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6 September 2013

Submission to Portfolio Committee on Mineral Resources on the MPRDA Amendment Bill: Closure, rehabilitation and financial provision (section 43 of the Act)

1. This submission on the Mineral and Petroleum Resources Development Amendment Bill [B15-2013] ("the Bill") is made by the following organisations and people:
    a. **Conservation South Africa** (www.conservation.org)
    b. **Centre for Environmental Rights** (www.cer.org.za)
    c. **Worldwide Fund for Nature South Africa** (www.wwf.org.za)
    d. **Federation for a Sustainable Environment** (www.fse.org.za)
    e. **groundWork** (www.groundwork.org.za)
    f. **Mark Botha** (private consultant on offsets and ecological provision to mining companies)

2. The organisations listed above respectfully request an opportunity to make an oral presentation to the Portfolio Committee at the public hearings scheduled to starting on 11 September 2013 on the issue of closure, rehabilitation and financial provision as dealt with in the Bill.

3. In this submission, "mining" should be read to refer to all prospecting, mining, reclamation, reconnaissance and exploration activities regulated by the MPRDA.

4. The scope and extent of the legacy problems around inadequate regulation of rehabilitation and closure of mines is succinctly described in the extract from a 2012 WWF-SA report below:

"Ongoing concerns regarding environmental degradation in mining areas, high numbers of ownerless and abandoned mines, and the incidence of acid mine drainage (AMD) have all highlighted the need for improved environmental maintenance and rehabilitation in the mining sector. These concerns give rise to questions about the availability of funds to manage the impacts of mining and the adequacy of financial provisions made by mining companies for rehabilitation. Recent research summarising impacts of coal mining in the Olifants catchment indicates that impacts are severe in many cases and have significant measurable external costs (WWF, 2011). In addition, the report to the inter-ministerial committee on AMD makes for sober reading with regard to impacts and challenges. Although it focuses primarily on abandoned mines in the Witwatersrand gold fields, it also warns about other areas such as the upper reaches of the Vaal and Olifants River systems where the impact of mining on the freshwater sources is noted as a serious concern (CGS et al., 2010). While there is relatively broad consensus that a significant portion of current environmental impacts relate to abandoned mines, there is a clear need to also ensure that current and future mining activities do not add to unacceptable environmental impacts and impose costs on society. The harsh lessons of the past need to be applied lest history be allowed to repeat itself… financial provisions and particularly those relating to mine closure are key tools aimed at ensuring that the taxpayer is not burdened with the costs of rehabilitation."[1]

5. We have noted the repeal of section 41 (and the deletion of the definition of "financial provision") by the Mineral and Petroleum Resources Development Act, 2008 (MPRDAA) and that financial provision for remediation of environmental damage by prospecting, mining, exploration, production and related activities will be governed by section 24P of the National Environmental Management Act, 1998 (NEMA), when that repeal takes effect.

[1] Van Zyl et al. 2012. Financial Provisions for Rehabilitation and Closure in South African Mining: Discussion Document on Challenges and Recommended Improvements. WWF-SA. Available at http://www.wwf.org.za/?6600/acid-mine-draining.

6. We therefore note that any concerns about financial provision must necessarily be addressed in the parliamentary process dealing with National Environmental Management Laws Amendment Bill 26 of 2013 (NEMLAB 3). However, we are concerned about the fact that issues relating to financial provision and issues relating to closure are integrally linked and that joint hearings on the Bill and on NEMLAB 3 have not been facilitated. NEMA itself does not yet define "financial provision", nor is a definition proposed by NEMLAB 3. In the context of mine closure, section 24P requires revision to align it with section 43 of the Act, section 28 of NEMA. In addition, clarity on the nature and timing of financial provision is required.

7. We intend to submit comments on NEMLAB 3, but highlight that it is illogical for hearings on these integrally related pieces of legislation to be separate, and before distinct portfolio committees.

8. The submission relates to the proposed amendments to section 43(1) and 43(6): Clause 29: Amendment of section 43 of Act 28 of 2002, as amended by section 34 of Act 49 of 2008 (Issuing of a closure certificate):

Existing section 43(1) (MPRDAA 2008)	**Proposed section 43(1)**
The holder of a prospecting right, mining right, retention permit**,** mining permit, or previous holder of an old order right or previous owner of works that has ceased to exist, remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to the conditions of the environmental authorisation and the management and sustainable closure thereof, until the Minister has issued a closure certificate in terms of this Act to the holder or owner concerned.	The holder of a prospecting right, mining right, retention permit, mining permit, or previous holder of an old order right or previous owner of works that has ceased to exist, remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance **[to]** with the conditions of the environmental authorisation and the management and sustainable closure thereof, **[until the Minister has issued]** notwithstanding the issuing of a closure certificate by the Minister in terms of this Act to the holder or owner concerned.'';
Existing section 43(6) (MPRDA 2002)	**Proposed section 43(6)**
When the Minister issues a certificate he or she must return such portion of the financial provision contemplated in section 41 as the Minister may deem appropriate to the holder of the prospecting right, mining right, retention permit or mining permit in question, but may retain any portion of such financial provision for latent and or residual environmental impact which may become known in the future.	When the Minister issues a certificate he or she may retain any portion of such financial provision for latent and residual safety, health or environmental impact which may become known in the future for a period of 20 years after issuing a closure certificate.

9. There are two discrete issues we wish to address for purposes of the oral submission:

    a. The first relates to responsibility for environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance with the conditions of the environmental authorisation and the management and sustainable closure; and
    b. The second relates to the retention of funds to address that environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance with the conditions of the environmental authorisation and the management and sustainable closure.

Responsibility

10. We welcome the acknowledgement in the Bill that environmental impacts of prospecting and mining may only become known many years after cessation of the operations and that the holder of the right or permit remains responsible notwithstanding the issuing of a closure certificate by the Minister of Mineral Resources.

11. We record that this principle is grounded in section 24 of the Constitution and is prescribed in section 28 of NEMA. Section 19 of the National Water Act, 1998 is aligned with NEMA. The amendment to section 43(1) aligns the MPRDA with these pieces of legislation.

Retention of funds

12. We are concerned about the limitation to section 43(6) introduced by the Bill. Whereas previously, the Minister could retain any portion of the financial provision for latent and or residual environmental impact which become known in the future, in terms of the Bill, she may only do so for 20 years.

13. A retention period of 20 years is arbitrary. The impacts of the mining operation will differ from one mineral to another, one environment to another and one operation to another. The retention period should therefore be for the predicted life of the impacts (e.g. the expected time of mine decant, etc) as assessed on cessation of the mining operation and annually thereafter, until the

impacts have been remediated. The stipulated period of 20 years may be too long or too short, depending on the circumstances.

14. This concern is shared by many of the organisations that made submissions on the draft Bill in February 2008:

    a. In its comments on the Bill in February 2013, the **Chamber of Mines** states at page 36, "The Chamber therefore requests the deletion of the fixed period of 20 years so as to permit the Minister as currently to have regard to the facts pertaining to the particular operation in determining the period for which the relevant portion of the financial provision is actually to be retained. The manner in which such portion and the period of retention are to be determined could be dealt with by regulation."

    b. In its comments on the Bill in February 2013, **WWF-SA** states at page 4, "We are concerned by the Minister's intention to retain a portion of financial provisions for latent environmental liabilities for only 20 years in the amendment to Sub section 6 of Section 43. Although the retention of the provisions for some time is commendable given the Acid Mine Drainage (AMD) challenge, our Coal and Waters Futures Report[2] revealed that AMD can start over 40 years after the mine has closed as was the case with the Blesbokspruit in Gauteng."

    c. In its comments on the Bill in February 2013, **Federation for a Sustainable Environment** states at page 10, "The proposed amendment to Section 43(6) contemplates retention of any portion of the financial provision for latent and residual safety, health or environmental impacts but only for a period of twenty (20) years after issuing a closure certificate. Currently the provision for retention of these funds allows the Minister to keep them indefinitely. It is submitted that the proposed twenty (20) year period is too short when environmental disturbances, particularly in non-visible areas such as underground may only become apparent decades after the surface of the earth's crust has been disturbed. For example in the case of acid mine drainage from gold

[2] Colvin et al. 2011. Coal and Water Futures in South Africa: A case for protecting headwaters in the Enkangala grasslands. WWF-SA. Available at http://awsassets.wwf.org.za/downloads/wwf_coal_water_report_2011_web.pdf

mining on the Witwatersrand the full impact thereof is being felt one hundred years later. This proposed amendment is not supported."

d. In its comments on the Bill in February 2013, **Conservation South Africa** states at page 2, "CSA suggests that the retention of any portion of the financial provision should be for the predicted life of the impacts (e.g. the expected time of mine decant etc) and not be limited by a stipulated period, which may be too long or too short.")

15. We attach to this submission a 2012 WWF-SA report on financial provision for rehabilitation and closure in South African mining.[3] This report was submitted to the Department of Mineral Resources (DMR) to assist in the law reform process, but was never acknowledged and appears not to have been taken into account in the Bill. One of the key recommendations of this report was the "augmented and structured use of the independent review mechanism as a standard, default approach when assessing the adequacy of financial provisions." In the absence of provision for compulsory or voluntary peer review for financial provision (and the annual reassessment of its sufficiency) in section 24P of NEMA or otherwise, we propose that this should be included in the Bill.

16. To the extent that it is not addressed specifically in section 24P and 24R of NEMA, we propose that section 43 expressly prescribes that:

a. liability for rehabilitation of known environmental impacts, and (unknown) latent and residual safety, health or environmental impact <u>and pollution, ecological degradation, the pumping and treatment of extraneous water</u>, is assessed for purposes of decommissioning/closure. To facilitate this, it is necessary to list decommissioning/closure as a listed activity that requires an environmental authorisation; and

b. the Minister may retain provision in terms of section 43(6) in respect of all of the above.

3. *Supra*

Signed on behalf of

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