Comments by the undersigned civil society members and organisations on the proposed regulations pertaining to financial provision for prospecting, mining, exploration or production operations published for comment on 17 May 2019

1. This document constitutes comments by the undersigned civil society members and organisations on the proposed regulations pertaining to financial provision for prospecting, mining, exploration or production operations published for comment on 17 May 2019 in Government Gazette 42464 under GN 667 (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. The Centre for Applied Legal Studies[3] (CALS);
   2.4. The Endangered Wildlife Trust[4] (EWT);
   2.5. The Legal Resources Centre[5] (LRC);
   2.6. Lawyers for Human rights[6] (LHR); and
   2.7. Mining and Environmental Justice Community Network of South Africa[7] (MEJCON).

3. The signatories to the comments in this document have a long history of involvement in the mining environment 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).

4. We have a few general comments as well as some comments on specific proposed regulations in the Draft Regulations. We will deal first with the general comments and thereafter with those that are more specific.

[1] http://www.cer.org.za/
[2] http://fse.org.za/
[3] https://www.wits.ac.za/cals/
[4] https://www.ewt.org.za/
[5] www.lrc.org.za
[6] http://www.lhr.org.za/
[7] https://cer.org.za/programmes/mining/mining-environmental-justice-community-network-south-africa

PART A: GENERAL COMMENTS ON THE DRAFT REGULATIONS

Right to make representations on the adequacy of the financial provision

5. The Draft Regulations do not contain any provisions which would enable interested and affected parties to make representations in the event that the proposed 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,[8] and in line with the requirements of the Promotion of Administrative Justice Act, 2000 (PAJA). This is all the more important given the State's historical failure independently to assess proposed financial provision.

6. When this issue was previously raised, DEA's answer was that it is the intention to have public participation in the initial determination of the financial provision but that this arises in the environmental impact assessment process so it is not necessary to spell it out in the Regulations. As we understand it, DEA does not support public participation when the amount is reviewed and amended (as this is currently a yearly process) but there would be a right of appeal. We are of the view that this intention is not properly captured in the Draft Regulations.

7. The trigger for the need to comply with the Draft Regulations is linked to the MPRDA and not to NEMA. If you consider the definition of applicant it refers to persons who require a mining right etc. under the MPRDA, consent in terms of section 11 and 102 of the MPRDA and a renewal in terms of the MPRDA. Although the MPRDA mandates consultation in the application process for a mining right, mining permit and prospecting right, the MPRDA does not specifically prescribe public participation in respect of a renewal, amendment (which may be substantive and include massive expansions) or transfer, and the Department responsible for Mineral Resources does not require it. In any event, the public participation that is called for under the MPRDA is not in respect of the financial provisioning. Instead the determination of the financial provision is a standalone procedure which must be in place before an environmental authorisation is issued as prescribed in section 24P of NEMA.

8. This being so, as it stands and as we read it, there is no prescribed public participation in respect of the determination of the financial provision.

[8] Section 2(4)(f) of NEMA

9. We therefore recommend the insertion of a regulatory mechanism enabling interested and affected parties to make representations.

10. We suggest the following inclusion in draft regulation 6:

(9) Prior to making submissions to the Minister in accordance with sub-regulations (7) and (8) the applicant shall

(a) provide interested and affected parties, who have registered as such either in terms of the related applications in terms of the Mineral and Petroleum Resources Development Act, 2002 or the Act, with copies of the documents mentioned in subregulation (7) or (8) depending on which is applicable; and

(b) allow a period of 30 days for comment.

11. Subregulations (7) and (8) should then include the following:

"(b) *(iii) any comments received by interested and affected parties and responses in respect thereof*"

Review, re-assessment, confirmation or adjustment of the financial provision

12. We remain concerned that annual reassessment as contemplated in terms of draft regulation 12(1) is impractical, and that the effectiveness and thoroughness of the process is 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.

13. We understand that an amendment in this regard has been proposed in NEMLAB4 and section 24PA(1) is proposed to be inserted into NEMA as follows:

*"(b) every **three years** review the environmental liability as prescribed and adjust, where required, the financial provision accordingly to the satisfaction of the Minister responsible for mineral resources;*

*(c) every **three years** subject the financial provision and the basis of the calculations to an independent audit, as prescribed;*

*(d) every **five years**, or in the case of a mining permit every three years, submit to the Minister responsible for mineral resources, an audit report*"

14. We understand further that there does not appear to be any way to amend the wording to allow for "review as prescribed by NEMA" which would've then changed to every three years when and if NEMLAB4 is enacted, because this would significantly affect the clarity of the calculations prescribed in the formulas in Appendices 4 and 5. In these circumstances, we hope that the Draft Regulations, if enacted before NEMLAB4, will be amended and brought in line with NEMLAB4 after its enactment and that the proposed amendment to NEMA is not lost.

Impact of the Draft Regulations as well as NEMLAB4 on liquidation

15. Just first to point out that the correct term is business rescue practitioner and not business rescue administrator.

16. Secondly, in NEMLAB4 section 24P is now the wider section which generally enables DEA to call for financial provisioning while section 24PA is now specific to mining. While section 24P continues to contain a provision to ring fence the financial provision, the same cannot be said of section 24PA.

17. There is a rule of interpretation that the specific provision must be applied in favour of the general provision. Accordingly, it is imperative that a similar provision in respect of ring-fencing is included into section 24PA.

    We propose the following addition to section 24PA(6): "*The Insolvency Act, 1936 (Act No. 24 of 1936), does not apply to any form of financial provision contemplated in subsection (1)(a) and all amounts arising from that provision.*''.

18. In addition to the above, and in order to ensure that the money is in fact properly ring-fenced, the Insolvency Act should be amended accordingly. If DEA does seek senior counsel's advice on the insolvency related provisions in the Draft Regulations, this may be something to incorporate into that brief – this could assist in engaging with the relevant role players to effect the desired amendment to the Insolvency Act.

19. As we read them, the Draft Regulations place the following duties on business rescue practitioners (BRPs) and liquidators:

19.1. 6(6) the **responsibility to implement** the plans and reports (per appendix 1 – 3) and to sign off all documentation submitted to the Minister.

19.2. 9(4) If the Minister wishes to initiate a claim against the financial guarantee to effect remediation and rehabilitation, notice and reasons must be provided to the BRP or liquidator and the liquidator or BRP must, within 30 days of receiving the notification **respond indicating the measures to be taken to remediate and rehabilitate** to the satisfaction of the Minister providing actions and timeframes.

19.3. 10(1) If the liquidator or BRP **fails to initiate actions** to rehabilitate environmental damage as contemplated in regulation 4 within 30 days after being ordered to do so by the Minister, the Minister may call on the FP. There is then a duty to hand over the funds accordingly.

20. A potential problem (as we see it) is with the duty placed on a **liquidator** in terms of **regulation 6(6).** Our reasons follow.

21. A BRP essentially steps into the shoes of the board. The BRP takes on full management and control of the company (s140(1)(a) of the Companies Act) and has the duties, responsibilities and liabilities of a director as per sections 75-77 of that Act. So in our view it is perfectly fine to place these duties on a BRP. They continue to run the business.

22. Although a moratorium is placed on legal proceedings against the company (s133 of the Companies Act) it appears that "*proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner*" are excluded from this moratorium. So the Draft Regulations appear to be sound in this regard. [Although senior counsel's advice should be sought if possible to ensure that this is indeed so.]

23. The problem comes in placing the duty to implement the plans and reports [Regulation 6(6)] on a liquidator. Firstly, we think there is a need to distinguish between liquidators who obtain a court order to continue running the business in order to sell it as a going concern and those who do not and simply wind it down. In the former case it should be okay to place the Regulation 6(6) responsibility on the liquidator as he or she cannot run the business of a company in breach of relevant laws. The problem appears to arise where the liquidator is simply winding down the company.

24. In these instances we are not sure that the regulation 6(6) duty can be placed on the liquidator as a liquidator's duties are to wind down the business in order to ensure that creditors are paid, or put differently, in the interests of creditors. Since the FP is ring-fenced, this money will remain separate and the liquidator would not be able to use it to pay creditors.

25. Instead of placing the regulation 6(6) duty on a liquidator, it may be better for liquidation to trigger the release of the FP to the Minister. For example, to write in a clause that when a liquidator is appointed, he or she has ten days to notify the Minister in writing of appointment and then the Minister will know to call up the funds. Of course if the liquidator continues to run the company then the Minister may not want to call on the funds just yet and this discretion would be catered for.

26. This provision is extremely important as illustrated by MINTAILS where the area was not secured by the liquidators and it was looted and cables necessary for the pumping of water were stolen. This now has the potential to cause imminent and dangerous harm both to the environment as well as to human health and well-being, particularly due to AMD which will begin imminently to decant into the surrounding environment, as pumping has ceased.

27. Due to the fact that in liquidations the liquidator may sell off assets to attain value for creditors, we are of the view that there should also be an amendment to NEMA to the effect that notwithstanding the Insolvency Act/old Companies Act (or alternatively 'any other law'), a liquidator may not sell assets crucial to the ongoing treatment of water, nor assets in respect of which sale would compromise rehabilitation.

28. In addition, we point out that there needs to be a provision to the effect that if the BRP or liquidator does not have sufficient funds to set aside per the requirements contained in the Draft Regulations, then it should be clear that the business may not continue to operate. This may require an amendment to NEMA.

29. We commend what the Draft Regulations seek to do in this regard but in our view it would be prudent to obtain the opinion of a senior counsel well versed in insolvency law to ensure that the Draft Regulations are not *ultra vires*, can meet the desired purpose, as well as whether or not NEMA, or other legislation, must be further amended to bring about this crucial goal of the Draft Regulations.

PART A: GENERAL COMMENTS ON THE DRAFT REGULATIONS

Definitions

30. CPI

30.1. CPI is currently defined as an index which is irrelevant because what the Draft Regulations intend to capture is not the index itself but the increase in the index. We therefore suggest (in order for the calculations in Appendices 4 and 5 to make sense) the following definition of CPI: "*means, as at any date, the most recently published year on year increase (expressed as a decimal) in the index published from time to time by Statistics SA in Statistics Release P0141 as the "Consumer Price Index" for all expenditure groups, all urban areas and all items (Base Dec 2016=100), or such index as may be determined by Statistics SA to replace such index"*

31. Incident

31.1. We suggest amending the definition as follows in order properly to capture the intent:

"means an unplanned and unusual event which could not have been foreseen and **[includes an act of God that]** which may cause environmental damage and harm to human health or safety"

32. Independent

32.1. We strongly oppose the fact that a concession is given to specialists in the oil and gas industry and that an employee of a parent or affiliate company may act as an independent expert. Such a person can never be independent and this flies in the face of the purpose of the provision in the first place.

32.2. While we understand that it may, as explained by DEA, be difficult to find specialists in the oil and gas industry, there is no bar from using specialists who live abroad. This is a particularly risky industry and the impacts when things go wrong are far reaching and devastating.

32.3. We propose amending the definition by deleting subsection (c): ***[(c) in the case of the oil and gas sector, such specialist or specialist team may be from a parent or affiliate company***].

33. Rehabilitate

33.1. We are unsure why rehabilitate refers only to the sustainable end state **of land** as opposed to simply the sustainable end state which is later defined and includes water and air.

33.2. We recommend amending this definition as follows: "*to restore to the approved sustainable end state **[of land]***"

34. Residual environmental impacts

34.1. Residual environmental impacts is defined as "*impacts remaining after all actions to mitigate, rehabilitate and remediate have been undertaken*". However, remediate is defined to mean "*to repair or reverse environmental damage*".

34.2. The proposed definition of “remediate” suggests that remediation entails achieving the pre-mining environmental state of the area concerned. Put differently, for remediation to have been achieved, no residual environmental impacts should remain in an area. Conversely, the definition of “*residual environmental impacts*” suggests that there will be residual environmental impacts after remediation has been undertaken.

34.3. These definitions thus contradict one another. We suggest amending the definition of “*residual environmental impacts*” as follows: “*means impacts remaining after all actions to mitigate **[,]** and rehabilitate [**and remediate]** have been undertaken*.”

35. Risk threshold

35.1. Risk threshold is defined as “*the determination of the environmental risk resulting from reconnaissance, prospecting, mining, exploration or production operations, which is regarded as being acceptable after the closure objectives have been implemented and the residual and latent defects have been calculated and which is to be included in the environmental risk assessment report as contemplated in these Regulations*.”

35.2. Firstly, closure objectives should be achieved as opposed to implemented. This is critical as if the objectives are framed in such a way that they can be implemented, but not necessarily achieved, then they are inappropriate objectives. We thus suggest replacing the word “implemented” in the definition, with the word “achieved”.

35.3. It is not clear what "*is*" to be included in the “*environmental risk assessment report”*. Is it the specific thresholds, or the determination? Clarity is required and we suggest that "*is*" is changed to refer to the specific article.

35.4. There is no indication of who this must be acceptable to. It appears that it must be acceptable to the Minister (as defined) but this reference has now been removed.

35.5. It is also not clear what this determination is based on. It appears that it must be considered acceptable if the measures identified in the risk assessment report have properly been implemented. More clarity on how to determine that this threshold is met is required as the way that is currently drafted creates a circular process open to manipulation.

35.6. In addition, when determining this threshold, there will be times when the damage will be enormous and in reaching the agreed objectives the environment will be unacceptably worse off. For example a wetland may be destroyed and thus not capable of rehabilitation. In this case the loss of the wetland must be accounted for in another way. Cost of rehabilitation will not be quantifiable and therefore inappropriate. In our experience, this is a frequent occurrence in practice where financial provision calculations on behalf of mining companies simply ignore the loss of that which cannot be rehabilitated.

35.7. It is submitted that provision should be made for these types of losses which cannot be left unaccounted for. Our submission seeks adherence to the polluter pays principle.

36. Specialist

36.1. This definition must be amended to clarify that a team of specialists is envisaged as follows: "means an independent person, or team of persons, **[who is]** qualified by virtue of [his or her] their demonstrable knowledge, qualifications, skills or expertise in the mining, environmental, water, resource economy and financial fields"

37. Sustainable end state

37.1. The definition as it stands is too open ended and we submit that the concept is nebulous. It also does not contemplate an end use of the land, water and air. An end use was contemplated in the previous iteration of the draft regulations and appeared, from the way it was spoken of as "end use" during the stakeholder engagement meeting, to be what is currently contemplated.

37.2. We therefore propose defining "sustainable end **use**" as opposed to "sustainable end **state**".

37.3. We also propose that the definition is articulated as follows: "*is the specific state of land, water and air at the time of reaching the risk threshold which state must be determined after consideration of at least those factors mentioned in paragraph 3 of appendix 2*. The definition should also include the post closure use/ end use of the land.

37.4. This proposal must be read together with our proposals for amending Appendix 2 below.

38. VAT

38.1. In order for the calculations in appendices 4 and 5 to make sense, VAT must also be defined. We suggest a definition as follows: "*VAT means the prevailing rate at which value added tax, as provided for in the Value Added Tax Act, 1991, is charged, expressed as a decimal*."

Purpose of these Regulations

39. We note that progressive rehabilitation is included in the purpose in regulation 2(b), however, we are of the view that this must also be articulated in regulation 2(a) in order properly to convey the shift of consciousness.

40. We propose the following insertion in regulation 2(a):

"establish the obligation of an applicant and holder to plan, manage and implement procedures and requirements to remediate and rehabilitate environmental damage caused by reconnaissance, exploration, prospecting, mining and production operations, from the outset of the operations, progressively as that environmental damage occurs;"

41. There is a typographical error in Regulation 2 which reads "The purpose of these Regulations **[are]** is to".

Purpose of financial provisioning

42. Regulation 5(1) should be amended as follows: "The financial provision must guarantee the availability of sufficient funds for- (a) **[progressive]** annual rehabilitation and remediation".

43. This is because while progressive rehabilitation as a principle has been introduced and this is supported, the financial provision is conceptualised around 3 notions: annual, decommissioning and closure, and latent and residual impacts, as elaborated on in appendices 1, 2 and 3.

Determining the financial provision

44. Regulation 6(1) should reflect that an end use of land, water and air must be determined upfront. Please refer to our comments above on the definition of "sustainable end state". We also propose that regulation 6(1) is amended as follows:

"*Financial provisioning is an iterative process of impact assessment and risk profiling to identify, calculate, predict and provide for the costs of remediating and rehabilitating environmental impacts and risks associated with a reconnaissance, prospecting, mining, exploration or production operation, determined against* ***[agreed]*** *approved closure objectives designed to achieve an approved sustainable end* ***[state****] use, in the short, medium and long term* ***[and an agreed sustainable end use****]*."

45. For certainty, subregulation (8) should include the following proposed insertion: "*The applicant must submit to the Minister with the application for consent,* or *renewal contemplated in subregulation (3)*-"

Availability of the financial provision

46. Subject to our comment elsewhere in this document regarding the fact that it is not necessary to have 2 Appendices to regulate the content of draft Appendices 4 and 5, we propose the following amendments in regulation 7(1)(b):

"set aside funds for the costs calculated using the methodology [**conforming to the requirements identified**] for the calculation of financial provision in-"

47. Perhaps better wording for regulation 7(3) which conveys the same intention is as follows: "Subject to regulation 11, **[F]** funds set aside for financial provision must remain in place until a closure certificate is issued **[, unless a withdrawal as contemplated in regulation 11 is allowed]**.

48. In terms of draft regulation 7(4)(a) just to highlight that funds cannot be ceded, only incorporeal objects can be ceded. We thus propose the following amendment: "be **[ceded]** paid over to the Minister".

Financial vehicles available for setting aside financial provision

49. We note that in terms of draft regulation 8(2), no interest will be payable by the Minister for any amounts deposited into an account administered by him. This is contrary to good practice and might be a disincentive to using this vehicle.

50. This will mean that the value of the cash deposited with the Minister would decrease every year in real terms because there would be no interest paid to even keep pace with inflation. The implication is that additional cash will have to be deposited each year if only to maintain the required value of the cash deposit. This would impose an unfair burden on applicants and holders. It is also likely that this burden will fall mostly on smaller miners as they are most likely to opt for the cash deposit as a vehicle because of the costs associated with other options such as trust funds and bank guarantees.

51. A potential remedy would be for the Minister to undertake to ensure that all cash deposited will grow at CPI at least. If the Minister places all cash deposited into an interest bearing fixed deposit account, it should be possible for the interest on such an account to match CPI whilst still being available to the Minister if needed within a relatively short notice period (e.g. 30-day notice deposits of R25,000 or more at commercial banks currently pay an interest rate approximately equal to CPI). (This proposal is subject to its permissibility under the PFMA or other relevant requirements.)

52. If the goal of draft regulation 8(2) is to make cash deposits unattractive thereby discouraging their use altogether then it is likely to achieve its goal. However, the clear prejudice against small miners who have limited access to the other financial vehicle options will remain.

Cancellation, withdrawal and claiming against a financial guarantee

53. We note that in terms of regulation 9(1), notice of intention to cancel or withdraw a financial guarantee must be communicated to the Minister by registered mail. We are concerned that this might not serve the important purpose. We propose inserting a requirement that notice also be given by electronic mail [and setting up an email address specifically for this purpose]. It is a risk as to whether registered mail will actually come to the Minister's attention timeously or at all.

54. In addition, we propose that this notification obligation [in draft subregulation (1)] is also placed, or rather placed, on the financial institution who is the Guarantor under the financial guarantee. When a company is going under they are unlikely to notify the Minister, there is also a time lapse between the company beginning liquidation proceedings and a liquidator being appointed. Therefore, placing this duty on the financial institution is the least risky option.

Withdrawal against a financial provision to facilitate decommissioning and financial closure activities

55. In this regard we express a concern that it may be difficult to determine the portion of the FP which is allocated toward latent and residual defects which cannot be withdrawn. This being so it may be that despite subregulation 11(2) funds are unwittingly withdrawn from the amount set aside for latent and residual impacts. Kindly clarify that this concern will not materialise.

56. Withdrawal should also be approved by the Minister responsible for environmental affairs [Regulation 11(1)(g)].

57. Currently, NEMLAB4 proposes only that the Minister consults with the Minister responsible for water affairs. We suggest that section 24PA(2) of NEMLAB4 (which currently only requires the Minister to consult with the Minister responsible for water affairs) is amended to require consultation with the Minister responsible for environmental affairs as well as the Minister of finance.

Review, reassessment, confirmation or adjustment of the financial provision

58. We repeat our comment herein above in respect of the intervals for review etc.

59. Clause 12(5) deals with an extension of time to submit information to the Minister. The Regulation provides that the Minister may consider the extension of time if certain requirements are met. We propose inserting the following:

(5) An extension of time to submit information contemplated in these Regulations may be considered by the Minister on application by the holder provided that <u>the application</u>-

(a) <u>is submitted at least one month prior to the expiry of the relevant time period</u>;

*(b) <u>includes</u> a detailed explanation of [**the**] <u>good</u> reasons for the inability to submit the information within the stipulated period; and*

(c) the extension of the time period does not exceed 3 months.

Responsibility of a holder to disclose information

60. We commend the inclusion of this provision.

61. We suggest amending draft regulation 14(1) as follows: "*The applicant and holder must make the determination, review and adjustment of financial provision, including relevant plans and reports, as well as any audit of such financial provision, once submitted to the Minister..*"

Powers and duties of the Minister

62. The most recent version of the draft Regulations have incorporated a provision in furtherance of the need to hold the Minister to account for the funds held in the account administered by him or her. We welcome this but hold the view that for it to meet its purpose, the register kept by the Minister must be made available for public scrutiny. We therefore suggest an amendment to draft regulation 15(3) as follows:

"The Minister must keep a register of funds kept in the account contemplated in Regulation 8(1)(a), including details of the amount held per applicant and holder related to permissions, permits and rights, and which operations the funds are held for.

The register must be updated every three months and an up to date copy thereof must be published on the website of the Department responsible for Mineral Resources."

Offences

63. Just to note that there is no regulation 13(5).

Repeal of Financial Provisioning Regulations, 2015

64. Just a typo as follows; "…. 21 September 2018, **[is]** are hereby repealed"

Short title and commencement

65. Another minor typo "…and come**[s]** into operation…"

Appendix 2

66. We note that the previous detail in respect of post mining land use has been removed. We are worried that with the definition of 'sustainable end state' as it stands, it is not sufficiently clear that the end use, which is more holistic than the 'end state' is properly included. Sustainable end **use** would include socio-economic considerations over and above those considerations in respect of the end state of land, air and water, it would also encourage an appropriate end use to be

approved prior to commencement. In this regard we proposed an amendment to that definition hereinabove.

67. In the third paragraph under paragraph 1, reference is made to the sustainability of the mine or operation. We suggest that the notion of viability of the mine or operation should be included here.

68. With "sustainable end state" being defined, we propose that paragraph 2.1 be amended as follows:
"2.1 *determine, at the outset, review on an annual basis, and revise as required, a sustainable end state for the [**mining operation**] disturbed area which includes **[a sustainable and achievable end state of the land as well as**] post closure management and monitoring measures, and detail as to what the land is intended to be used for post closure;"*

69. Paragraph 2.3 provides as follows: "*ensure early and regular consultation throughout the life of the mine, with government and external stakeholders and communities on closure objectives and the sustainable end state objectives*."

70. In our view this is too open and subject to abuse. Clarity must be provided in terms of when consultation must happen. We propose the following amendment: "2.3 to determine and review the sustainable end state, *ensure adequate consultation when compiling this plan, and regular consultation throughout the life of the mine, and at least every three years, with government and external stakeholders and communities. Sustainable end state must include a description of the **[on]** closure objectives and the sustainable end state objectives required to achieve this*."

71. The details of the preferred sustainable end state needs to include details of what the land will be used for post closure. The way to address this is by broadening the definition of 'sustainable end state' as discussed above. We propose that the words "of the operations" in 3.5 are substituted with the words "disturbed area" .

72. In paragraph 3.6.7.2, the phrase "all areas" should rather refer to "all impacted areas" and the words "the mine" should be substituted with "the applicant or holder".

Appendix 4

73. Appendix 4 seems superfluous as Appendix 5 could be used for new and existing operations, suitably distinguished. Where an operation is new total 1 would just be zero because there would

be no current disturbed area. We therefore suggest excising Appendix 4. However, if our suggestion is not taken on board then we suggest the following amendments.

73.1. In paragraph 2, the inclusion of the following: "*The costs to be provided for must include the costs associated with rehabilitation and management impacts from: …*"

73.2. Paragraph 2 should be changed as follows because we are not dealing with assumptions for the calculation but rather requirements:

"Requirements for calculation

2.1 All current costs must be based on prevailing market rates as at the date of calculation;

2.2 All costs must include VAT unless they are for goods or services that are zero-rated or exempt from VAT;

2.3 All costs that would need to be incurred in future years (i.e. not the current year) must be adjusted upwards for inflation using an annual inflation rate of CPI + 2%;

2.4 Mining infrastructure asset salvage may not be taken into account or used to offset or reduce any costs; and

2.5 Provisional and general costs and contingencies in accordance with the prevailing industry standard must be included; and

2.6 *All costs must be based on employing or contracting a* third party to undertake rehabilitation and remediation work."

74. Include the following under 2.

"Current costs should be inflated at an annual rate of CPI + 2% when estimating future costs using the following equation:

Future cost for n^{th} year = current cost X (100% + CPI + 2%)^n

Where:

n is the number of years from the current year when the costs occur (e.g. n = 5 if the costs occur in 5 years from the current year)

CPI is the current Consumer Price Index published by the Statistics South African (e.g. CPI was 4.5% in June 2019)"

75. The formula is mathematically incorrect. To make sense, and in the light of the suggestions above, it should read as follows:

"*Financial Provision = Total 1 (including VAT and inflation of future costs at CPI + 2%) + Total 2 (including VAT and inflation of future costs at CPI + 2%) + Total 3 (including VAT and inflation of future costs at CPI + 2%)"*

76. As mentioned above, for this formula to read properly and as intended, VAT and CPI must be defined as set out hereinabove.

Appendix 5

77. The same amendments proposed to Appendix 4 apply, save that 2.1. will need to be amended as follows: "A third party must **[will]** be employed to undertake rehabilitation and remediation work."

Appendix 6

78. The first paragraph should be number 1, not 4. The number should then follow sequentially.

79. The term "trust fund" should be changed to "trust" throughout. The trust fund is, in law, the assets of a trust. The trust is the notional "entity" that comes into being when the trust fund is placed under the control of the trustees.

80. Paragraph 1.4 should be amended as follows: "the sole objective of the trust [**fund**] or closure rehabilitation company, namely to receive contributions and to hold these contributions for the purposes of providing the vehicle contemplated in regulation 8(1)(b) and (c) of these Regulations, **[for maintaining]** with sufficient funds to maintain the financial provision required to be set aside by the holder **[for the guaranteeing of funds]** for the purposes of fulfilling the holder's obligation to remediate and rehabilitate environmental damage;"

81. In paragraph 1.5.2 – the words 'or closure rehabilitation company' are missing. It should read: "*the trustee(s) and director(s) shall not receive any remuneration from the trust [**fund**] or closure rehabilitation company…"*

82. In addition, the qualifier is not correct in that even a professional fiduciary should not be paid by the trust or company, as it does not have any guaranteed funds other than the provision. The qualifier should therefore read as follows: "... **[unless]** provided that if the trustee or director is a professional fiduciary services company, or holds his or her position as trustee or director by virtue of employment with a professional fiduciary services company, that professional fiduciary services

company **[in which event it]** may be paid its normal commercial rates by the holder for the provision of professional services."

83. It is important to understand that professional fiduciary services companies may be appointed as trustees, but actual letters of authority are issued by the Master to the individuals who represent that company. Likewise, a company cannot be a director, so professional fiduciary services companies get paid for supplying the individuals who hold the posts.

84. In paragraph 1.6.3.2 – the 'and' between trust [**fund**] and closure rehabilitation company should be 'or' as follows: "*shall cause proper books of account to be kept for the trust [**fund and]** or closure rehabilitation company and shall appointment independent auditors to report on the financial statements for each financial year of the trust [**fund and]** or closure rehabilitation company*;"

85. In Paragraph 1.6.3.3 – the first words should be "shall not be authorised to distribute". Where a trustee acts outside of his/her authority, the act is void. "Permitted" will probably have the same effect but it is best to use the established legal term. We suggest amending the paragraph as follows:

"*shall not be **[permitted]** authorised to distribute, except as may otherwise be provided herein, any of the funds of the trust [**fund**] or closure rehabilitation company to any person and shall utilise the **[trust]** funds of the trust or closure rehabilitation company solely for investment or payment to the Minister in accordance with the object for which the trust [**fund**] or closure rehabilitation company has been established"*

86. In paragraph 1.6.3.4 – "entitled" should be "authorised". The paragraph should thus read: "*shall not be **[entitled]** authorised, on behalf of the trust or….*"

87. A new paragraph 1.8 and 1.9 should be included as follows:

1.8 the authority of the trustees of a trust, or the power and capacity of a closure rehabilitation company and the authority of the directors of a closure rehabilitation company, are limited and subject to a restrictive condition such that the trust or closure rehabilitation company can only act in order to fulfil its main objective subject to and in accordance with the provisions of these Regulations; and

1.9 in the case of a closure rehabilitation company, the memorandum of incorporation must comply with sections 11(3)(b) and 13(3) of the Companies Act, 2008, as amended from time to time.

88. In addition, the following clause must be added to Appendix 6 (as a new paragraph 2):

"2. The founding documents of a trust or a closure rehabilitation company may not contain any provision which is in conflict with or derogates from any of the requirements set out under paragraph 1 above."

89. This is necessary because this Appendix sets minimum requirements only, and other provisions may therefore be included in a trust deed or MOI.

The template for a financial guarantee

90. There us a typo in paragraph 1 and "casued" must be corrected to read "caused".

91. In general, the document contains more detail than is required. The detail only provides potential room for dispute. We thus propose simplifying the template as follows:

"1. In relation to the responsibility, terms of the National Environmental Management Act 107 of 1998 (as amended and/or replaced from time to time, the "Act") and the Financial Provisioning Regulations 2019 promulgated under the Act (as amended or replaced from time to time, the "Regulations"), ……(the "holder") is required to determine and provide the prescribed make financial provision **[to undertake rehabilitation and remediation of]** for its obligations to remediate and rehabilitate environmental damage caused by reconnaissance, prospecting, exploration, mining or production operations to the satisfaction of the Minister in accordance with the provisions of the Financial Provisioning Regulations, 2019, promulgated in terms of the Act, or any legislation or subordinate legislation which supplements, amends and/or replaces such regulations or deals with similar or related matters for such operations known as …….. and situated at the holder's operations at …… (*give full description of property*). [**or any applicable part thereof ("the "Mine"), and we, in our capacity as duly aithorised representative of the bank/ financial institution as Grantor, confirm that the aggregate**

maximum of amount R….. (the Guaranteed sum). Is available to the Minister for the purpose of executing the rehabilitation and remediation actions identified in plans used to determine the prescribed financial provision for such operations as contemplated in the Financial Provisioning Regulations, 2019, or any legislation or subordinate legislation which supplements, amends and/or replaces such regulations] We (the "Guarantor") hereby confirm that we hold the sum of R…… (the "Guaranteed Sum") which is available on the terms set out herein for the purposes contemplated in the Regulations."

92. If the change is accepted, then paragraph 2 can be amended as follows: "Subject to compliance by the Minister to give notice as contained in the [Financial Provisioning] Regulations **[2019, or any legislation or subordinate legislation which supplements, amends or replaces such regulations]** the Regulations…

93. Paragraphs 2.1 and 3.1 should be combined because the original cannot be returned on giving account, as it must be returned when a claim is made. Clause 2.1 must therefore provide for the return, or the provision of an indemnity if the original has been lost, when a claim is made. Clause 3.1 can be deleted, as the duty to account is in the Regulations – it doesn't need to be restated in the guarantee.

94. In paragraph 3.2(i) – the words "financial institution" should be replaced with "the Guarantor".

95. In paragraph 3.2(ii) – the last part of this should read *"…Act, 2002 (as amended or replaced from time to time) in respect of the whole of the operations in relation to which this Guarantee provided the required financial provisioning (or part thereof) under the Regulations*". This is because "operations" is not defined, so there needs to be a link to the provisioning requirements.

96. In paragraph 3.2(iii) – the latter part should read "… and replacement with an alternative **[financial vehicle where relevant]** guarantee and/or alternative form of financial provision in accordance with the Regulations."

97. Paragraph 4 should be amended for clarity so that it is certain that the Guarantor can only withdraw if the Minister does not call up the provision during the notice period. It should read: *"Subject to regulation 9 of the Regulations, the Guarantor…."*