

 <p>environmental affairs Department: Environmental Affairs REPUBLIC OF SOUTH AFRICA</p>	Reference:	Minutes: Financial Provisioning Regulations: Intergovernmental and Stakeholder meeting on the NEMLA Bill and proposed amendments to the Financial Provisioning Regulations		
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Date: 24 May 2018

Time: 09h00-15h00

Venue: Premier Hotel, Arcadia, Pretoria

	Opening and welcoming remarks	<ul style="list-style-type: none"> • Opening and Welcome by Mr Alf Wills. • Attendance as per attendance register. • Agenda approved with the addition of “care and maintenance” to “other” • Purpose of the meeting: <ul style="list-style-type: none"> – To discuss issues of the Financial Provisioning Regulations (FPR) that are affected by the NEMLA Bill. • Context and background to the meeting <ul style="list-style-type: none"> – Amendments to the proposed FPR were gazetted for comment on 10 November 2017 – Comments received were considered and proposals on changes to the regulations have been discussed between DEA/Treasury/SARS/DMR and DWS. – A few of the changes proposed will require amendments to the empowering NEMA Act. – Amendments to the NEMA Act were submitted to Parliament earlier in the year and in April 2018, the Portfolio Committee (PC) 	

		<p>for environment held public hearings on the Bill after which the Department was requested to consider the inputs and to make recommendations to the PC on how the comments could be incorporated.</p> <ul style="list-style-type: none"> – Through this process the Department made proposals and included the additional amendments which were required to enable the various amended provisions of the Financial Provisioning Regulations. – The PC for environment requested that DEA urgently engage with stakeholders on the proposed NEMLA amendments which were not in the version gazetted for public comments and to provide report to the PC on the outcomes. – The expectation from today’s meeting is to share the issues that have not been previously deliberated upon with stakeholders, to engage and to feedback to the PC on the initial reactions to the proposed amendments. <ul style="list-style-type: none"> • The first issues on the agenda are matters which have been raised during the NEMLA4 process or have been added to the NEMLA Bill due to the comments received on the proposed amendments to the FPR. • There are also items towards the end of the agenda related to the comments received on the FPR which do not impact on the NEMLA Bill process which have been discussed between the government stakeholders and proposals made to be able to finalise the regulations. Any issues which cannot be accepted by industry or other stakeholders after this process will need to be taken up with the principals of DEA, DMR, DWS and National Treasury for resolution. • The intention is for all parties to understand the issues, engage on these and for DEA to prepare proposed amendments to be gazetted for another commenting period due to new concepts that are proposed and introduced and the substantial amendments to be made to the previous draft. 	
	ITEM	DISCUSSION	ACTION

<p>1.</p>	<p>Definitions</p> <p>➤</p>	<p><u>Primary Processing:</u></p> <ul style="list-style-type: none"> • The Minerals Council South Africa (MCSA) (formerly Chamber of Mines) raised a concern that primary processing is not clearly defined in NEMA and are not terms used in the MPRDA. They feel this creates confusion in the industry. • DEA agrees that there is no definition of primary processing in NEMA but also does not intend to propose such a definition. It is however important that the phrase 'primary processing' is retained as the MPRDA links mining to mining area which includes aspects for which DMR is not the competent authority. What is included and excluded in primary processing is however clarified, in the Listing Notices containing the mining related activities which require environmental authorisation (EA). DEA therefore does not support the removal of this term in the regulations or the Act. • PricewaterhouseCoopers (PwC) asked what the effects of the split between primary and secondary processing for closure application purposes would be in a situation where the life of mine for secondary processing is much longer than primary processing. Further, mines could close while secondary processing remains operating. Clarity was sought if the secondary processing would require FP. • DMR explained that DMR have the competency for mining right area. Outside this area is for DEA/province competency e.g for closure of a smelter (secondary processing) DEA/province has the mandate and not DMR. • DEA further explained that DMR is the competent authority (CA) for mining and activities directly related to mining. DMR is not the CA for secondary processing under NEMA if it triggers the EA requirement. If directly associated and primary processing, DMR is CA. Only the mining activity will require FP and not the secondary processing. Section 24P of NEMA does not cover FP for secondary processing such as a beneficiation plant. The law allows for mine closure and continuation of secondary processing. • PwC pointed out that e.g. WULA would require International Financial 	
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	<p>➤</p> <p>➤</p>	<p>Reporting Standards (IFRS) 37 audit processes for also secondary processing activities. FP also has to be set aside in terms of the National Water Act, leading to duplication. National Water Resource Strategy and Water Quality Management Plans are not clearly articulated by the DWS. It is important to note that post-closure land use objectives cannot be separated from water quality objectives for surface and groundwater.</p> <ul style="list-style-type: none"> • DEA stated that as the One Environmental System (OES) evolves there is a need to integrate the NWA FP and NEMA FP requirements to avoid duplication. The departments have recognised this duplication; however the DWS FP goes beyond mining. Allowing the Minister responsible for Water and Sanitation access to the FP for mining activities would assist to avoid duplication. <p><u>Latent</u></p> <ul style="list-style-type: none"> • Latent to be retained but to be defined according to dictionary definition (not “Acts of God”); MPRDA Regulations definition will not be used. “Existing but not yet developed or manifest” is the preferred definition. • A risk based approach is proposed to determine anticipated risks to be covered in the latent. Climate change will also need to be catered for in latent. • SsEE Solutions explained that Engineers utilise a method that considers higher and lower probability in the risk assessment. <p><u>Mitigate, remediate, rehabilitate, residual</u></p> <ul style="list-style-type: none"> • All above words to be defined and referred to. • DMR stated that the term “sustainable post-closure land use” must be considered in the definition of rehabilitate. • Federation for a Sustainable Environment (FSE) suggested that restoration should also be included. • DEA pointed out that restoration is already part of the definition of rehabilitation to the extent that restoration is identified in the 	<ul style="list-style-type: none"> • Issue for principals to consider and decide: integration with DWS FP and WULA conditions etc. • Define words in FPR
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2.	Scope of the Financial Provision	<ul style="list-style-type: none"> DEA: To include holder of unconverted "old order" rights in scope of FPR. As long as a right is in effect, FP is required. Compliance with the NEMA remains, even if it is through duty of care provisions of Section 28 of NEMA. PwC: Old order mine entities continue to fund liability in terms of IFRS DEA: Add business rescue practitioner and liquidator to the list of definitions. Minerals Council South Africa advised that at any point where no comment is made by industry does not mean acceptance by industry e.g. including "transfer" in terms of sections 11 and 102 in the definition of "applicant" is not agreed to. 	<ul style="list-style-type: none"> Include and clarify holder of unconverted "old order" rights
3.	Timeframes for review, auditing and reporting	<ul style="list-style-type: none"> 3 years for determination; audit every 5 years. Use 'determination' and 'review', not 'assessment'. Cannot change the time frames in FPR unless it has been given effect in NEMA 	
4.	Timeframes for retention of FP	<ul style="list-style-type: none"> PwC asked if there is an expected timeframe for closure liability especially with regard to water decanting of extraneous water, as it is difficult to audit the adequacy of financial liability. DEA reminded that the polluter pays principle would apply. It is beneficial for a mine to look at sustainable solutions for water as the responsibility is retained in perpetuity as per NEMA. The risk will differ from mine to mine. DMR said that the degree of treatment required for the water will depend on the post closure land use. DWS explained that their department is providing guidance in this regard. Must ensure some level of minimum consistency. The degree of treatment depends on your strategy and must comply to discharge standard. It is encouraged to discharge water back to its source. 	

	<ul style="list-style-type: none"> • Anglo American said that if something is not latent/residual it should not be provided for in perpetuity. The suggestion was to rather change “in perpetuity” to “until mitigated”. Need to look for business solutions to cater for sustainable solutions for the impacts. • DEA agreed that technical solutions need to be incorporated in the closure plan and an entity needs to engage with DWS and with DMR to decide whether that is residual or latent. There will not be a return of FP for residual. • Norton Rose Fulbright (NRFSA) asked how excess FP will be dealt with in a scenario where expected work planned is not undertaken, leading to less FP required. • DEA is aware of the dilemma that the current FPR is not suited in all aspects to the ‘Oil and Gas’ Industry e.g. the financial vehicles may not be adequate. A solution is still to be found; the principals to consider and decide whether other vehicles such as parent company/affiliate company guarantee is included as a vehicle or not. • NRFSA observed that the FPR refers to final closure, end of life of mine, and current disturbance. Must clarify terms. Is money to be set aside for current plus 3 years or end of life of mine plus 3 years? • DEA explained that the FP calculation covers current disturbance plus 3 years i.e. current plus three years of the expected latent risk costs. • Wits Law School understanding is that FP needs to be provided for operational plus three years. However environmental liability may be timeless. • Wits Law School asked whether where there is a change in ownership, the FP provided thus far could also be bought. Is the FP attached to the right or to the holder? • DMR explained that a mine is sold separate from the FP. FP is not an asset. Before approval is obtained for transfer of the mining right, the new owner must provide FP. Each rights owner must provide for their own FP; however arrangements may be made between old and new holders. • DMR said that it becomes complex when the FP is held in a trust fund 	<ul style="list-style-type: none"> • Principals to consider and decide proposed financial vehicles appropriate for the oil and gas sector. • Reword FPR to provide clarity on the 3 years • Explanatory diagram of calculation required • DEA to liaise with Engineers/Engineering Council of South Africa (ECSA) regarding the wording of the calculation
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		<p>and the buyer uses a guarantee. This issue is under discussion with National Treasury.</p> <ul style="list-style-type: none"> • DEA said that the Income Tax Act (ITA) regulates movement of funds in the trust fund. Closure certificates is currently the method of getting the money out from the trust fund. Although still a proposal at this stage, DEA is considering amending the EIA Regulations to include a provision for requirement of an EA (Part 2 amendment) when a MWP changes. Such change is likely to occur in the case of transfer of a mine. • FSE cited an example of a mine where the trustees transferred money to the new owner without a closure certificate required or issued. This is problematic as often when companies go under business rescue/ liquidation the environmental impacts continue. • DMR is aware of the current concern that trust funds are not as water tight as previously thought and is looking for a resolution to this with NT and SARS. The Companies Act supersedes all legislation when a business goes into liquidation. This presents a huge challenge as it does not favour the DMR to remedy environmental impacts. • DEA responded that there is a proposal to have a provision in NEMLA that states that it is an offence to use the trust fund for any other purpose except rehabilitation. Currently NEMA contains a weak provision that addresses this by excluding FP funds from the Insolvency Act [Refer section 24P(6) of NEMA]. • The Office of the Chief State Law Advisor cautioned that legislation needs to be written in a clear and understandable manner. NEMA should be regarded as primary legislation pertaining to financial provision. Everything else must be aligned to the NEMA provisions (insolvency, business rescue, etc.). • DEA will re-consider Regulation 17 as it is very broad in terms of offences, as even minor administrative issues would all be subject to the same (harsh) penalties. 	<ul style="list-style-type: none"> • DEA to re-consider Regulation 17 wording
5.	Draw down of Funds	<ul style="list-style-type: none"> • DEA suggested introducing a concept to allow for draw down of funds 	

		<p>based on a 5 year approved decommissioning plan. This decommissioning plan will be linked to the closure plan in the EIA Regulations, which is linked to the MPRDA. It should be a single closure plan, must be consultative and well thought through.</p> <ul style="list-style-type: none"> • MCSA raised concern that there may be more funds in the trust fund than what is required. Asked if drawdown would be allowed if the trust fund is overfunded as the mine approaches closure? Interim drawdowns is currently prohibited and cash for rehabilitation towards final closure is not available. This is a big problem with some operations as an entity has to fund the rehabilitation using other funding whereas there is money sitting in the trust fund. • DEA stated that interim drawdowns were never intended as there would be a final drawdown at closure. • DMR explained that as regards the MPRDA, access to funds in overfunded trust funds was a problem in the past due to the calculation of the quantum. Quantum used to be calculated for life of mine. The funds in a trust fund would be under risk if money is released to mine and such mine does not do the required rehabilitation. This is hence a protective measure. • Anglo American proposed some flexibility in order to make funds available to mine to do rehabilitation but not right at the end. He suggested a five year plan that was not tied to a particular period. Such flexibility can be achieved with agreements, motivations and approval, with audits and monitoring. • MCSA observed that funding for draw down cannot be confused with funding of annual rehabilitation, as the terms for the draw down and trust deed is only for rehabilitation purposes. • DEA indicated that this proposal can be considered. 	<ul style="list-style-type: none"> • All to consider the proposal of interim draw down in a situation where trust fund is over-funded
6.	Ceding and Liability	<ul style="list-style-type: none"> • DEA stated that changes need to be proposed to the ITA to enable ceding to DMR. • Wits Law School raised concern about who would take responsibility and where innovation would lie if the funds are ceded to the DMR. • Malan Scholes asked what would happen to funds ceded to DMR for a 	

		<p>prospecting right where plans change. Would risk amount be ceded or the whole amount in the trust fund.</p> <ul style="list-style-type: none"> • DEA said that only the amount determined by the risk assessment would be ceded. Guarantees seem impractical as the amount cannot be ceded to DMR • DMR said that due process will be followed by the DMR on a case by case basis regarding use of rehabilitation companies as the DMR appoints a third party to undertake rehabilitation. 	
7.	Minister's Access to FP	<ul style="list-style-type: none"> • DEA indicated that there are discussions about the Minister responsible for Water and Sanitation inability to access FP. Proposal is for the Minister responsible for Water and Sanitation to be identified in NEMA - currently only the Minister responsible for Mineral Resources may access the trust fund. • DMR said that if agreed to, a mechanism will be put in place that allows both Ministers to have access to FP prior to and after closure. This is in instances where the mine fails to act and rehabilitate. • FSE pointed out that DWS does not sign off currently, but their comment is required before closure certificate is issued. 	
8.	Public Participation and Notification	<ul style="list-style-type: none"> • CER were of the opinion that a mechanism to query the accuracy of FP calculation, preferably prior to finalization, is required. Initial FP will be low and grow as operation proceeds so it is more important to see the calculations later in the life of mine not just on application. • FSE stated the need to involve civil society, given their local and traditional knowledge. • DMR noted that the risk of non - accuracies has been minimised by the inclusion of specialists and sign off by auditors as part of the review process. • NRFSA cautioned that allowing for an additional I&AP review would have time and cost implications. 	
9.	Other	<ul style="list-style-type: none"> • For tender processes etc., contractor work to be based on general going rates and not preferential rates to address concerns of confidentiality. • Auditors report to be provided to client who must then pass it along to 	

		<p>the DMR as per their annual re-assessment requirements. The audit report must be signed off by the auditor.</p> <ul style="list-style-type: none"> • Proposal - An 'anniversary date' will be included in the FPR to clarify the required frequency of the assessment of adequacy. • Health impacts are already covered in Mine Health and Safety Act 	<ul style="list-style-type: none"> • DEA proposed inclusion of an anniversary date • DEA proposed Amendment to EIA Regulations: Mine Works Programme
10.	Guarantee	<ul style="list-style-type: none"> • MCSA is not in agreement on the limitation placed on the guarantee (as it is not to be used for residual and latent impact rehabilitation): MCSA is of the opinion that guarantees already make allowance for residual. • SsEE stated that there are financial products that are meant for a specific purpose and can be for a combination of closure and latent/residual. These products build an amount up over time similar to a pension fund. Historically hard cash was utilised and also short term insurance to address the gaps. • DEA proposed that insurance products should not be short term but for life of mine. Jones and Wagener noted that the guarantee is open-ended with no expiry date. Restricting to long term insurance products will be problematic. • The format of the guarantee may need to be changed to allow for the Minister to use all or part of the FP as necessary to do the rehabilitation. • Trust fund template also to be reconsidered as much of it is dealt with in other legislation (such as the Trust Property Control Act provisions). It may create challenges when other Acts amended. 	<ul style="list-style-type: none"> • DEA to meet with insurance companies / representatives regarding restrictions in financial vehicles
11.	Care and Maintenance	<ul style="list-style-type: none"> • FSE proposed that "care and maintenance" be retained as often no rehabilitation is undertaken when companies go into care and maintenance and sufficient FP is not made. Care and maintenance is often simply a vehicle for abandonment, leading to unlawful mining, no 	

		<p>access control etc.</p> <ul style="list-style-type: none"> • DMR accepted that 'care and maintenance' is complex. The proposal is to remove 'care and maintenance' from the FPR as it is a competency of the MPRDA and MPRDA Regulations deal with this. It is an issue of enforcement, compliance and monitoring by the DMR. 	
12.	Issues for Decision by Principals	<ul style="list-style-type: none"> • 10 years to 3 years • Parent company guarantee/Affiliate company guarantee • CPI + 2% • VAT • Non-issue of closure certificate • Minister responsible for Water and Sanitation ability to access FP • Proposal for Care & Maintenance Regulations in the future 	<ul style="list-style-type: none"> • DEA Technical Team
13.	Way Forward	<ul style="list-style-type: none"> • Presentation to be circulated • Gazette another set of FP Regulations for public comment. • NEMLA4: DEA proposed amendments and it is then out of DEA's hands as Parliament then decides. From there National Assembly to National Council of Provinces, and then another round of consultation. 	<ul style="list-style-type: none"> • DEA Technical Team