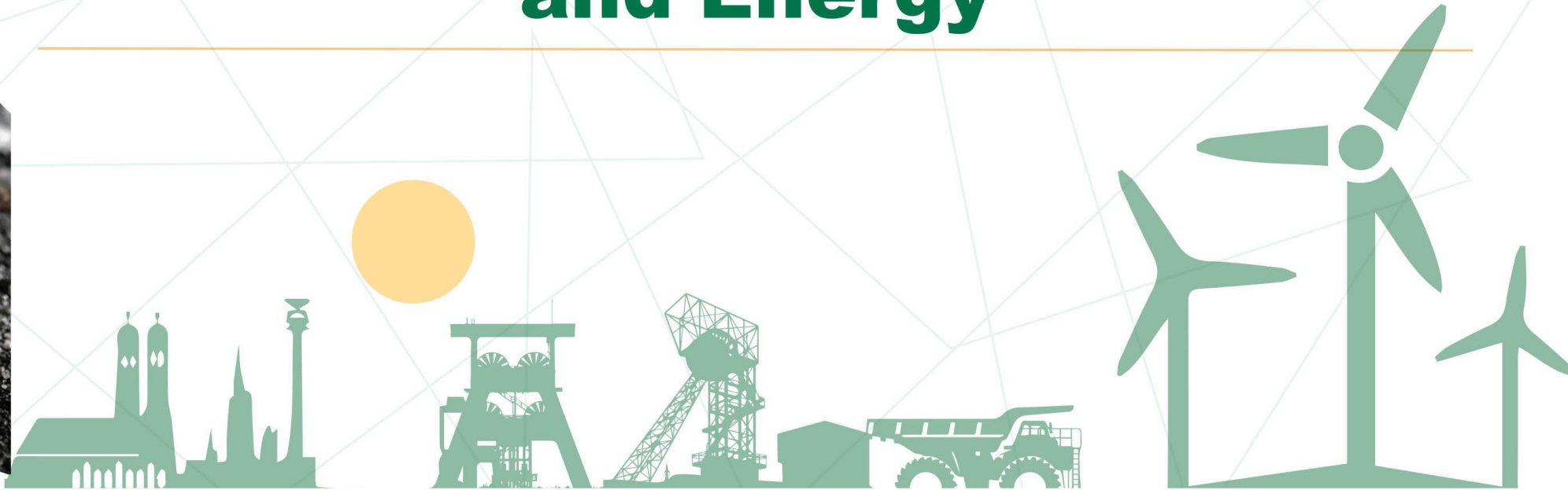



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Financial provisioning for environmental rehabilitation of mining, prospecting and exploration activities

Adv Mmadikeledi Moloto
Deputy Director-General
8 November 2022



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PRESENTATION STRUCTURE



Background



Legislative evolution on financial provision



Effect of business rescue



Determining financial provision



Conclusion

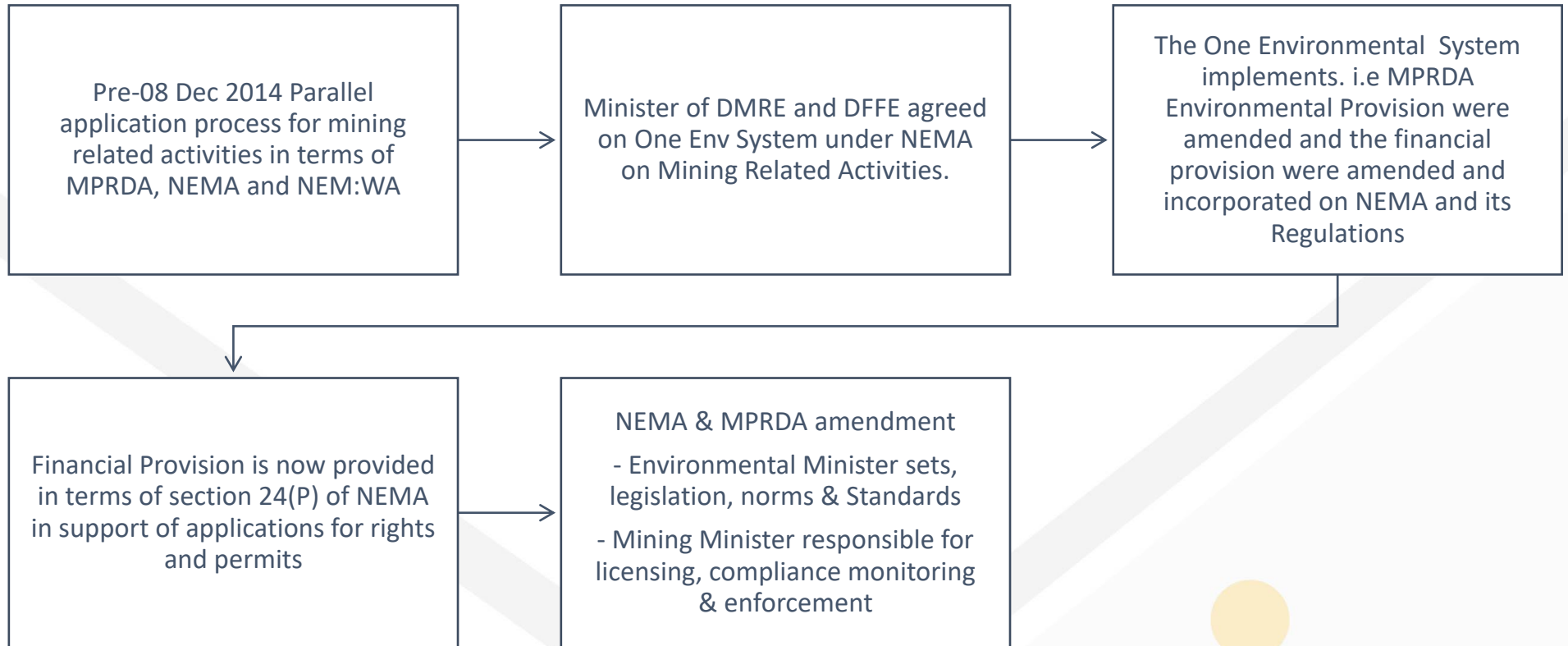


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BACKGROUND





LEGISLATIVE ENVIRONMENT

- National Environmental Management Act, 107 of 1998
 - EIA 2014 Regulations
 - Financial Provision guideline (2015)
- National Environmental Management: Waste Act, Act 59 of 2008
 - Waste Regulations
- National Appeals Regulation
- Section 37A Income Tax Act

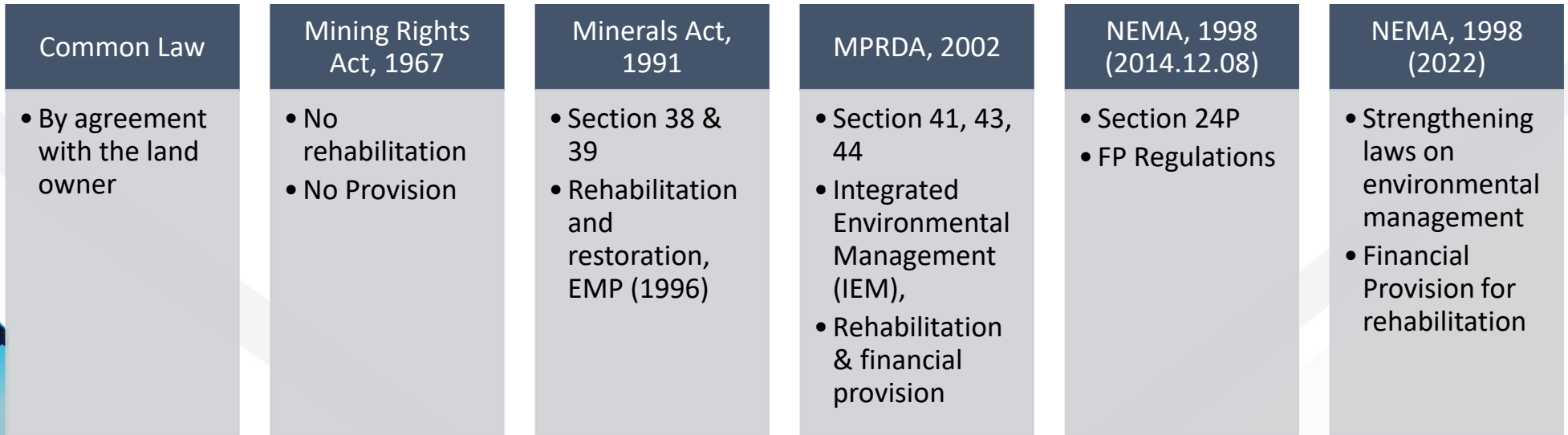


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LEGISLATIVE EVOLUTION ON FINANCIAL PROVISION



- 11 July 2022 proposed regulation
- Method of calculation
- % retention of FP
- others



DEFINITION OF FINANCIAL PROVISION

“**financial provision**” means the insurance, bank guarantee, trust fund or cash that applicants for an environmental authorisation must provide in terms of this NEMA guaranteeing the availability of sufficient funds to undertake the-

- (a) rehabilitation of the adverse environmental impacts of the listed or specified activities;
- (b) rehabilitation of the impacts of the prospecting, exploration, mining or production activities, including the pumping and treatment of polluted or extraneous water;
- (c) decommissioning and closure of the operations;
- (d) remediation of latent or residual environmental impacts which become known in the future;
- (e) removal of building structures and other objects; or
- (f) remediation of any other negative environmental impacts;





SECTION 24P – NEMA (1)

24P. Financial provision for remediation of environmental damage.—

(1) An applicant for an environmental authorisation relating to prospecting, exploration, mining or production must, before the Minister responsible for mineral resources issues the environmental authorisation, comply with the prescribed financial provision for the rehabilitation, closure and ongoing post decommissioning management of negative environmental impacts.

(2) If any holder or any holder of an old order right fails to rehabilitate or to manage any impact on the environment or is unable to undertake such rehabilitation or to manage such impact, the Minister responsible for mineral resources may, upon written notice to such holder, use all or part of the financial provision contemplated in subsection (1) to rehabilitate or manage the environmental impact in question.

(3) Every holder must annually—

a) assess his or her environmental liability in a prescribed manner and must increase his or her financial provision to the satisfaction of the Minister responsible for mineral resources; and

b) submit an audit report to the Minister responsible for mineral resources on the adequacy of the financial provision from an independent auditor.





SECTION 24P – NEMA (2)

(4) (a) If the Minister responsible for mineral resources is not satisfied with the assessment and financial provision contemplated in this section, the Minister responsible for mineral resources may appoint an independent assessor to conduct the assessment and determine the financial provision.

(b) Any cost in respect of such assessment must be borne by the holder in question.

(5) The requirement to maintain and retain the financial provision contemplated in this section remains in force notwithstanding the issuing of a closure certificate by the Minister responsible for mineral resources in terms of the Mineral and Petroleum Resources Development Act, 2002 to the holder or owner concerned and the Minister responsible for mineral resources may retain such portion of the financial provision as may be required to rehabilitate the closed mining or prospecting operation in respect of latent, residual or any other environmental impacts, including the pumping of polluted or extraneous water, for a prescribed period.



Financial Provision and Insolvency

- The financial provision for rehabilitation of mines does not form part of the Company's assets and thus cannot form part of its insolvent estate
- s24P(6) The Insolvency Act, 1936 (Act No. 24 of 1936), does not apply to any form of financial provision and all amounts arising from that provision.



EFFECT OF BUSINESS RESCUE ON MINING COMPANIES



"business rescue"

Necessary legislative mechanism to facilitate the rehabilitation of a company that is financially distressed



- Temporary supervision of the company and its affairs, business and property;
- Places a temporary moratorium on the rights of claimants against the company or in respect of property in its possession
- Allows for the development and implementation, of a plan to rescue the company (its affairs, debt and other liabilities)



- Maximise the likelihood of the company continuing in existence on a solvent basis or in a better return for the company's creditors or shareholders
- To minimize the impact it would have on creditors and shareholders if the company had been instead liquidated



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PLACING A COMPANY ON BUSINESS RESCUE

- Company resolution to begin business rescue proceedings
 - The board of a company adopt a resolution to voluntarily begin business rescue proceedings and place the company under supervision, if the board believes that the company is financially distressed and there are reasonable prospect of rescuing the company.
- Court order to begin business rescue proceedings
 - The second method happens when an affected person applies to court an for an order placing the company under supervision and commencing business rescue proceedings.
- If liquidation proceedings have already been commenced against the company at the time an application is made the application will suspend those liquidation proceedings until conclusion of business rescue proceedings or a final order of court is made





MORATORIUM ON A COMPANY ON BUSINESS RESCUE (1)

- ❑ During business rescue proceedings, no legal proceedings (i.e enforcement action in relation to any property belonging to the company) except-
 - with the written consent of the practitioner, or with the courts leave and in accordance with any terms the court considers suitable;
 - as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began; criminal proceedings against the company or any of its directors or officers
 - proceedings concerning any property or right over which the company exercises the powers of a trustee;
 - **Proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.**



MORATORIUM ON A COMPANY ON BUSINESS RESCUE (2)

- ❑ During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.
- ❑ If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit (prescription), the measurement of that time must be suspended during the company's business rescue proceedings



METHODS OF FINANCIAL PROVISIONING

- ❑ An applicant or holder of a right or permit must make financial provision:
 - Financial guarantee from a bank registered in terms of the Banks Act, 1990 (Act No. 94 of 1990) or from a financial institution registered by the Financial Services Board as an insurer or underwriter;
 - Cash deposit into an account administered by the Minister responsible for mineral resources and energy; or
 - Contribution to a trust fund that complies with section 37A of Income Tax Act.



FINANCIAL GUARANTEE

- Financial guarantee from a bank registered in terms of the Banks Act, 1990 (Act No. 94 of 1990) or from a financial institution registered by the Financial Services Board as an insurer or underwriter;
- The financial institution must comply with the Prudential Authority requirements for issuing non-life insurance or financial products
- The Minister is able to claim against the guarantee where the company has failed to meet its obligations and apply the funds for rehabilitation and remediation of environmental damage



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CASH DEPOSIT (1)

- This fund is administered by the DMRE Rehabilitation Trust, established in 2003 to provide holders of prospecting and mining rights with the option to make financial provision by way of cash deposits.
- Prior to its establishment, cash deposits were kept in a departmental suspense account.
- However, upon the promulgation of the Public Finance Management Act (the “**PFMA**”) in 1999, the state was prohibited from holding funds on behalf of or in Trust for any person, which necessitated the establishment of a separate trust fund.
- The Trust Fund was audited by the AG in 2020 and obtained a Clean Audit.
- The trustees of the Trust are officials in the employ of the DMRE.
- The secretarial and administration functions of the Trust are performed by the Department’s Financial Administration Chief Directorate under the control of the Chief Financial Officer.

CASH DEPOSIT (2)

- The trustees must receive, invest and administer such funds received from holders of prospecting and mining rights, i.e. the beneficiaries, for the sole purpose of funding the execution of Rehabilitation of operating mines.
- Upon discharging its statutory rehabilitation obligations to the satisfaction of the DMRE, funds deposited by a beneficiary must be placed at the disposal of such beneficiary.
- Should a beneficiary fail to carry out its statutory rehabilitation obligation, funds will be placed at the disposal of the DMRE for rehabilitation.
- Should there be any balance standing to the credit of any Beneficiary(ies) after all the measures required to be taken in order to comply with its statutory obligations have been executed to the satisfaction of the DMRE, the said balance shall be kept in the Trust fund for such Beneficiary(ies) to be utilised for future rehabilitation only.
- The “account administered by the Minister” is therefore a Trust which accepts contributions from the Beneficiaries for the sole purpose of their rehabilitation obligations.



TRUST FUND – 37A INCOME TAX

Contribution to a trust fund that complies with section 37A of Income Tax Act.

- Deductibility of contributions made to a mining rehabilitation company or trust, section 37A(1)
- Types of rehabilitation expenditure provided for
- Qualifying assets of a mining rehabilitation company or trust – which is the assets held solely for purposes of rehabilitation
- Distribution of property by a mining rehabilitation company or trust (at closure & decommission and for the positive balance remaining after obligations have been met)
- Tax treatment of a mining rehabilitation company or trust and the persons who may be eligible for the deduction



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HOW TO DETERMINE FINANCIAL PROVISION

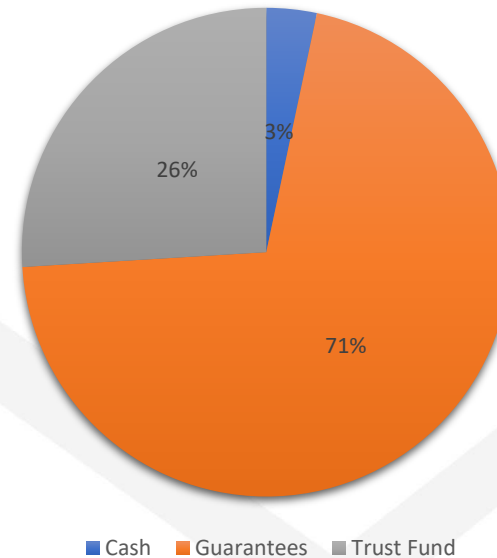
- The Act places an obligation to the applicant —
- To ensure that a determination is made of the financial provision and the plans are submitted for consideration by the Minister for environmental authorisation, the associated environmental management programme and the associated right or permit in terms of the MPRDA;
- Financial Provision, at any given time, equal to the sum of the actual costs of implementing the plan and reports, for a period of a least 10 years – post closure
- The determination, review and assessment must be done by a specialist.
- The financial provision liability may not be deferred against the assets at mine closure or mine infrastructure.
- Where a bank or insurer is used for payment or adjusting the FP, verification of registration of the financial institution must accompany the proof of payment.



Financial Provision Position (November 2022)

Right Type	Cash	Guarantees	Trust Funds	Total Provision
Mining & Prospecting	3 150 522 530.22 (3,1 billion)	66 933 963 907,15 (66,9 billion)	24 583 156 461,41 (24,5 billion)	92 734 730 462,54 (92,7 billion)

Mining & Prospecting



POWERS OF THE MINISTER

- ❑ May only grant EA after arrangements have been made for financial provision and proof is provided
 - If the Minister is not satisfied with the calculations or the assessment, can request the holder to revise at own cost & can have the calculations reviewed by external party at own costs
 - Appoint an independent assessor at the cost of the applicant.
 - May retain a portion of the financial provision based on the environmental risk report on issuing of a closure certificate and must return the remaining financial provision
 - If a holder of a right or permit fails to undertake rehabilitation the Minister of DMRE may use the financial provision or such portion as required to carry out the rehabilitant or claim the costs from the holder

OFFENCES UNDER FINANCIAL PROVISIONS

- Regulations places an offence if any person contravenes the financial provision regulations
 - Not to have it sufficiently covered
 - Withdrawn without permission
 - Not having it covered after being directed to do so
- Compliance inspections and audits are undertaken periodically to verify the adequacy of the financial provision, and where there is a shortfall the holder is directed to correct the shortfall.
- If the holder has failed to rectify after being ordered to do so, they may be prosecuted - Regulation 18(1) may result in the holder being convicted to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine or such imprisonment.



DEALING WITH MINE CLOSURE

- Application for closure is in terms of Section 43 of MPRDA (Act 28 of 2002)
 - **Application for closure together with**
 - Closure Plan
 - Final Performance Assessment Report
 - Environmental Risk Report MPRDA
- Reimbursement of cash deposit done upon issuing of closure certificate

Submission of reimbursement must have the following

- ✓ Full details of the holder
 - ✓ Copy of permit or right and closure certificate
 - ✓ Amount provided and amount to be refunded
 - ✓ Proof of banking details for refund purpose
 - ✓ Affidavit in case of the third party refund
- No refund will be made if the holder owes prospecting fees



CONCLUSION

- We appreciate that over a century of mining where environmental regulation was not part of our law, has resulted in the State inheriting the liability for those mines where the holders cannot be traced. This position has been drastically changed in the legislative amendments since (the Minerals Act, MPRDA and NEMA).
- The financial provision for rehabilitation is currently highly regulated to ensure that the State does not inherit a responsibility of rehabilitation when mines prematurely decommission.
- This is a commitment of the Department and it is being discharged rigorously.



THANK YOU



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