

**Reference:**

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**FEEDBACK ON THE REGULATIONS PERTAINING TO THE FINANCIAL PROVISION FOR PROSPECTING, EXPLORATION, MINING OR PRODUCTION OPERATIONS UNDER SECTION 44(aE), (aF), (aG), (aH) READ WITH SECTIONS 24(5)(b)(ix), 24(5)(d), 24N, 24P AND 24R OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO.107 OF 1998) (“THE NEMA”)**

**1.** **PURPOSE**

To request that you take note of–

* 1. the purpose of the Financial Provisioning Regulations, 2015 (“the Regulations”);
  2. interactions with stakeholders including industry in relation to the amendments
  3. main challenges raised through the process.
  4. Trust fund

**2**. **BACKGROUND AND DISCUSSION**

* 1. The Ministers responsible for environmental affairs, water and sanitation, and mineral resources, entered into an agreement to manage the environmental impacts of mining through a single environmental system under the National Environmental Management Act, 1998 (Act No.107 of 1998) (“the NEMA”). As of 08 December 2014, the Department of Mineral Resources (“the DMR”) became the 11th Competent Authority (“CA”) responsible for the issuing of environmental authorisations (“EA”) and waste management licenses (“WML”) under the NEMA and the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (“the NEMWA”).

* 1. This agreement has been formalised through the amendment of the various relevant environmental, water and mining legislation. Section 44 of the NEMA, in particular, has been amended to empower the Minister of Environmental Affairs to “promulgate regulations with respect to:
* the assessment and determination of environmental liability;
* auditing and reporting of environmental liability; and
* any other matter necessary to facilitate the implementation of the financial provision.”
  1. In line with above powers, draft regulations pertaining to the financial provision for prospecting, exploration, mining or production operations were developed by the Department of Environmental Affairs (“the Department”) to regulate the making of financial provision, as contemplated in the NEMA, for the costs associated with the undertaking of management, rehabilitation and remediation of environmental impacts from prospecting, exploration, mining or production operations. Further, the determination of adequate financial provision for rehabilitation of mining is to ensure rehabilitation and to protect the State from liability.
  2. The Regulations were published for implementation on 20 November 2015, as GNR 1147 in Government Gazette No. 39425.
  3. Subsequent to the Regulations coming into effect, the Department met with various stakeholders, amongst others the Chamber of Mines, who had expressed serious misgivings regarding the content and implications of the regulations.
  4. Subsequent to the Regulations coming into effect, the mining industry, through the Chamber of Mines and BUSA engaged with Department and Treasury regarding certain provisions which were not aligned to the Tax Act and concerns regarding tax implications of certain of the provision of the regulations. Other concerns were also raised related to:
     1. The intentions of some provisions not being clear
     2. The inclusion of the annual rehabilitation requirement in the financial provision to be set aside – double accounting
     3. The cost to the industry of retaining funds for 10 years
     4. The possible “ultra vires” nature of the provision related to care and maintenance and closure/partial closure
     5. The restriction of the trust fund mechanism for financial provision to latent defects
     6. The inclusion of the financial liability on the financial statement of the holder
     7. Requiring the CEO to take responsibility for the financial provisions and the implementation of concurrent rehabilitation
     8. Public access to the EMPR and the calculation of the financial provision
     9. Timeframes for existing holders to comply
     10. Burden of an annual audit
     11. Proof of payment of funds into the vehicle for financial provision before commencement
     12. Appendices for guarantees and trust funds felt to be prescriptive
     13. Qualifications/costs of auditors and specialists needing to prepare and review documents
     14. Inclusion of VAT into the financial provision – DMR contracting out rehabilitation charged VAT
     15. Building in of escalation for premature closure on a proportional basis
  5. To understand, and where appropriate to address the issues raised a series of engagements with the mining sector through BUSA and the Chamber of Mines were held

* 1. Further, to address issues and align the regulations to various acts, interdepartmental meetings/workshops were held with Department of Mineral Resources (DMR), the Department of Water and Sanitation (DWS), National Treasury (NT) and the South African Revenue Service (SARS)
  2. These engagements lead to the Department issuing an extension of two years for implementation of the regulations for existing holders. This extension was published and came into effect on the 26 October 2016
  3. Clarification of certain issues, alignment, and discussion on additional amendments have been ongoing during the extended industry consultation.
  4. Through regulations review process certain alignment issues between the various Acts, being the Income Tax Act, the National Environment Act and the Mineral and Petroleum Resources Development Act, were identified and need to be rectified. These are as follows:
     1. The intention is to allow the financial provision sum related to latent defects to be ceded to the DMR to allow for closure of mines and wrapping up of boards etc., NEMA and the Income Tax Act currently do not make provision for this and must be amended
     2. The intention is also to allow for a three yearly audit and not an annual audit as is currently required in NEMA. The act needs to be amended to allow for the more relaxed audit period
     3. The MPRD is to be amended to ensure alignment between NEMA and the MPRD in terms of environmental liability NEMA has unlimited liability, the MPRD amendment bill restricts liability to 20 years
  5. A final industry meeting will be held on the 10th to discuss the remaining items which include the following:
     1. Calculation of the sum for financial provision
     2. Potential misalignment of future risks with financial auditing standards
     3. Proportionality of escalation for premature closure
     4. VAT to be included or not in the Financial Provision
     5. Approval of plans – versus approval of the financial provision and by implication the approval of plans
     6. Clarity on the content of EMPR versus the financial provision plans
  6. After the meeting the amendments will be finalised and the regulations gazetted for public comment for a period of 30 days. Comments will then be incorporated as required after which they will be gazetted for implementation.