to extract/mine isn’t always so and that there are factors other than and/or in addition to mineral type that must be considered for risk to be gauged. For example, depth - the deeper the operation, no matter what the mineral:
- 27.2.1. the more risk is posed to groundwater
- 27.2.2. the more potential for toxins to be exposed (or just things that should not be exposed to oxygen)
- 27.2.3. the bigger the overburden, slimes dams, etc with all the knock-on impacts that these then have.
- 27.3. Method and location also have a bearing on risk. For example, while the draft regulations list diamonds as a low risk commodity, this is certainly not the case for alluvial diamonds given where these are mined.
- 27.4. While we support the introduction of a dual system, what constitutes “low risk” and should fall into a draft regulation 7 process, is complex. We therefore propose the development of a screening tool the application of which is prescribed by the draft regulations. That tool should take spatial data into account as the environmental sensitivity and hydrological importance of the receiving environment are also relevant factors for risk.
- 27.5. We reiterate our submission above regarding the definition of applicant and submit that there are categories of applicant that the draft regulations should apply to that are omitted from draft regulation 7 (and 8). We refer in this regard to applicants for consent in terms of section 11 of the MPRDA and applicants for renewals of rights. Draft regulations 7 and 8 must be amended to ensure that those applicants are

¹³ Please refer to the Report by Stichting Onderzoek Multinationale Ondernemingen (Centre for Research on Multinational Corporations) (www.mindthegap.ng)

bound by the financial provisioning regulations and regulations 16(1) and 16(4) must be amended to align with those amendments.

- 27.6. We support the requirement for independent specialists to compile the relevant information in Regulation 7(3) and 8(3). We however propose that these independent specialists be also required to interrogate the "Master Rates" referenced in Regulation 7(1) to ensure that they are adequate and further accurately reflect the expected market price for the particular intervention or service, and are appropriately inflated for the expected date of deployment.
- 27.7. We further submit that the master rates amount should be reviewed and adjusted every year even if this means that they are merely adjusted for inflation. It is our submission that if this is not done, it creates unnecessary uncertainty as evidenced by the non-adjustment of the master rates published in the DME 2005 Guideline Document for the Evaluation of the Quantum of Closure-related Financial Provision Provided by a Mine¹⁴.
- 27.8. We submit that experience allowing rates to lag behind in inflation results in applicants using outdated master rates that are too low thereby resulting in financial provisions also being too low. The failure to update the master rates would also be in conflict with or at least counter to the spirit of, the Public Finance Management Act 1 of 1999 (PFMA).
- 27.9. Consideration should also be given to the need for master rates to be current market related rates and updated and signed off by Qualified Quantity Surveyors annually to ensure accuracies. The method of rehabilitation might also be have to be adjusted and amended and a template restricts this and often excludes very important line items. The closure objective must be achieved but a set template and master rate should be assessed for accuracy throughout the operation.
- 27.10. We submit that the proposed dual system should not be brought into effect until the master rates, templates and spreadsheets have been made available for stakeholder engagement and public comment given their critical importance in the financial provisions system. In addition, the regulations need to be clear as to where the template and master rates can be easily accessed online once the regulations are in force. This submission is made in light of the challenges regularly faced accessing information from the regulator.

28. Regulation 9: Availability of the financial provision

- 28.1. The reference in draft regulation 9(1) should be to "progressive rehabilitation" as this is what is defined in the draft regulations. However, the intention here does not appear to be completely clear. On the one hand, it is clear that financial provisioning must take account of annual rehabilitation. On the other, regulation 9(1) contemplates the availability of funds through the operational budget of the holder. It would appear that the intention is that provisioning for annual rehabilitation must be provided (probably most often in the form of a guarantee rather than actual cash, to prevent cash being unproductive) but that the cash required for rehabilitation operations must in fact be funded and provided for through the holder's operational budget. This makes sense in that the provisioning should be secured in the event that it later appears that annual rehabilitation was not in fact carried out, meaning the Minister should be able to access the secured provisioning in order to deal with the annual rehabilitation which should have taken place. If annual rehabilitation does take place, then presumably there is a rebalancing of the amount of provisioning required by virtue of the annual rehabilitation which has in fact been carried out.
- 28.2. In relation to draft regulations 9(2) to 9(4), what is provided by way of proof of provisioning requires some minor redrafting. As regards guarantees, what should be provided is the original document, since the beneficiary is the Minister – Appendix 7 requires that the original is surrendered when a claim is made, so it must be delivered. If there is a specific reason not to do this initially, then delivery of the original must be dealt with in another regulation and, at the very least, a certified copy of a signed guarantee must be provided, not a "signed certified copy". Insofar as closure rehabilitation companies or trusts are concerned,

¹⁴ <https://www.dmr.gov.za/API/Evotiva-UserFiles/FileActionsServices/DownloadFile?ItemId=1005&ModuleId=1414&TabId=162>

the affidavit should be accompanied by a certified copy of the bank statement of the relevant entity, showing the cleared funds held pursuant to the deposit.

28.3. In relation to reg 9(5) and 10(4), proof of the applicable rating of the financial guarantor must also be provided. This reg (or a new 9(6), or in 10(5), which seems to deal with the same issues) must also provide that where a parent or affiliate company guarantee is provided, proof of rating, proof of country of registration and proof of connection to the holder should all be provided.

28.4. The reference in 9(9) should presumably be to subregulations (2) to (5).

29. Regulation 10: Financial vehicles available for setting aside financial provision

29.1. We are concerned about the inclusion of a parent or affiliate company guarantee under Regulation 10(d), especially as it relates to exploration and production. What mechanisms will be used to monitor the availability of funds, how will those funds be accessed and how will the amount be reviewed on a regular basis? If the parent company goes into liquidation or business rescue, what are the mechanisms for protecting the funds set aside? While self-insurance mechanisms are relied upon in international practice,¹⁵ experience has shown that financial tests conducted for the acceptance of a company guarantee:

- 29.1.1. Often do not accurately reflect company health (often look at financial statements prepared for other purposes);
- 29.1.2. Are not guided or specified in legislation, thus resulting in differing tests and financial statements;
- 29.1.3. Are time consuming;
- 29.1.4. Are difficult to conduct on multi-level companies because it may not be clear which level of the company is responsible;
- 29.1.5. Require specialists to assess the financials due to the lack of corporate finance expertise within the authority Department/Ministry; and,
- 29.1.6. Create enforcement problems.

29.2. International practice has shown that corporate guarantees and the financial tests that inform their acceptance are high risk mechanisms and require a lot of information to provide effective assurance.¹⁶ Third-party methods provide more protection than company guarantees and 'self-insurance mechanisms'.

29.3. We submit that the risk associated, and lack of monitoring, control and access to funds is especially concerning when we consider that it could be used in high-impact exploration and production cases. We therefore submit that this subsection and allowance be removed from the regulations.

29.4. We are concerned that the reading of Regulation 10(2) remains the same – *Where the financial vehicle used is a closure rehabilitation trust contemplated in subregulation (1)(a), [no interest] will be payable by the Minister for any amounts deposited in such a closure rehabilitation trust.* It is our view that this is contrary to good practice and might be a disincentive to using this vehicle.

29.5. This will mean that the value of the cash deposited with the Minister would decrease every year in real terms because there would be no interest paid to keep pace with inflation. The implication is that additional cash will have to be deposited each year if only to maintain the required value of the cash deposit. This would impose an unfair burden on applicants and holders. It is also likely that this burden will fall mostly on smaller miners as they are most likely to opt for the cash deposit as a vehicle because of the costs associated with other options such as trust funds and bank guarantees.

¹⁵ United States Environmental Protection Agency (2010) *Research and Analysis in Support of UIC Class VI Program Financial Responsibility Requirements and Guidance*. See <https://www.epa.gov/sites/default/files/2015-07/documents/uicclass6researchandanalysisupdatedpg84.pdf>

¹⁶ *Ibid.*

- 29.6. A potential remedy would be for the Minister to undertake to ensure that all cash deposited will grow at CPI at least. If the Minister places all cash deposited into an interest-bearing fixed deposit account, it should be possible for the interest on such an account to match CPI whilst still being available to the Minister if needed within a relatively short notice period (e.g., 30-day notice deposits of R25,000 or more at commercial banks currently pay an interest rate approximately equal to CPI). (This proposal is subject to its permissibility under the PFMA or other relevant requirements.)
- 29.7. If the goal of draft regulation 10(2) is to make cash deposits unattractive thereby discouraging their use altogether then it is likely to achieve its goal. However, the clear prejudice against small miners who have limited access to the other financial vehicle options will remain.
- 29.8. Regulation 10(7) raises particular concerns for oil and gas exploration or production. We submit that, as per para 26.1 – 26.3 above, the mechanism is too risky, especially in relation to oil and gas exploration and production, and should therefore be removed as a mechanism in the Section 10(1) list.
- 29.9. We support the provisions in Regulation 10(8) which provide that a financial guarantee may not be used as a financial vehicle for the costs associated with mitigation, rehabilitation and management of latent environmental impacts.

30. Regulation 11: Review and update of templates, spreadsheets, plans and reports and confirmation or adjustment of the financial provision

30.1. We are concerned that annual reassessment as contemplated in terms of draft regulation 11(1) is impractical, and that the effectiveness and thoroughness of the process is compromised if the holder of a long-term right is required to undergo this process on a yearly basis. Annual reassessment that requires procurement, investigation, analysis and revision will lead to an endless (and possibly fruitless and ineffective) cycle of reassessment. We therefore recommend a triennial (i.e. 3-yearly) assessment and review by a competent team of specialists to ensure a better plan, improved outcomes and hence more accurate financial provision, with a discretion to reduce this to an annual requirement where appropriate (for example, where the mining permit is for a maximum of three years).

30.2. We therefore propose that Regulation 11(1) should read as follows:

*In line with the iterative process of impact assessment and risk profiling, a holder must **[annually]** triennially review and update the template, spreadsheet, plans, report and calculation contemplated in Regulation 7 or 8 with a view to re-assessing.*

30.3. We are further concerned that draft regulation 11(1)(b) refers to closure objectives and these have not been defined, nor how they relate to the sustainable end (use). We think that the reference to sustainable end state in draft regulation 11(1)(c) has inadvertently been limited to land, and that this needs to be aligned with the definition.

31. Regulation 12: Audits and related requirements

31.1. We support the proposed time frame for conducting of audits provided for in Regulation 12(1) to be done on a triennial basis. We are however concerned with the provision under 12(2)(a) that makes provision for the audit process to be concluded in a period not exceeding 36 months. This time period should be reduced to 12 months as it would mean that the audit process may otherwise conclude too late - 6 years after the fact.

31.2. The audit referred to in draft regulation 12(2) should be to a review by independent specialists of the scientific and engineering acceptability of the measures and the adequacy of related costs associated with complying to the provisions of these Regulations, following inspection on site. The team must understand, for example, biological succession paths.

32. Regulation 13 and 15: Cancellation and claiming against a financial guarantee or parent or affiliate company guarantee and Withdrawal against a financial provision to facilitate decommissioning and final closure activities

- 32.1. We submit that in terms of draft regulation 13(1), notice of intention to cancel or withdraw a financial guarantee should not be communicated to the Minister by registered mail as there is a risk as to whether registered mail will actually come to the Minister's attention timeously or at all.
- 32.2. We propose instead a requirement that notice be given by electronic mail [and setting up an email address specifically for this purpose] and by hand-delivered mail.
- 32.3. The drafting of 13(1) also needs revision. We propose the following wording:

"13(1) In the event that a financial institution which has provided a financial guarantee, or a parent or affiliate company which has provided a parent or affiliate company guarantee (in each case which supports a financial provision) intends to cancel the applicable guarantee, the financial institution or parent or affiliate company must communicate its intentions, by hand delivered mail and electronic mail, at least six months in advance to the holder, the Minister and the Minister responsible for environmental affairs".

(The same issue around registered mail should be changed in Appendix 7.)

- 29.4 There is a problem where the guarantor is foreign, since it will not be bound by the provisions of the regulations, so the offences relating to regulation 13 will be without consequence. Nevertheless, these provisions are partially included in the terms of the financial guarantee (Note: there is no template for the parent or affiliate guarantee) so that there is at least a breach and consequent damages claim if the provisions are not adhered to.

- 32.4. We submit that draft regulation 15(1)(e)(i) should be amended as follows:

"mitigation and rehabilitation having been achieved in the form of, amongst others, survey reports, photographs and satellite imagery as identified in the approved final rehabilitation, decommissioning and mine closure plan signed off by an independent specialist who has conducted a site inspection."

33. Regulation 16: Responsibility of an applicant or holder to consult and disclose information

- 33.1. We commend the inclusion of express provisions to ensure regulation of consultation and of disclosure of information in draft regulation 16. We submit that this draft regulation requires some enhancement and clarification.
- 33.2. We submit that there is a constitutional duty to consult in various processes governed by the draft regulations but that as currently phrased, this is not sufficiently clear and will therefore affect compliance and enforcement of that compliance. Those processes are the determination of the closure obligations for approval by the regulator, the determination of the sustainable end state (use) for approval by the regulator, the determination of the financial provision, the review of the financial provision and the audit of the financial provision. Draft regulations 16(1) and 16(4) require amendment to ensure that each of these processes is incorporated.
- 33.3. We submit that the draft regulations need to cater for consultation and disclosure of information specifically on the determination of closure objectives and the sustainable end state (use).
- 33.4. We submit that the structure of draft regulation 16 should be revised to cater for the application for approval processes first and the processes once approval has been obtained second.
- 33.5. We submit that draft regulation 16(2) requires amendment by:

33.5.1. the insertion of a reference to draft regulation 12(2)(d) therein, in addition to the reference to draft regulation 11(4)(b);

33.5.2. the insertion of cross references to the duties in regulations 7(4) and 8(4);

33.5.3. the insertion of references to the regulations we have proposed in relation to closure objectives and sustainable end state (use);

- 33.5.4. the insertion of the duty to notify interested and affected parties specifically of the decisions because they remain stakeholders throughout the life of the operation; and
- 33.5.5. the inclusion of a reference to the right to appeal the decision and the process that applies to that appeal.

33.6. We submit that draft regulation 16(4) should be amended to:

- 33.6.1. include reference to each of the regulations/processes referred to in our preceding paragraph;
- 33.6.2. to cater for making the documents and applications available prior to submission to the Minister for approval and with a reasonable timeframe for the submission of comments thereon;
- 33.6.3. the insertion of the duty to notify interested and affected parties specifically of the availability of the documents because they remain stakeholders throughout the life of the operation
- 33.6.4. in draft regulation 16(4)(c) to prescribe that making the documents available to the public on request should be in hardcopy or electronically.

33.7. Draft regulation 16(5) should be:

- 33.7.1. amended to refer to subregulations (2) and (4) therein (the current reference to subregulation (5) appears to be an error);
- 33.7.2. clarified by reference to “the holder’s website”
- 33.7.3. amended to by the insertion after the words “site office” of the phrase “and electronically on request”.

34. Regulation 17: Powers and duties of the Minister

- 34.1. We welcome the view that the Minister is to account for the funds held in the account administered by him or her, however for this view to meet its purpose, the register kept by the Minister must be made available for public scrutiny. We therefore suggest an amendment to draft regulation 17(2) to read as follows;

“The minister must keep a register of funds kept in the trust contemplated in Regulation 10(1)(a), including details of the amount held per applicant and holder related to permissions, permits and rights, and which operations the fund are held for,

The register must be updated every three months and an up to date copy thereof must be published on the website of the Department responsible for Mineral Resources.”

- 34.2. Our submission that the register of funds should reflect the amount held per applicant and holder and related these amounts to each specified operation, is to address the problem we and our clients experience where the Department responsible for mineral resources is unable to provide information on the financial provision set aside for a particular operation. For a community affected by a specific operation, this is an untenable situation.

Chapter 4: Transitional arrangements

35. We generally support the transitional arrangements but have a few concerns as follows.

36. We do not support the additional time afforded to off-shore oil and gas operators for compliance with the draft regulations. These companies have been aware of the law reform process underway for years in relation to financial provisioning and should have been preparing themselves for compliance. This comment does not apply should these operations be suspended pending compliance with the draft regulations.

37. We submit that draft regulation 18(3) must refer to draft regulation 8(1) and not only draft regulation 7(1). Failing a reference to draft regulation 8(1), there is a host of operations that will not be catered for.

38. For the sake of clarity, we propose the insertion of the phrase “whichever was applicable when application for approval was made” following the words “still in effect” in draft regulation 18(4).

39. We submit that the reference to “annual” in draft regulation 18(5) should be a reference to “triennial”.
40. We support the consultation obligation in draft regulation 18(6). We suggest that the Minister, in considering the duration of the payment plan, consider the duration of the right or permit and that the text of the regulation specifically provides for this.
41. We submit that the payment plan and timeframe must be subject to approval by the Minister of Finance, and not merely “supported” by them.
42. The wording of draft regulation 18(6)(e) needs to align with the wording use elsewhere in the draft regulations on “sustainable end state (use)”.
43. Draft regulation 18(7) should be amended by the insertion of the phrase “, and must be furnished by the holder” after the words “from the holder”.
44. Draft regulation 18(8) requires amendment by the substitution of the words “proof of” for the words “any indication”.
45. Draft regulation 18 should provide for the event of non-compliance with or breach of the payment plan by the holder because as it stands, there are no consequences for non-compliance or breach.
46. We question the need for a timeframe difference for mining (19 June 2022) and oil and gas (19 February 2024), and we suggest that the threshold be reviewed. What is different between what needs to be done by general mining vs oil and gas activities?
47. We submit that the risk threshold used in the appendices need to be different for mining vs oil and gas activities. The vast differences in the impacts caused by each should warrant a more nuanced threshold and calculation of financial provisions used in the Regulations.

Chapter 5: General matters

48. Regulation 20: Penalties

- 48.1. We submit that Regulation 20 should prescribe an obligation to rectify the offence, where relevant, through an administrative penalty process. The Minister should be empowered to require specific performance of any activity for which Financial Provisioning may have been set aside, should this be required to achieve or promote the objectives of the Regulations.

Appendix 1

49. We welcome the provision of the appendices generally and support the **objectives** of the annual rehabilitation plan. Given the important role of annual rehabilitation in ultimately achieving closure and guarding against mine abandonment, we submit that the annual rehabilitation plan must aim to record the activities that were not undertaken and the targets not achieved in the preceding 12 months with an accounting or explanation for this in a plan to address these in the current 12 months. This is important for accountability and, where appropriate or necessary, compliance enforcement.
50. We support the **content** requirements of the annual rehabilitation plan but, for the reasons indicated in our preceding paragraph, submit that all non-compliances with the plan from the preceding period should be recorded.
51. We propose that a new item 3.1.5 is inserted requiring that the details of all rights, permits, licences and authorisations associated with the project/operation, including the right or permit number, environmental authorisation number, and similar details of all other authorisations received and/or required, e.g. water use licence, waste management licence, etc. are contained in the plan.

52. We submit that “shortcomings” in item 3.4 should be substituted with “activities not undertaken and targets not met”.
53. We submit that the annual rehabilitation plan should include an implementation plan against which compliance can be measured.

Having noted this, it bears to emphasise the importance of clarity regarding the definition of “sustainable end state” as the definition of ‘sustainable end state’ as it stands, it is not sufficiently clear that the end use, which is more holistic than the ‘end state’ is properly included. Sustainable end **use** would include socio-economic considerations over and above those considerations in respect of the end state of land, air and water, it would also encourage an appropriate end use to be approved prior to commencement. In this regard we proposed an amendment to that definition hereinabove.

With “sustainable end state” being defined, we propose that paragraph 3 be amended as follows:

*“The annual rehabilitation plan will be relevant for a period of 12 months, after which the plan is to be updated to reflect progress relating to mitigation and rehabilitation activities in the preceding 12 months and the updated extraction and rehabilitation schedules as well as the budget for the forthcoming 12 months. The annual rehabilitation plan must contain information that defines concurrent mitigation and rehabilitation activities for the forthcoming 12 months and how these relate to the operations’ closure vision and sustainable **[end state] end use**, as detailed in the final rehabilitation, decommissioning and mine closure plan. The annual rehabilitation plan must indicate what closure objectives and criteria are being achieved through the implementation of the plan, it must be measurable and auditable and must include—”*

Appendix 2

54. We support the proposed final plan but reiterate our comments elsewhere herein regarding the need for closure objectives and a sustainable end state (use) to be subject to public participation and approval by the regulator and not simply “agreed”, “preferred”, “proposed”, “identified” etc. The latter terms need to be deleted from this Appendix and “approved” substituted.
55. We reiterate our submissions regarding the need for a sustainable end use to be approved and achieved.
56. It is most often the case that it is not possible to restore mined land to its pre-mining state. We submit that in the climate crisis, experienced more seriously on the African continent, and the consequential threats to food and water security, particularly to those in our society who are most vulnerable, the loss of sensitive ecosystems and agricultural land (such as cultivated land where maize yields from rehabilitated land cannot be made to match maize yields prior to mining) must weigh particularly heavily. The end use needs to be sustainable, in keeping with the legal and governance framework, appropriate, reflective of the local environmental and socio-economic context, feasible, possible to implement, based on stakeholder consultation specifically with affected communities. Regard must be had to the significant pressure on the specialists to recommend an end state more favourable to the applicant or holder. There is significant risk that the requirement for end states to be “feasible” in particular is used to justify an end state that requires lower expenditure by the applicant relative to other end states that may be more beneficial to society. More specific regulation will obviously be a good thing in such circumstances to ensure that extractives projects address or alleviate rather than aggravate our country’s socio-economic challenges in the long term, or else are not given the go-ahead.
57. We submit that item 2.2 of this appendix must include explicit end states/ targets for biodiversity (rather than just ‘general environmental quality objectives’).
58. We propose that a new item 3.1.4 is inserted requiring that the details of all rights, permits, licences and authorisations associated with the project/operation, including the right or permit number, environmental authorisation number, and similar details of all other authorisations received and/or required, e.g. water use licence, waste management licence, etc. are contained in the plan.
59. We submit that the final plan should contain timeframes for its implementation.

60. While we appreciate that provision must be made for unforeseeable circumstances, there must be specific checks and balances to ensure against a shifting of the goal posts to accommodate what is financially more desirable for the applicant/holder.

Appendices 4 and 5

60.1. The formula in Appendix 4 is Total 1 + Total 2 = sum \times VAT. The convention is sum \pm VAT and we submit that the formula should be amended to reflect this.

60.2. The same comment applies to the formula in Appendix 5.

We thank you for the opportunity to submit comments on the draft regulations and invite discussion any aspect thereof in more detail should this be necessary or useful.

Yours faithfully

Centre for Environmental Rights

The Centre for Applied Legal Studies

The Federation for a Sustainable Environment

Lawyers for Human Rights

Endangered Wildlife Trust

Mining and Environmental Justice Community Network of South Africa

Khuthala environmental Activist group, Ermelo