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Director-General
Department of Environmental Affairs
Pretoria
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11 December 2017

Comments by several civil society organisations on the proposed regulations pertaining to financial provision for prospecting, mining, exploration or production operations

1. This document constitutes comments by several civil society and community-based organisations on the proposed regulations pertaining to financial provision for prospecting, mining, exploration and production operations published for comment on 10 November 2017 in Government Gazette 41236 under GN R1128 (Draft Regulations).

2. The following organisations are signatories to the comments in this document:

   2.1. The Centre for Environmental Rights[1] (CER);
   2.2. The Federation for a Sustainable Environment[2] (FSE)
   2.3. Lawyers for Human Rights[3] (LHR)
   2.4. Conservation South Africa[4] (CSA)
   2.5. World Wide Fund for Nature, South Africa[5] (WWF-SA)
   2.6. Mining and Environmental Justice Community Network of South Africa[6] (MEJCON-SA)

3. The signatories to the comments in this document have a long history of involvement in the mining industry in South Africa and have significant experience in applying the legislation and regulations relating to financial provision both under the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) and the National Environmental Management Act, 1998 (NEMA).

[1] http://www.cer.org.za/
[2] http://www.fse.org.za/
[3] http://www.lhr.org.za/
[4] https://www.conservation.org/global/ci_south_africa/Pages/conservation-south-africa.aspx
[5] http://www.wwf.org.za/
[6] https://cer.org.za/programmes/mining/mining-environmental-justice-community-network-south-africa

4. We have some comments on specific proposed regulations in the Draft Regulations, which we will deal with after some general comments on the Draft Regulations.

PART A: GENERAL COMMENTS ON THE DRAFT REGULATIONS

Removal of the provisions dealing with care and maintenance for prospecting, mining, exploration and production operations

5. The provisions relating to care and maintenance in the Financial Provisioning Regulations, 2015 have been removed from the Draft Regulations. The Department of Environmental Affairs' (DEA's) explanatory memorandum gives only the briefest explanation for the omission of the care and maintenance provisions from the Draft Regulations:

   "Unease about the DEA mandate to address care and maintenance… It is deemed that the provisions in this section are also fundamental to many other aspects of the MPRDA and therefore care and maintenance and deemed closure aspects would be better placed within the regulatory framework of the MPRDA."

6. We disagree with this legal position for the reasons set out below, and strongly recommend that care and maintenance be regulated in the Draft Regulations.

7. Despite frequent use of the term in the mining industry in South Africa, "care and maintenance" is not regulated anywhere else, including in the MPRDA.[7] This is demonstrated by the following news articles, accessed at a quick search:

   7.1. "Atlatsa to place South Africa's Bokoni mine on care and maintenance", 24 July 2017 (http://www.mining-technology.com/news/newsatlatsa-to-place-south-africas-bokoni-mine-on-care-and-maintenance-5879439)

   7.2. "Glencore places Eland mine on care and maintenance", 7 October 2015 (http://www.miningweekly.com/article/glencore-places-eland-mine-on-care-and-maintenance-2015-10-07)

   7.3. "AngloGold intends to place its Kopanang mine and the Savuka section of the TauTona mine on care and maintenance", 28 June 2017

[7] Although "care and maintenance" is a well-established practice in the mining industry in South Africa, the Department of Mineral Resources has never shown any interest in regulating this state of affairs in the MPRDA or otherwise.

(https://www.bloomberg.com/news/articles/2017-06-28/anglogold-may-cut-as-many-as-8-500-jobs-at-south-african-mines)

8. Given the enormous potential impact of a "care and maintenance" state of a mining operation on the environment, including serving, in practice, as a gateway to mine abandonment, there is ample legal and practical justification for care and maintenance of mining operations to be regulated under NEMA. Moreover, this is not dealt with in any other primary or subordinate legislation, resulting in circumstances where mines never close and the land is never rehabilitated – situations of permanent 'temporary' closure.

9. Section 44(1) of NEMA, which authorises the Minister of Environmental Affairs to make regulations, is wide enough in scope to cover regulations relating to environmental management and financial provisioning for prospecting, mining, exploration and production operations that have been placed under care and maintenance. Section 44(1), in relevant part, provides as follows:

(1) The Minister may make regulations –

(aH) [relating to] any other matter necessary to facilitate the implementation of the financial provision

(b) generally to carry out the purposes and the provisions of [NEMA].

10. As the issues of financial provision for remediation and rehabilitation and care and maintenance are integrally connected, the provisions relating to care and maintenance fall comfortably within the ambit of section 44(1)(aH) of NEMA. Moreover, care and maintenance would also be captured under section 44(1)(b) of NEMA which authorises the Minister "generally, to carry out the purposes and the provisions of this Act".

11. The care and maintenance provisions in the Financial Provisioning Regulations, 2015 are necessary to avoid mine abandonment and therefore the potentially catastrophic consequences for the environment and mining-affected communities. The practice of care and maintenance – particularly when it carries on for a significant period - is a direct cause of social disruption, detrimental environmental and health impacts, and safety risks – all matters that fall within the ambit of NEMA. That care and maintenance frequently serves as a gateway to mine abandonment has long been recognised. As long ago as 2006, Laurence, D. said in "Optimisation of the mine

closure process", "*In practice ... only a small percentage of mines are closed according to plan, with the majority closing prematurely or suddenly for a variety of reasons."*[8]

12. As such, regulation 16 of the 2015 Regulations serves to facilitate the carrying out of some of the purposes of NEMA, such as the prevention of pollution and ecological degradation[9] and ensuring the costs of remedying pollution, environmental degradation and consequent adverse environmental health effects, and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.[10] It must be retained.

13. Section 44 of NEMA must also be read in the light of section 50A(2) of NEMA, which sets out the agreement that gave rise to the One Environmental System. In terms of that agreement, the Minister responsible for environmental affairs sets the regulatory framework and norms and standards. This part of the agreement was confirmed as law by our courts, most recently in the matter of *Stern N.O. and others v Minister of Mineral Resources*,[11] in which the Eastern Cape Division of the High Court struck down regulations pertaining to the environmental management of hydraulic fracturing. The court found that the Minister responsible for mineral resources was not authorised to make those provisions and that that function must be exercised by the Minister responsible for environmental affairs. By analogy, the aspects of care and maintenance dealing with environmental management must be provided for in regulations made by the Minister responsible for environmental affairs.

14. "Care and maintenance" is crying out for regulation and this was one of the major achievements of the 2015 Regulations. We therefore recommend that the draft regulations be amended to include the care and maintenance arrangements provided for in the 2015 Regulations, and that the short title, scope and purpose of the draft regulations are amended to include reference to care and maintenance. A failure to regulate care and maintenance (and particularly the financial provision for care and maintenance) creates a loophole in the law that allows mining companies to ostensibly put a mine on care and maintenance while effectively closing it without rehabilitation.

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[8] *Journal of Cleaner Production*, *14*(3–4), 285, 286,
[9] Preamble to NEMA as well as section 2(4)(a) of NEMA
[10] Section 2(4)(p) of NEMA
[11] Case No. 5762/2015 (17 October 2017)

Right to make representations on the adequacy of financial provision

15. The draft regulations do not contain any provisions which would enable interested and affected parties to make representations in the event that financial provision for a specific prospecting, mining, exploration or production operation is inadequate. Provisions to that effect would be in line with the national environmental management principle in section 2 of NEMA that the participation of all interested and affected parties in environmental governance must be promoted, [12] and in line with the requirements of the Promotion of Administrative Justice Act, 2000 (PAJA).

16. We therefore recommend the insertion of a regulatory mechanism, similar to that of the complaints procedure for interested and affected parties in relation to environmental assessment practitioners as contained in the 2014 EIA Regulations,[13] enabling an interested and affected party to make representations to the Minister responsible for mineral resources notifying him or her that the financial provision for a relevant prospecting, mining, exploration or production right is inadequate and calling on him or her to require a holder or holder of right or permit to adjust the financial provision in the manner contemplated in draft regulation 14. A notification by an interested and affected party may be accompanied by a report by relevant specialists.

17. The Minister responsible for mineral resources must be obliged in terms of the proposed mechanism to investigate the financial provision determination and respond to the interested and affected party within a specified period of time.

18. For this purpose, we recommend the insertion of a new draft regulation 16 (before "transitional arrangements"), in the following terms:

    Any interested or affected party shall at any time be entitled to make representations to the Minister responsible for mineral resources notifying him or her that the financial provision for a relevant prospecting, mining, exploration or production right is inadequate, and calling upon the Minister to require a holder or holder of right or permit to adjust the financial provision in the manner contemplated in regulation 14. In making these representations, the interested or affected party may rely on a report (or reports) by relevant specialists.

    On receiving such representations, the Minister responsible for mineral resources must promptly investigate the adequacy of the financial provision, and must respond to the interested or affected

[12] Section 2(4)(f) of NEMA
[13] Regulation 14 of the 2014 EIA Regulations.

party within 30 days, indicating the results of his or her investigation and whether or not the holder or holder of a right or permit shall be required to adjust its financial provision (including the reasons for the Minister's decision in this regard).

PART B: COMMENTS ON SPECIFIC DRAFT REGULATIONS

Draft regulation 1: Definitions

Proposed definition of "applicant"

19. We strongly support the wider definition of applicant.

20. However, we have two concerns about part (b) of the proposed definition.

    20.1. First, sections 11 and 102 of the MPRDA do not explicitly require holders of rights or permits in terms of the MPRDA to amend or replace their financial provision when transferring or amending their rights or conditions of operation. We therefore submit that the phrase "a person who is required in terms of the [MPRDA] to amend or replace the financial provision made in respect of any prospecting, exploration, mining or production operations" renders the definition ambiguous. We submit that applications in terms of section 11 of the MPRDA to cede, transfer, assign or alienate a right or permit, and applications in terms of section 102 of the MPRDA to amend a mining right, mining permit, prospecting right, exploration right, exploration permit, environmental management programme or environmental authorisation must always involve the re-evaluation of financial provision to ensure that it is still adequate.

    20.2. Furthermore, we submit that part (b) must also refer to the Environmental Impact Assessment Regulations (EIA Regulations) since these govern the amendment of environmental authorisations.

21. In light of our two concerns, we recommend the following re-wording of part (b) of the definition of "applicant":

    [a person who is required in terms of the Mineral and Petroleum Resources Development Act, 2002 to amend or replace the financial provision made in respect of any prospecting, exploration, mining or production operations as a result of an application for consent to cede,

transfer, assign, alienate or amend a right or permit as contemplated in section 11 or 102 of the Mineral and Petroleum Resources Development Act, 2002]

A person who seeks to -

(i) cede, transfer, assign or alienate a right or permit in terms of section 11 of the Mineral and Petroleum Resources Development Act, 2002; or

(ii) amend a mining right, mining permit, prospecting right, exploration right, exploration permit, environmental management programme or environmental authorisation in terms of the Mineral and Petroleum Resources Development Act, 2002, or in terms of the Environmental Impact Assessment Regulations

Proposed definition of "CPI"

22. We recommend that the proposed definition of "CPI" is amended as follows:

"CPI" *means the headline consumer price index (all urban areas) as published by Statistics South Africa or its successor from time to time under statistical release P0141, or, if that index is no longer published, the most similar index published by Statistics South Africa or its successor from time to time.*

Proposed definition of "residual environmental impact"

23. We support a definition for "residual environmental impact". However, we have some concerns around "residual environmental impacts" generally and the proposed definition of "residual environmental impact."

24. We submit that the definition of "residual environmental impact" should be aligned with the mitigation hierarchy provided for in section 2 of NEMA. We therefore recommend the insertion of the phrase "measures to avoid, minimise or remedy".

25. The scope of the definition encompasses only environmental impacts that result or manifest after closure. However it is possible that residual environmental impacts result or manifest after relevant prescribed actions have been taken to avoid, minimise or remedy environmental impacts during the operational phase of a mine, i.e. before closure. For that reason, it is imperative that annual rehabilitation plans are revised on a regular basis. We make some comments about the revision of annual rehabilitation plans in paragraphs 61 to 63 below. For the purposes of

strengthening the definition of "residual environmental impact", we recommend that it is amended in the following manner:

"residual environmental impact" *means any environmental impact or risk that* ***[may result]*** *remains or may manifest after* ***[actions for]*** *measures to avoid, minimise and remedy that impact or risk have been implemented during the lifespan of the operation, and during and after the final rehabilitation, decommissioning and closure [have been implemented]*

Proposed definition of "specialist"

26. The definition of specialist does not include "biodiversity" specialists. As biodiversity is often adversely affected by mining, it is sometimes important for biodiversity specialists to give input in the calculation of financial provision. We therefore recommend that the definition of specialist is re-drafted as follows:

"specialist" *means an independent person or persons who is qualified by virtue of his or her demonstrable knowledge, qualifications, skills or expertise in the mining, environmental, biodiversity, water, resource economy and financial fields*

Draft regulation 3: Application of Regulations

27. We submit that the Minister of Environmental Affairs should also be given the discretion to extend the application of the draft regulations to applications other than applications for environmental authorisation relating to prospecting, exploration, mining or production (for example an environmental authorisation for construction of a chemicals plant). Such an amendment would bring the draft regulations in line with section 24P of NEMA. Subsection (7) of that section provides that the Minister, or an MEC, with the concurrence of the Minister, may in writing make section 24P applicable to any application other than an application for environmental authorisation relating to prospecting, mining, exploration or production operations, with changes required by the context.

Draft regulations 5: Scope of financial provision

28. We support the wording of draft regulation 5.

Draft Regulation 6: Method for determining financial provision

29. It is not clear from draft regulation 6 whether or not public participation is required for the determination of financial provision. We strongly recommend that explicit provision is made for

public participation in relation to the determination of financial provision. Such a provision would be in line with the national environmental management principle in section 2 of NEMA that the participation of all interested and affected parties in environmental governance must be promoted,[14] and given the external legal effect of the approval of financial provision, public participation is also required by the right to administrative justice enshrined in the Constitution of the Republic of South Africa, 1996[15] and provided for in the PAJA.

30. In our experience, mining companies refuse to conduct – and the Department of Mineral Resource (DMR) fails to require - public participation on any issue in respect of which it is not an explicit requirement in the particular statute (as opposed to the Constitution, or other overarching laws like PAJA).[16] Although this is unlawful, violation of the requirements for public participation can then only be remedied through appeals and litigation, placing an unfair burden on those whose rights to participation were violated in the first place to rectify the situation.

31. In terms of draft regulation 6(a), "annual rehabilitation, as identified in an annual rehabilitation plan," is one of the factors that needs to be considered in determining financial provision. We submit that that draft regulation should also refer to "remediation" and not only "rehabilitation." Such a proposed change would align draft regulation 6(a) with draft regulation 5(a), which provides that an applicant, holder or holder of a right or permit must make financial provision for "rehabilitation and remediation." Furthermore, "remediation" is an integral part of the mitigation hierarchy contemplated in section 2 of NEMA.

32. Annual rehabilitation plans must also be aligned with obligations in environmental authorisations. We recommend the insertion of a specific provision to that effect.

Draft regulation 7: Availability of financial provision

33. We <u>strongly object</u> to the proposal that the amount of available financial provision should be equal to the costs of implementing the final rehabilitation, decommissioning and mine closure plan and

[14] Section 2(4)(f) of NEMA
[15] Section 33 of the Constitution
[16] An example of this is the fact that public participation seldom seems to be required in relation to section 102 applications made by existing operations to amend their mining rights and environmental management programmes, despite the fact that these amendments often entail significant expansions in the size of the operations, which has an external legal effect on communities in the area of operation.

the environmental risk assessment report for a period of 3 years (and 1 year in the case of an applicant or holder of a mining permit).

34. The explanation given by DEA for reducing the 10 year period to 3 years is that "committing [financial provision] for 10 years upfront will have negative financial impacts on a company." However, not having adequate financial provision available also has extremely negative financial impacts for a company, its shareholders, its creditors and employees, its directors, the state, the environment and affected communities. This is well illustrated by the example of Blyvooruitzicht where no rehabilitation work has taken place to date, to the detriment of the surrounding community, as reported on by Lawyers for Human Rights.[17]

35. The Financial Provisioning Regulations, 2015 (Regulations) were a much needed improvement on the previous regulatory system for financial provision under the MPRDA and its regulations. The Regulations had the potential to ensure accurate and suitable cover for remediation and rehabilitation, and in so doing, significantly interrupt the ongoing trend of mine abandonment, a trend facilitated precisely because financial provision was not properly assessed or collected. The Regulations seemed to recognise and attempt to address the emerging acknowledgement that the prime challenge facing sustainable mine closure was the inadequate funding of and poor cash flow management of the closure process. Thus, long-term remediation measures were usually sidelined due to budget constraints. This became especially chronic near the end of life-of-mine when cash flow becomes constrained.[18] Mileras et al found that "*Key failure lies in mine closure generally being pushed out towards the end of the life of the mine when money gets tight."*[19]

36. Mine abandonment is endemic in South Africa and has a profoundly adverse impact on our water and air, the productive capacity of our soil and on the health and well-being of people - mining-affected communities in particular. The cost of unrehabilitated mines extends to the likes of acid mine drainage remediation, unquantified health costs, unravelling of the security situation on unrehabilitated and abandoned mines with unquantified police resources expended on informal mining and mine-related conflicts.

37. We understand the purpose of financial provision as provided for in Section 24P of NEMA is to ensure that the holder (or, in the absence of the holder, the Minister of Mineral Resources) has

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[17] Lawyers for Human Rights, *Blyvooruitzicht Mine Village: the human toll of state and corporate abdication of responsibility in South Africa*, January 2017.
[18] M. Milaras, F Ahmed TJM McKay 'Mine closure in South Africa: A survey of current professional thinking and practice' Paper presented at Mine Closure 2014, held in October 2014, Johannesburg, South Africa
[19] Ibid.

sufficient funds available to rehabilitate a mine and deal with the residual impacts where the holder is not able to do so at a particular point in time. If that is the case, the proposed Regulation 7 is directly contrary to that aim, as it appears to require only that a portion of the required provision is "available" at any given time. Such an approach is also in conflict with the environmental management principles set out in Section 2 of NEMA. It is critical to note that Section 24P requires not an accounting provision, but actual financial resources that are set aside for the purpose of rehabilitation and residual impact management – this is clear from Section 24P(2), which empowers the Minister of Mineral Resources to use the applicable provision if the holder fails to comply with its obligations. An accounting provision would be meaningless in this context.

38. Conceptually, Section 24P, and the Regulations, are akin to insurance for the State – if a contingent event occurs (the holder failing to comply with its obligations) the insurance payment must allow the State to fulfil those obligations in the holder's place. When taking out insurance, the degree of contingency of the event insured against does not affect the amount for which you insure (which must always be the full amount required, the "replacement value" in insurance terms), it only affects the premium. In this instance, because the obligations insured against are the holder's obligations, the holder will negotiate and bear those "premiums" – this is in fact what the cost of a financial guarantee amounts to. If the proposed Regulation 7 allows only a proportion of the provision to be "available" at any given time, the State will, continuing the analogy, be "underinsured" by a significant margin – each time the event insured against occurs, the fiscus will bear the additional cost. The State assuming this risk amounts to an unjustifiable subsidy for the holder.

39. The definition of "financial provision" in NEMA (which deal with "guaranteeing the availability of sufficient funds"), read with Section 24P(2), make it clear that actual financial resources must be available to allow the Minister of Mineral Resources to fulfil the necessary rehabilitation or management obligations if the holder does not do so at any time. Regulation 6 provides the methodology to determine the extent of the financial resources required. If the Regulation 7 allows only a proportion of those financial resources to be available at any time, it is unclear how the Minster of Mineral Resources is to act under Section 24P(2), since he or she will not be able to access the full provision if it is not available. Furthermore, a portion of financial provision does not meet the definition of "financial provision" in NEMA. As such, it is likely that the proposed Regulation 7 is *ultra vires* NEMA, particularly Section 24P. It is also noteworthy that Regulation 8 provides that the financial provision must be made in one or more of three prescribed ways – it

does not allow for an "available" portion of the financial provision to be made in any of those ways. For these reasons, we strongly recommend that the full amount of financial provision must be made available, and that draft regulation 7(1) is reworded as follows:

"An applicant, holder or holder of a right or permit must ensure that the available financial provision, calculated using the methodology described in Appendix 1 or 2, is at any given time equal to the sum of the costs of implementing the activities identified in the plan and report contemplated in regulation 6(b) and (c) ***[for a period of –***

(a) 3 years; or

(b) 1 year in the case of an applicant or holder of a mining permit]*."*

40. While reserving all rights in relation to the position above, if it is the Minister's position that he only wishes to hold security for a proportion of the actual rehabilitation and management costs and accepts the risk for the balance of that proportion on behalf of the State, then that proportion should at least be prescribed, bearing in mind that the balance of that proportion will have to be funded by the fiscus if the mine is abandoned, and the company has insufficient other funds, and/or is wound up. If there are long-term residual effects, particularly acid mine drainage which has a duration of many decades, it becomes a virtual certainty that the State will have to bear these costs.

41. It should be noted that, against the background set out above, the proposed period of 3 years for "available" financial provision is completely arbitrary, and does not take into account the variability of the time it may take to rehabilitate and close a mine, let alone the period for which residual effects are likely to persist. (This comment also applies to the 10 year period provided for in the Regulations.)

42. Moreover, financial provision availability of 3 years is untenable in all cases except for those exceptional situations in which good concurrent rehabilitation has been achieved throughout the life of mine. It is conceivable to move physical infrastructure and possibly undertake earthmoving and soil placement within 3 years. But to establish a stable ecosystem through rehabilitation, including stabilising the hydrological services from impacted sites, is not possible in the South African context. Arbitrary as it also is, a 10 year period is likely a minimum timeframe to achieve this.

43. In addition, the 3 (or 10) year period makes no distinction between proposed Regulations 6(b) ("final rehabilitation, decommissioning and closure… expected at the end of the life of

operations") and 6(c) ("residual environmental impacts"). In relation to 6(b), regard must be had to how long it would take to close and rehabilitate a mine. For the reasons set out above, 3 years is hopelessly inadequate except in the most unusual of cases.

44. For 6(c), since acid mine drainage is the most obvious of residual environmental impacts, a much longer period – at least 20 years - is required. The environmental risk assessment required by the proposed subregulation would presumably show with some certainty whether acid mine drainage is likely and whether long term pumping and/or treatment of polluted or extraneous water would be required, or any other long term residual effect would have to be addressed.

45. Furthermore, and depending on the content of the plans and reports, the 3 year period exposes the financial provision system to further risk of abuse. It would allow applicants, holders and holders of rights or permits to "frontload" their least cost remediation and rehabilitation measures in the first few years of operation, which would keep their financial provision relatively low. This again opens the door to mine abandonment or liquidation before the highest cost remediation and rehabilitation measures are implemented. The risk of abuse is only partially alleviated by the requirement to regularly audit and revise financial provision. This is particularly so where the DMR's capacity to properly implement those financial provision regulations is limited.

46. The proposed 3 year period is therefore dangerously inadequate, and leaves the fiscus, the environment and affected communities exposed to the risk of liquidation, business rescue, sale of the mine and/or abandonment of the mine – these are major drivers of unplanned or poorly executed mine closure.

47. Subject to the comments in relation to proposed draft regulation 7(1) above, we support the proposed draft regulation 7(2), but we suggest that drafting be altered somewhat to read: "The sum contemplated in subregulation (1) must, whenever it is determined, be increased by the most recently published year on year CPI plus 2%, and must include value added tax at the applicable rate."

Draft regulation 8: Financial vehicles used for financial provision

48. One of the proposed financial vehicles for financial provision is *"… a deposit into an account administered by the Minister responsible for mineral resources*" (daft regulation 8(1)(b)).

49. It is not clear from regulation 8(1) if all financial provisions made in terms of draft regulation 8(1)(b) must be deposited into a single bank account or if each financial provision will have a separate bank account. We recommend that some clarity is provided in the draft regulations in this regard. For the purposes of the comments under this heading, it will be assumed that the draft regulations envisage a single bank account for all financial provisions made in terms of regulation 8(1)(b). It is also clear from a perusal of the annual financial statements of mining companies that even though this is an existing requirement, funds for rehabilitation are being deposited into a variety of different accounts which are not administered by the Minister responsible for mineral resources (e.g. money market funds).

50. We object to the use of a bank account administered by the Minister of Mineral Resources in the absence of specific regulations on how funds deposited into such a bank account are used and audited. More particularly, we recommend the insertion of at least a regulation or regulations providing –

    50.1. for regular independent auditing of the bank account and the annual publishing of the audit results, as well as details of the amounts and operations to which they are connected, in the *Gazette* or by other means;

    50.2. that the Minister responsible for mineral resources must, as part of the auditing process, provide proof of how the funds withdrawn from the bank account have been spent in the relevant auditing period;

    50.3. that each financial provision made in terms of draft regulation 8(1)(b) must be linked to a specific prospecting, mining, exploration or production operation, and that the funds must be itemised as such in the audit results published in the Gazette or by other means;

    50.4. that the funds deposited into such account may only be used for the purposes of rehabilitation and remediation of the environmental impacts of relevant prospecting, mining, exploration or production operations; and

    50.5. for remedies in the event that the funds are misused.

51. We further submit that the draft regulations must explicitly prohibit the use of financial provision held by means of a trust fund or rehabilitation company contemplated in draft regulation 8(1)(c)

for any purpose other than the rehabilitation and remediation of the environmental impacts of relevant prospecting, mining, exploration or production operations and other environmental risks and obligations. The failure to comply with or a contravention of such a prohibition should attract criminal sanction. The trust fund or rehabilitation company's financial statements must also be made publicly available.

52. We support draft subregulation (2) which provides that a financial guarantee may not be used for the financial provision required for remediation of residual environmental impacts. (Note that, if the final version of these regulations take a different position, various consequential changes need to be made to Appendix 2.)

53. We submit that the requirement in draft subregulation (8) for the holder or holder of right or permit to notify a relevant financial institution that a financial guarantee may be called is unnecessary, since financial institutions do not ordinarily require prior notification unless it is required in terms of a financial guarantee. We furthermore submit that subregulation (8) should also be applicable to applicants. We therefore recommend the following re-wording of subregulation (8):

Should the Minister responsible for mineral resources wish to initiate a claim under a financial guarantee, he or she shall first provide written notice of the intention to initiate a claim, including written reasons for such claim to the relevant applicant, holder or holder of a right or permit, after which the applicant, holder or holder of a right or permit, if it wishes to respond to such notice, must do so ***[respond]****, within 30 days* ***[to such notice or notify the financial institution that the guarantee may be called]****.*

54. We welcome the requirement under draft subregualtion (11) for a holder or holder of right or permit to apportion financial provision relating to each right and permit where that holder or holder of a right or permit holds more than one right or permit, but only has one financial vehicle for financial provision in respect of all of its rights or permits. However, we submit that subregulation (11) must specify how such apportionment is made by a holder or holder of right or permit. We make the following recommendation:

Where a holder or holder of a right or permit is in possession of multiple rights or permits issued in terms of the Mineral and Petroleum Resources Development Act, 2002, the apportionment of the financial provision relating to each right and permit must be identified in the relevant financial

guarantee, in a written notice to the Minister responsible for mineral resources accompanying any deposit, in the documents constituting a trust fund or rehabilitation company, as the case may be, and in the annual financial statements of the holder or holder of a right or permit.

Regulation 9: General requirements for financial provision

55. In terms of draft regulation 9(1), the determination, review and assessment contemplated in draft regulations 4, 5, 6, 7, 10 and 11 must be undertaken by a specialist or specialists. We submit that those determinations should be made by a team of specialists and that applicants, holders and holders of rights or permits should not be given the option to have those determinations made by a single specialist. We submit that no single specialist will be able to calculate financial provision accurately. We therefore propose the following re-wording of draft regulation 9(1):

    *Unless subregulation (2) applies, the determination, review and assessment contemplated in regulations 4, 5, 6, 7, 10 and 11 must be undertaken by **[a specialist or]** relevant specialists.*

56. Draft subregulation (2) makes provision for "in-house" determination, review or assessment on the condition that such determination, review and assessment is externally reviewed by relevant independent specialists. We submit that the independent specialists must be required to professionally certify that the determination, review or assessment is correct. We therefore recommend the following re-drafting of subregulation (2):

    An applicant, holder or holder of right or permit may conduct the determination, review and assessment on condition that –

    (a) such applicant, holder or holder of right or permit appoints relevant independent specialists to externally review such determination, review and assessment; and
    (b) those independent specialists certify that the determination, review and assessment are in accordance with the applicable regulations and the highest prevailing standards in the specialists' respective industries, and the conclusions reflected therein are correct and properly substantiated.

57. There appear to be drafting errors in subregualtions (5) and (6). We submit that those subregulations are re-drafted as follows:

(5) Where regulation 8(1)(a) applies, the proof or making or adjusting the financial provision contemplated in regulations 10(b) or 12(4)(b), as the case may be, must be accompanied by a verification of ***[registered]*** *registration or accreditation of the financial institution contemplated in those subregulations.*

(6) Where an applicant, holder or holder of right or permit makes use of the financial vehicle contemplated in regulation 8(1)(b), any interest earned on the deposit shall first be used to defray bank charges in respect of that account and thereafter accumulate and form part of the account administered by the Minister responsible for mineral resources and no interest will be payable by the Minister responsible for mineral resources to the applicant, holder or holder of a right or permit for any amounts deposited in such account.

Regulation 10: Determination of financial provision by applicant

58. We refer to our comments on the proposed definition of "applicant" in paragraphs 19 to 21 above. We request that our comments should be taken into consideration in relation to the review of this draft regulation.

59. We submit that draft regulation 10 must also provide for how financial provision is made in the event that –

    59.1. a holder or holder of a right or permit is required to adjust financial provision in terms of draft regulation 11; and

    59.2. the Minister responsible for mineral resources utilises his or her power in terms of draft regulation 14 to increase financial provision

60. We therefore recommend the addition of subregulations (3) and (4) in the following terms:

    (3) A holder or holder of a right or permit which is required to adjust financial provision in terms of regulation 11(2) must provide proof of payment of the additional financial provision, or in the case of a financial guarantee, proof of an amended guarantee.

    (4) A holder or holder of a right or permit which, as a result of a revision or review of the determination, assessment or adjustment of financial provision as contemplated in draft regulation 14, is required to increase financial provision, must provide proof of payment of the

shortfall, or in the case of a financial guarantee, proof of such amended guarantee, within 30 days of the submission of the revision or review of the financial provision to the Minister responsible for mineral resources.

Draft regulation 11: Review, assessment and adjustment of financial provision by a holder of a right or permit

61. We remain concerned that annual reassessment as contemplated in terms of draft regulation 11(1) is impractical, and that the effectiveness and thoroughness of the process may well be compromised if the holder of a long-term right is required to undergo this process on a yearly basis. Annual reassessment that requires procurement, investigation, analysis and revision will lead to an endless (and possibly fruitless and ineffective) cycle of reassessment. We therefore recommend a triennial (i.e. 3-yearly) assessment and review by a competent team of specialists to ensure a better plan, improved outcomes and hence more accurate financial provision, with a discretion to reduce this to an annual requirement where appropriate.

62. Draft regulation 11 provides for the periodic review of the adequacy of financial provision based on the plans and report referred to in draft regulation 6. There is however no provision in the draft regulations requiring a holder or a holder of a right or permit to review the plans and report referred to in regulation 6 on a regular basis. We submit that appropriate provisions are inserted requiring the regular review of the plans and report referred to in draft regulation 6.

63. Draft subregulation (3) may well be in conflict with section 37A of the Income Tax Act, 1962, which allows distributions by a trust/company if the Minister is satisfied that it has sufficient assets to rehabilitate entirely. We therefore submit that draft subregulation (3) is aligned with that provision. Moreover, we submit that the phrase "be deferred" in draft subregulation (3) is replaced with "continue to be provided".

Draft regulation 13: Responsibility of holder or holder of a right or permit

64. We support and welcome the requirement that holders and holders of rights or permits must make their determination, review and adjustment of financial provision as well as any audit of such financial provision, once submitted to the competent authority, publicly available. We however submit that holders and holders of rights and permits must also make their plans and report contemplated in draft regulation 6 as well as any review thereof, once submitted to the competent authority, publicly available. Without the plans and reports, the financial provision

information cannot be properly understood, and vice versa. Closure planning and consultations done with interested and affected parties are meaningless without access to this information. We therefore recommend the re-formulation of draft regulation 13(1) as follows:

*(1) The holder or holder of a right or permit must make its determination, review and adjustment of financial provision, **[as well as]** any audit of such financial provision as well as its plans and report contemplated in regulation 6 and any review of such plans and report, once submitted to the competent authority —*

(a) available on a publically accessible website of the holder or holder of a right or permit, if such holder of a right or permit has such a website;

(b) available at the site office of the prospecting, exploration, mining or production operation; and

(c) accessible to the public on request.

65. We submit that the requirement in draft subregulation (3) for all documentation to be signed off by the Chief Executive Officer or independent auditor must also be made applicable to applicants (not only holders and holders of rights or permits). We therefore propose the following amendment to draft subregulation (3):

All documentation submitted to the Minister responsible for mineral resources by an applicant, holder or holder of a right or permit must be sighed off by the Chief Executive Officer or person appointed in a similar position and information regarding financial aspects contained in such documentation must be signed off by an independent auditor.

Draft regulation 14: Powers of Minister responsible for mineral resources

66. We support the requirement for financial provision to be in place before the Minister responsible for mineral resources may grant environmental authorisation in respect of any prospecting, mining, exploration or production operation.

67. We submit that proof of payment of adequate financial provision, or in the case of a financial guarantee, adjustment of the financial guarantee, should also be made a prerequisite for the giving of consent for –

67.1. the cession, transfer or assignment of a relevant right or permit in terms of section 11 of the MPRDA; and

67.2. the amendment of a relevant right, permit, environmental management programme or environmental authorisation in terms of section 102 of the MPRDA, read with the Environmental Impact Assessment Regulations.

68. We propose the insertion of a subregulation after subregulation (1) in the following terms:

The Minister responsible for mineral resources may only give his or her consent for –

(a) the cession, assignment, transfer of a prospecting right, mining right, mining permit, exploration right or production right in terms of the Mineral and Petroleum Resources Development Act, 2002; or

(b) the amendment of an environmental authorisation or environmental management programme in terms of section 102 of the Mineral and Petroelum Resources Development Act, 2002, read with the Environmental Impact Assessment Regulations

after compliance by the applicant with regulation 10.

69. We welcome the provisions in subregulations (2) and (3) requiring the applicant, holder or holder of right or permit to bear the costs of a revision or review of the determination of financial provision.

70. We submit that draft regulation 14 should contain a subregulation that authorises the Minister responsible for mineral resources to suspend or cancel environmental authorisation for a prospecting, mining, exploration or production operation in the event that a holder or holder of a right or permit fails to adjust its financial provision if it is required to do so following an annual review and assessment contemplated in draft regulations 11 and 16(4), after giving notice to the holder or holder of right or permit.

Draft regulation 16: Transitional arrangements

71. Draft subregulations (8)-(11) provide that the Minister responsible for mineral resources may enter into a payment agreement with a holder, an applicant contemplated in part (b) of the

definition of "applicant" or a holder of a right or permit who applied for such right or permit before the commencement of the Financial Provisioning Regulations, 2015 but who obtained such right or permit after the commencement of those Regulations or a holder of an offshore oil and gas production right, if such holder, applicant or holder of a right or permit is not able to increase the assessed and audited financial provision to cover an identified shortfall.

72. For the event that the inability to meet the increased financial provision is a possible precursor to liquidation, business rescue or the abandonment of its operation, we submit that increased frequency of monitoring and auditing of operations is prescribed.

73. There is no explanation why the oil and gas industry have been afforded an additional six years to comply with the draft regulations. That exceptionally long transitional period poses a significant threat to the marine environment and therefore the marine living resources on which many South Africans are reliant for their livelihoods. Given that rights have already been awarded to that industry over 98% of our marine environment, the threat is stupendous. We strongly object to this, and recommend that the six year period must be dramatically reduced.

Draft regulation 20: Short title and commencement

74. The short title given in this draft regulation is not the same as the short title given in the *Gazette* under which the draft regulations were published.

75. In addition, as explained in paragraphs 5 to 14, the scope of the draft regulations must be expanded to include provisions dealing with care and maintenance.

76. We therefore recommend that draft regulation 20 is re-formulated as follows:

*These regulations are called **[Financial Provisioning Regulations, 2017]** Regulations pertaining to the financial provision for prospecting, mining, exploration and production operations and care and maintenance for prospecting, mining, exploration and production operations and commence on the date of publication in the* Gazette.

Draft appendices 1 and 2: Methodology for calculation of financial provision for new and existing developments

77. We welcome the prescribed methodology for the calculation of financial provision for new and existing development. However, we submit that the proposed methodologies in Appendices 1 and

2 are too vague. We suggest that they are supplemented with a table of definitions for terms such as “prevailing rates”, “Year 0”, etc. We submit that it would also be useful to attach a table depicting an example of the use of the methodologies.

Draft appendices 1, 2, 5 and 6

78. In line with our comments that the scope of the regulations must be extended to cover “remediation” and not only “rehabilitation”, we strongly recommend that Appendices 1, 2, 5 and 6 are revised to include “remediation” items, such the cost of implementing biodiversity offsets.

Draft appendix 3

79. In paragraph 2, the Minister should be able to claim an amount up to a maximum of the Guaranteed Sum (as it may not be necessary to claim the full amount), and should also be able to claim more than once, subject to the maximum aggregate claim being not more than the Guaranteed Sum.

80. Paragraph 2.1 – the ability to call on the guarantee if the guarantee is to be cancelled has been removed. This is an essential protection for the State – a guarantee of this nature would be cancelled only for 2 reasons:

    80.1. the holder is changing banker or is providing the financial provision in a different manner, in which event a replacement guarantee or other provision can be provided and cancellation would be by agreement, not by notice from the bank. This situation does not need to be specifically regulated; or

    80.2. if the bank no longer wishes to provide the guarantee, which would be because the bank has cancelled the relevant guarantee facility. The latter would only occur if the holder had breached the terms of that facility, either by not paying its guarantee fee, or becoming insolvent, or something similar.

81. In the second situation contemplated above, simply allowing the guarantee to fall away leaves the State completely exposed, with recourse only to the holder. Since it is likely that financial or similar difficulties would be the cause of the guarantee falling away, this undermines the entire purpose of the Regulations.

82. Paragraph 2.1.1 deals only with a failure to execute actions identified in the final rehabilitation and closure plan, but Regulation 6(a) requires that the financial provision deals also with annual rehabilitation. The guarantee should therefore also be available for a failure to comply with those obligations, as may well occur when a holder is in financial difficulty, and rehabilitation is required even if the mine is not to be closed. Paragraph 2.1.1 of the previous version of this document should therefore be reinstated, otherwise it does not constitute financial provision under Regulation 6(a).

83. In paragraph 2.1.2, the words "or is placed under supervision for business rescue" should be added after the words in brackets.

84. Having regard to the comment in 79, paragraph 2.3 should be amended by the inclusion of the words "(if the full Guaranteed Sum is claimed or the amount claimed brings the aggregate claim to the Guaranteed Sum)" should be added after the word "together" in the third line. The reference to paragraph 4a should be to paragraph 3.1.

85. Paragraph 3.1 – the words "when giving account to the Guarantor in terms of clause 3 above" should be deleted and replaced by the words "as contemplated in paragraph 2.3".

86. Paragraph 3.2(i) – the words "or 3" should be deleted.

Draft appendix 4

87. There are a number of references to the "Minister of mineral resources" but the defined term is just "Minister".

88. Paragraph 15 – this paragraph only allows action by the Minister if there is a failure to comply with a final rehabilitation and closure plan. It must do so if there is a failure to comply with either plan under Regulation 6(a) or 6(b) or, in particular, with the report contemplated in Regulation 6(c), otherwise the Minister cannot access the funds to deal with residual impacts.

END