



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Our ref: MT/CH
4 September 2017

Dear Sir/Madam

COMMENTS BY THE CENTRE FOR ENVIRONMENTAL RIGHTS ON THE DRAFT MINE WATER MANAGEMENT POLICY POSITION

1. In this document the Centre for Environmental Rights (CER) makes comments on the draft Mine Water Management Policy Position that was published for external consultation and discussion in GG 40966 of 7 July 2017 under Notice No. 658, read with the correction notice of 14 July 2017 in GG 40987 of 14 July under Notice No. 690 (draft policy position).
2. The CER is a non-profit organisation and law clinic that helps communities and civil society realise our constitutional right to an environment that is not harmful to health or well-being through litigation and advocacy. We have been working on the impacts of mining since our establishment in 2010 and have throughout the intervening time been applying the National Water Act, 1998 (NWA), the regulations and policy instruments published under the NWA and related environmental legislation and regulations, and the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) on behalf of our clients and in our own name.
3. The CER welcomes initiatives by the Department of Water and Sanitation (DWS) to address the problem of mine water management in South Africa. We believe that inadequate or ineffective mine water management is a major threat to water security in South Africa. The pollution stemming from most mining operations renders water unusable, through for instance, the creation of acid mine drainage, and because most mining uses vast quantities of water and causes local water shortages, aggravated dramatically in times of drought.
4. However, we consider the draft policy position to be inadequate given our experience of the state of mine water management currently in South Africa (and as reflected by the DWS itself in the draft policy position), attributable, in our experience to both poor licensing decisions and inadequate, and at times absent compliance monitoring and enforcement. We hope that our comments will assist to improve the draft policy position before it is finally published. Our comments on the specific sections of the draft policy position are set out below.

Introduction

5. Our concern about the policy position first manifests in its Introduction which, we submit, understates the problem and does not take into account the crisis-state of mine water management on the ground. The Introduction provides that:

“Acid Mine Drainage (AMD) and related mine water impacts have in the past decade evolved to become a major environmental challenge. Whilst the challenge is limited to the mining sector during operations, it eventually

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becomes externalised during mining downturn, and is especially pertinent post-mining closure, especially if mine closure does not proceed according to regulatory-approved recommendations.”

6. We submit that a DWS policy position on mine water management must acknowledge and take into account the fact that “mine closure” with little exception, in fact “does not proceed according to regulatory-approved recommendations”. The South African reality is that mines, particularly coal and gold mines, with significant water impacts, are not attaining closure. [viz <https://oxpeckers.org/2017/04/coal-mines-legacy/> and <https://oxpeckers.org/2017/05/r60-billion-held-mines-never-closed/>]. The inability to close mines is a global problem, as highlighted by a study conducted by ERM across 57 mines globally. A mere 9% had achieved closure. [viz
7. We submit in light of the above, that a starting point for a policy position is an acknowledgment of the frank reality that, most often, the impact of mining on water is permanent (whether because the contamination of water by mining, with its consequences, cannot actually be treated, or because it is not financially viable to treat it, or because there is non-compliance by the polluter and inadequate or absent compliance monitoring and enforcement by the Department) and that fact has to inform licencing of new mines. A question that the Department must establish the answer to when asked to issue a water use licence is: can we justifiably and lawfully sacrifice the water resource that this operation will destroy?
8. In considering the justification, we submit that it is not appropriate to consider the “potential this deposit has for local economic development”. Given the long history of mining in South Africa, the rampant unemployment rates, lack of infrastructure roll out, extreme poverty and massive inequality in our mineral rich regions are testament to the fact that the potential for economic development through mining remains just that: potential and not reality.
9. We submit that fact must be taken into account when the Department is charged with deciding whether a water resource can be sacrificed.

Purpose of the policy

10. We note that the two purposes of the policy position are to provide the Department’s position on mine water management, including AMD and to provide measures on protection of water resources from prospective, operational and historical mine activities that have negative quality impacts.
11. We submit that the purpose of the policy position is a little ambiguous. It is our view that the draft policy position should set out the problems with mine water management and identify existing legislative tools that can be used to address those problems.
12. The policy position must set out how appropriate legislative measures can be used to effectively apply the principles in the draft policy position and to realise the objectives set out in the draft policy position.
13. It is also our view that the range of legislative measures in the NWA, the National Environmental Management Act, 1998 (NEMA) and the MPRDA should be used to better protect water resources from mine pollution, and are unutilised or underutilised by relevant authorities. Those legislative measures will be pointed out and elaborated on in the paragraphs below.

Scope of the policy

14. The scope of the policy appears to be confined to water *quality* management and therefore does not deal with water *quantity* management. If the exclusion of quantity management from the scope of the draft policy position was intentional, we recommend that the DWS considers publishing a separate policy dealing with the quantity of

water used by mines. The shortage of water during the 2015/16 drought resulted in resource grabs by several mines operating in rural areas, leaving affected communities without a supply of water. For instance, in 2015/16, Tendele Mining (Pty) Ltd (Tendele) started abstracting water from an underground resource on which the Somkhele community was reliant for operations at its Somkhele Mine near Mtubatuba in northern KwaZulu-Natal. Tendele’s use of that underground water resource resulted in it being depleted, leaving the community without access to any water for a prolonged period of time. Tendele prevented the community access to key abstraction points from which they drew water before the mine laid claim to them.¹

15. There will inevitably be more droughts in future. It is therefore imperative that the DWS takes proactive legislative and policy measures dealing with the abstraction of water by mines in terms of which conflict over resources, especially during future droughts, can be managed fairly and lawfully.

Current legislative framework

16. The draft policy position states that specific sections of the White Paper on National Water Policy for South Africa (White Paper), the NWA, the NEMA and the MPRDA comprise the “current legislative framework.” As the White Paper is not legislation, but a policy instrument, and is not binding, we are concerned that the draft policy position is ambiguous in this respect. We also submit that that there is a range of other appropriate legislative measures that should be utilised for sound mine water management in South Africa.

17. The reference to “other appropriate and relevant legislations... in order to fulfil the State’s responsibility to respect, protect, and promote social and economic rights in the Constitution” is vague and deficient, and, given the poor state of mine water management in South Africa, it is incumbent upon the Department to be more specific.

18. We submit that, in addition to the named pieces of legislation, the following Acts are applicable and should specifically be referred to, in addition to the general catch-all phrase, in the draft policy position:

Applicable legislation	
Act	Relevance
National Environmental Management: Protected Areas Act, 2003 (NEMPAA)	Mining is prohibited in most protected areas as defined in NEMPAA. The declaration of protected areas should therefore be one of the possible mechanisms referred to in the draft policy position to ensure that mining is not authorised in areas that are critical for ensuring water security, such as strategic water source areas and wetlands. Furthermore, the draft policy position should provide that mine water must be managed in such a way as to prevent pollution from having unacceptable impacts on downstream protected areas.
National Environmental Management: Biodiversity Act, 2004 (NEMBA)	Threatened and protected ecosystems, including ecosystems that are critical for ensuring water security in South Africa, are identified in terms of NEMBA. The draft policy position should propose mechanisms for licensing that promote protection of those ecosystems.
Spatial Planning and Land Use Management act, 2013 (SPLUMA)	SPLUMA deals with land use and development by municipalities. The draft policy position should provide that the DWS will liaise with relevant municipalities to ensure that inappropriate development in water source areas should be avoided.

¹ WoMin and Women Building Power “No longer a life worth living”: mining-affected women speak through participatory action research in Somkhele and Fuleni communities, northern KwaZulu-Natal, South Africa” (2016)

19. As the draft policy position is essentially an environmental policy, it is a concern that reference to environmental rights and the right to have access to sufficient water have been omitted from the draft policy position.
20. In the tables below, we set out some of the appropriate provisions in the three Acts which should, in addition to the sections mentioned in the draft policy position, form part of the draft policy position's legislative framework:

National Water Act, 1998	
Provision / Chapter	Relevance
Chapter 2: Water management strategies	The National Water Resource Strategy (NWRS) and all catchment management strategies (CMSs) must be aligned with this policy and its approach to mine water management. As the Minister, the Director-General of the DWS, organs of state and water management institutions are obliged to implement the NWRS and CMSs, the draft policy position will have a more solid legal footing.
Chapter 3: Water classification system	The draft policy position should propose that resource quality objectives (RQOs) and the reserve published under Chapter 3 of the NWA is used to inform decisions relating to mine water management, including decisions to grant or refuse water use licences (WULs) for mines and developing conditions subject to which WULs are granted. RQOs and reserves published for mining-affected catchments, such as the Olifants, Vaal, Tugela, Pongola, Inkomati and Usuthu catchments can also be used to inform related decisions, such as decisions to utilise section 19 or 20 of the NWA and decisions to require security from WUL applicants.
Chapter 4: Use of Water	Chapter 4 of the NWA prescribes certain factors that need to be taken into account by responsible authorities when taking decisions relating to water use, such as the decisions to grant or refuse WUL applications. The draft policy should therefore at least refer to the relevant considerations, the essential requirements of licences, condition for issue of general authorisations and licences and security by applicant in sections 27-30 of the Act. We highlight in particular section 30 in terms of which the responsible authority has the power to require applicants for licences to put up security for their obligations under a WUL. In circumstances where the DMR, as a matter of course, does not require mining right holders to make financial provision for water treatment costs, it is imperative that the DWS uses its authority under the NWA to obtain security for these costs.
Part 1 of Chapter 5: Water use charges	The draft policy position can provide that charges for water use and pollution should be set at a high enough level to prevent overuse and pollution by mines and to encourage the construction of water treatment plants.
Chapter 14: Monitoring, assessment and information	The draft policy position can provide that the various monitoring assessment and information mechanisms provided for in Chapter 14 of the NWA are utilised to ensure that the Minister and responsible authorities have sufficient information about mine water management to ensure that water resources are adequately protected from water pollution from mines.
Chapter 16: Offences and remedies	The draft policy must set out that, in appropriate circumstances, such as when a mining company fails to comply with a directive issued in terms of section 19 or 20 of the NWA, when a mining company uses water without a water use licence, or when a mining company causes unacceptable pollution of a water resource, the DWS must take steps to initiate the prosecution of those persons or water users.

National Environmental Management Act, 1998

Provision/Chapter	Relevance
Section 2: National Environmental Management Principles	The national environmental management principles must guide all environmental decision-making. The draft policy position should therefore refer to those principles to help guide decision-making around mine water management. The key relevant principles are the polluter pays principle, the risk averse and cautious approach, the mitigation hierarchy, integrated environmental decision-making, environmental justice, equitable access to environmental resources, public participation, access to information and the protection of sensitive, highly dynamic or stressed ecosystems, amongst others.
Section 24(2A): restriction or prohibition on the granting of environmental authorisations	In terms of section 24(2A) of NEMA, the Minister of Environmental Affairs may prohibit or restrict the granting of environmental authorisations for specified listed activities in respect of specified geographical areas. We submit that that section is a possible tool for the protection of key water source areas that can be identified as such in the draft policy. A motivation can thus be submitted to the Minister of Environmental Affairs for the restricting or prohibiting of mining-related activities in water source areas.
Section 24O: criteria to be taken into account by competent authorities when considering applications	In terms of section 24O of NEMA, competent authorities are obliged to take into account information when considering applications for environmental authorisations, including the comments of any organs of state charged with the administration of any law which relates to activities listed in the listing notices published under NEMA. We submit that the draft policy position should recommend that the guiding principles inform the comments by the DWS on applications relating to mine development.
Section 24P: Financial provision for remediation of environmental damage	The draft policy position should also provide that the DWS's involvement in the determination of financial provision (as a commenting authority) should be guided by the guiding principles. Steps must be taken to ensure that sufficient financial provision is made for mines that will have significant impacts on water resources. In the event that the Department of Mineral Resources fails to require sufficient financial provision, the DWS can supplement the financial provision by requiring security for mining operations in terms of section 30 of the NWA.

Mineral and Petroleum Resources Development Act, 2002

Provision/Chapter	Relevance
Chapter 4: Mineral and Environmental Regulation	The draft policy position must provide that the DWS must take steps to ensure that decisions to grant or refuse applications for mining rights, mining permits and prospecting rights are guided by the guiding principles in the draft policy position. Where those rights or permits are granted, they must be granted subject to appropriate conditions that ensure the sound management of mine water.
Section 38A: Environmental authorisations	The draft policy position must provide that the DWS must take steps to ensure that decisions to grant or refuse applications for environmental authorisations for mining and related activities are guided by the guiding principles in the draft policy position. Where environmental authorisations are granted, they must be granted subject to appropriate conditions that ensure the sound management of mine water.
Section 43: Closure certificates	Section 43 of the MPRDA provides for the issuing of closure certificates for mines at the end of their lifespan. In terms of subsection (5), "[n]o closure certificate may be issued unless the Chief Inspector and each government

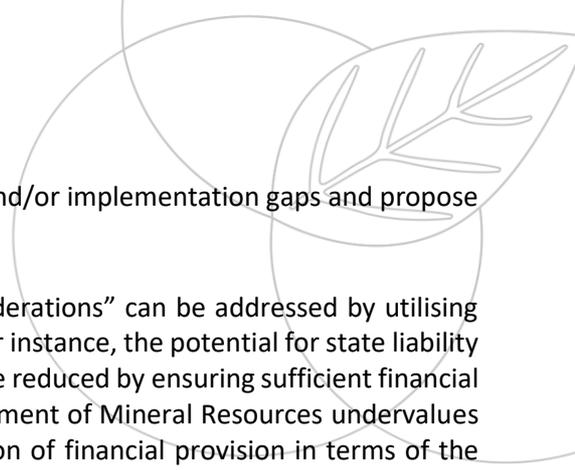
	department charged with the administration of any law which relates to any matter affecting the environment have confirmed in writing that the provisions pertaining to health and safety and management pollution to water resources, the pumping and treatment of extraneous water and compliance to the conditions of the environmental authorisation have been addressed.” The draft policy position can therefore provide that it must guide the decisions by relevant authorities to grant or refuse closure certificate applications.
Section 46: Minister’s power to remedy environmental damage in certain instances	The draft policy position should provide that directives should be issued to mining companies in charge of mining operations that are causing, have caused, or are likely to cause unacceptable pollution to water resources.
Section 47: Minister’s power to suspend or cancel rights, permits or permissions	The draft policy position should provide that the Minister should cancel the mining rights, mining permits or prospecting rights of mining companies in charge of mining operations that are causing, have caused, or are likely to cause unacceptable pollution to water resources.
Section 48: restriction or prohibition or prospecting and mining on certain land	Section 48 provides that no reconnaissance permission, prospecting right, mining right may be granted or mining permit be issued in respect of land in most protected areas, as identified in NEMPAA. We therefore reiterate that the declaration of protected areas can be used as a mechanism to protect key water source areas and that this position should be captured in the draft policy position.
Section 49: Minister’s power to prohibit or restrict prospecting or mining	The Minister of Mineral Resources may, in terms of section 49 of the MPRDA, prohibit or restrict the granting of any reconnaissance permission, prospecting right, mining right or mining permit in respect of land identified by the Minister for such period and on such terms and conditions as the Minister may determine. We submit that the draft policy position should identify this power by the Minister of Mineral Resources as a possible mechanism that can be used for the protection of key water resources and water source areas from certain types of mining operations that are associated with water pollution and AMD, such as coal mining. The DWS can submit a motivation to the Minister of Mineral resources for the declaration of section 49 areas for strategic areas.

21. In addition, it is imperative that the draft policy refers to the mine water management mechanisms provided for in the Regulations on the Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources, 1999² (GN704) published under the NWA, as it is the chief set of regulations in South Africa governing the use of water for mining and related activities in South Africa.
22. It is furthermore our respectful submission that a DWS policy position on mine water management must refer to, and endorse the tools that have been developed with enormous investment from multiple stakeholders, including the Department itself, such as the Atlas of National Freshwater Ecosystem Priority Areas in South Africa (“the NFEPA Atlas”) published in 2011 by the Water Research Commission, the CSIR, SANBI, the Department of Environmental Affairs and the Department. Such tools include research reports by the likes of the Council for Scientific and Industrial Research (CSIR), such as *South Africa’s Strategic Water Source Areas*, 2013 in which strategic surface water sources areas that are of national importance were identified as areas considered nationally important as sources of groundwater based on the volumes available or their importance for water supplies to settlements and agriculture. These tools are crucial to mine water management at a development planning and licensing stage.

² GN R704 in GG 20119 of 4 June 1999

Key policy considerations

23. We endorse the stance that there are policy questions that are crucial at the conception stage of any mining venture. However, given the legal imperative on the state to promote development that is sustainable, the policy question posed in the draft policy position cannot be “*is it currently expected of new mining ventures to demonstrate that long-term liabilities, with explicit reference to mine water management (i.e. potential AMD formation), are not exceeding the long-term benefits of such mining ventures?*”
24. Rather the draft policy position should be that before licensing new mining ventures, the policy question must be asked: will *long-term liabilities*, with explicit reference to mine water management (i.e. potential AMD formation), exceed the long-term benefits of such mining venture? And secondly, should long-term liabilities (with respect to AMD) exist, what is the risk of it reverting to the State and what is the extent of potential State exposure?
25. We do not endorse as a policy question: “During operational phase of the mine, firstly, are legal liabilities with respect to mine water management being enforced?” This is not a policy question. In our 2016 report, *Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga*, we showed conclusively that this question is answered squarely in the negative, [viz Section 2.4, pp 53].
26. The next draft policy question: “Does such enforcement yield the required results?” therefore falls away.
27. “What should be improved?” is also, in the circumstances, inappropriate as a policy question. *Zero Hour* recommends that the Department needs to invest adequately in compliance monitoring and enforcement capacity; it needs to institute a comprehensive compliance monitoring and enforcement programme, with appropriately incentivised officials to implement it; it needs to implement a proper administrative penalty system; and it needs to ensure the transparent reporting of results. These are the types of mechanisms a policy position should flesh out:
- a. improved CME must become a political and management priority, as also the appointment of a senior champion within DWS with the right skills and vision to raise CME profile, skills and expertise of Blue Scorpions.
 - b. additional resources must be made available to fill expanded staff structures (including more senior positions) in DWS and staff with appropriate specialised skills and experience must be engaged.
 - c. an appropriate CME strategy (incorporating prioritisation, compliance promotion and a media strategy to publicise results) must be developed and published and which engages with Blue Scorpions on immediate increase in visible compliance monitoring in prioritised sectors (incorporating, where possible citizen monitoring).
 - d. improved reporting mechanisms to incentivise reporting and whistleblowing in civil society must be implemented.
 - e. EMLs to enforce the NWA must be designated.
28. We endorse the Department’s identification as a problem for mine water management, the phenomenon of “selling off marginal mines to smaller companies during the end of the mine’s life cycle (as part of a closure strategy)”. *Zero Hour* demonstrates that “[b]oth the DMR and the DWS allow behind-closed-doors amendments of WULs, mining rights and EMPRs, and furthermore do not ensure or allow public participation on transfer of rights applications. Moreover, neither department adequately assesses environmental liability at point of transfer. This means that the financial capacity of the transferee is often not adequately considered, facilitating a dire trend in South Africa of transferees going insolvent shortly after approval of the transfer of rights and environmental liabilities” (pp69).

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29. We submit that the role of a policy position is to identify the legislative and/or implementation gaps and propose effective ways to address these.
30. Many of the problems referred to under the heading “Key Policy Considerations” can be addressed by utilising existing legislative instruments in the NWA, its regulations and NEMA. For instance, the potential for state liability for the residual environmental impact of mining (particularly AMD) can be reduced by ensuring sufficient financial provisions for relevant mining operations. In our experience, the Department of Mineral Resources undervalues the residual environmental liability of mines in its approval of calculation of financial provision in terms of the MPRDA and NEMA. In particular, despite a responsibility to do so in terms of the Mineral and Petroleum Resources Development Regulations, the DMR does not require mining companies to make financial provision for water treatment costs. It is possible that that department perceives this to be the mandate of the DWS. However, the DWS fails to implement section 30 of the NWA at all. A responsible authority can utilise section 30 of the NWA to require an applicant for a water use licence to put up security for its obligations under the water use licence. This section has, to our knowledge, and despite reference in licence conditions, never been implemented. In the context of the state of mine-water management in South Africa, the Department’s failure to implement this section of the NWA is astonishing.
31. Moreover, the Minister of Water and Sanitation can assign Environmental Management Inspectors in terms of section 31BA of NEMA to enforce the provisions of the NWA and GN704 to achieve the objectives of the draft policy position.
32. Most of the questions raised as policy questions are capable of being addressed through implementation of existing law, and in particular through compliance monitoring and enforcement.

Integrated approaches to mining closure

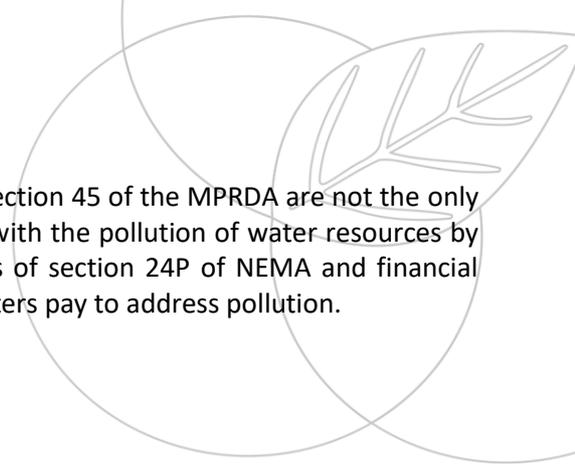
33. We support the proposal to establish a “New Trilateral Memorandum of Understanding” with the Department of Environmental Affairs (DEA) and the Department of Mineral Resources (DMR) to ensure that the efforts of the three departments to deal with the pollution of water resources from mines are aligned.
34. We however submit that it is imperative to involve catchment management agencies, affected municipalities and environmental management inspectors, particularly those who are designated to enforce the NWA and NEMA, in the formulation of the terms of the proposed New Trilateral Memorandum of Understanding.
35. We further submit that while there are certainly legislative gaps, government would indeed have more enhanced control and legal administration of the mine water challenges and issues, if existing law was implemented and compliance was monitored and enforced.

Apportionment of liabilities

36. We agree that the “polluter pays principle should be applied to mine water in all its forms”. We however disagree that the polluter pays principle is not formally defined in South African legislation. One of the national environmental management principles in the NEMA is that *“the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling and minimising further pollution and environmental damage or adverse health effects must be paid for by those responsible for harming the environment”*.³ The national environmental management principles inform how environmental legislation, including NEMA, the NWA and the MPRDA must be applied.⁴

³ Section 2(4)(p) of NEMA

⁴ Section 2(1) of NEMA



37. We also reiterate that section 31 of the NWA, section 28 of NEMA and section 45 of the MPRDA are not the only relevant provisions in those three Acts which can be employed to deal with the pollution of water resources by mining companies. In particular, the use of financial provision in terms of section 24P of NEMA and financial security in terms of section 30 of the NWA are key to ensuring that polluters pay to address pollution.

38. Again, there is a lack of implementation and of enforcement.

Classification and differentiation of mines

39. We support the proposed classification of mines and the proposal that Category A Mines, which includes all gold and coal mines, are subjected to stricter water use and treatment conditions than other categories of mines.

Promotion of sustainable mining development

40. We fully support the articulation of the problem and the principle, save for any suggestion that mining is authorised irrespective of long term cost of impact, is a perception only. This is not perception only, but reality. The problem statement should not give the impression that the possibility of implementing the sustainable development philosophy still needs to be investigated. Sustainable development is the cornerstone of section 24 of the Constitution. Organs of state are therefore bound to give effect to sustainable development. This inevitably involves a “green approach” to mining in terms of which a cost-benefit analysis is already mandatory for each mine, particularly coal mines and mines that have the potential of producing acid mine drainage. It is unconstitutional and unlawful not to follow that approach.

41. We support any initiative by the DWS which involves the commissioning of an expert study of the long-term costs of mine water, including the impacts of mine water on ecosystems, the impact of mine water on future water security, the impacts of mine water on human health and the broader socio-economic impact of mine water.

42. The key to ensuring that development is sustainable is applying the law in a manner that is consistent with section 24 of the Constitution and the national environmental management principles set out in section 2 of NEMA.

User commitment to sustainable water resource protection

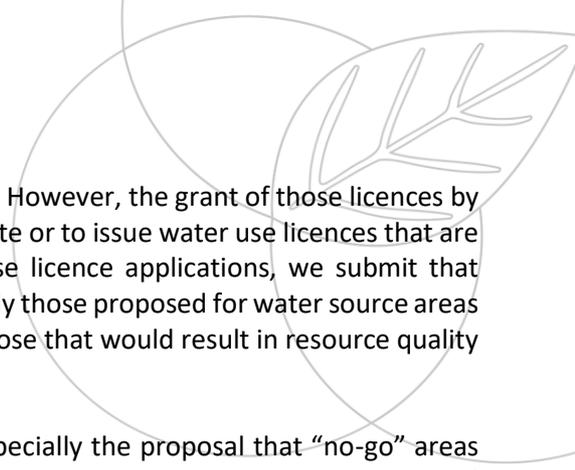
43. We support the articulation of the problem and the proposed policy principle and agree that financial provision for mines must always be sufficient to cover the mitigation of all environmental impacts. We reiterate that the DWS must utilise section 30 of the NWA to ensure adequate security to cover the costs of remedying pollution of water resources.

44. It may be that “the NWA has gaps with regards to ‘retrospective liability’.” However, we specifically point out that the criminal remedies in the NWA are retrospective and can therefore be used to hold to account persons who have committed offences in terms of the NWA even after they have ceased the conduct, constituting those offences, such as those who “unlawfully and intentionally or negligently commit any act or omission which pollutes or is likely to pollute a water resource”.⁵ Section 28 of NEMA is specifically retrospective and is therefore another remedy that may be utilised to hold recalcitrant mining companies to account even after they have ceased operations.

Environmental vigilance and continuous improvement

45. We support the articulation of the problem and the policy principle. We agree that mining rights and environmental authorisation are often granted in respect of water sensitive areas with little or no regard to environmental planning and that the potential cumulative impacts of individual mining operations are often

⁵ Section 151(1)(i) of the NWA



ignored or underestimated by relevant authorities, particularly, the DMR. However, the grant of those licences by other departments does not authorise the DWS to depart from its mandate or to issue water use licences that are irrational and unlawful. As the DWS is empowered to refuse water use licence applications, we submit that responsible authorities must refuse water use licences for mines, especially those proposed for water source areas and sensitive ecosystems, where the impacts cannot be mitigated and those that would result in resource quality objectives and the reserve for water resources being breached.

46. We therefore wholeheartedly support the proposed policy principle, especially the proposal that “no-go” areas for mines should be determined in water source areas and other important aquatic ecosystems. We recommend that the NWA is amended to empower the Minister of Water and Sanitation to declare “no-go” areas for WULs along the lines of section 24(2A) of NEMA or section 49 of the MPRDA. In the interim, it remains the imperative of the DWS to apply the NWA, NEMA, in particular its principles and the various tools and instruments that have been developed, such as the NFEPA Atlas and the identification of strategic water source areas to ensure that no WUL is granted if the impacts are not justifiable and lawful. The policy principle would also help to ensure that the resource quality objectives and the reserve are given effect. While the development of a “Master Plan” might be aimed at ensuring that the cumulative impacts of mining are better considered in decision-making, we are concerned that such Master Plan will merely be a re-articulation of the law and result in a diversion of resources that might be better placed enhancing implementation of existing instruments in the licensing process and in enhancing compliance monitoring and enforcement of existing and new operations.

Institutional arrangements on infrastructure management/transfer after mine closure

47. If the reference to the “Mining Charter” should be taken as a reference to the Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry published under the MPRDA⁶, then it is not correct that the Mining Charter provides that mines are expected to design and plan all operations so that adequate resources are available to meet the closure requirements of all operations”. The relevant provisions relating to financial security for mines are section 24P of NEMA and the Financial Provisioning Regulations, 2015. We recommend that the reference to the Mining Charter is deleted and that it is replaced with a reference to section 24P of NEMA read with the Financial Provisioning Regulations, 2015.
48. In our view, the problem outlined in the problem statement can be addressed in part by ensuring that mining companies make sufficient financial provision for post closure management of infrastructure and rehabilitation. It is imperative that financial provision for rehabilitation of mining is calculated accurately and by taking into account the costs of water treatment, including post closure maintenance and operation of water management and treatment infrastructure.
49. We further reiterate that section 30 of the NWA must be implemented to require an applicant for a water use licence to put up security for its obligations under its WUL. DWS must prioritise acquiring capacity to implement this crucial provision of the NWA.
50. Furthermore in our view, in order to address the problem as articulated, the provisions of the NWA on the transfer of WULs need to be up-scaled dramatically. We advocate for Ministerial consent for transfer of WULs incorporating a public participation process, an assessment of the holder’s liability at the point of transfer, an assessment of the financial and technical capacity of the transferee to undertake the obligations in the WUL, etc.

Reuse of treated mine water, including AMD

51. We support the policy principle that treated mine water should be used to help alleviate the water shortage in the country, provided that the water so reused is fit for use by municipalities. However, the fact that mine water can

⁶ Notice No. 581 in GG 40923 of 15 June 2017

be treated and reused should not be used as a basis to issue water use licences for mines when, from an environmental perspective, it would be inappropriate to do so, or when such issuance is irrational or unlawful for any other reason.

Way forward

52. We support the proposal for a Mine Water Management Unit in the Department. However, from the work that we do we have identified an overwhelming need for improved capacity generally in the Department at a licensing and a compliance monitoring and enforcement level.
53. We have also identified a frequent failure to fulfil the mandate of the Department when it is faced with an application for a water use licence where a mining right has already been granted. The Department cannot fob off its obligations under the NWA when considering an application for a WUL for a mining operation simply because a mining right has been granted. In our experience, mining rights are granted without consideration for the environmental impacts, including impacts on water. In many instances the minerals authority states in terms that the mining right is subject to the grant of an environmental authorisation and the grant of a water use licence. The environmental obligations of the minerals authority are thereby fobbed off onto the water and environment authorities. While this is certainly unlawful, we submit that the implication is that it is that much more incumbent upon the water authorities to ensure that its obligations under the NWA, NEMA and the Constitution are met.
54. Thank you for the opportunity to make representations on the draft policy position. Please do not hesitate to contact us should you have any queries about our comments.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS



per:

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