

Draft Mine Community Resettlement Guidelines, 2019

Table of Comments by the Centre for Environmental Rights, January 2020

Clause	Proposed Clause in Guideline	Comment
No clause	Introduction	<p>While historically the mining and minerals industry was a major contributor to the South African economy, it cannot be ignored that the vast majority of South Africans were excluded from those benefits, and in fact the economy as a whole. This happened in a variety of ways, not least through loss of land and livelihoods through colonisation and later forced removals under apartheid, in respect of which, to date, there has been no redress.</p> <p>It is furthermore not correct in present times that mining is the cornerstone of the economy where other forms of economic activity are considerably larger contributors.</p> <p>Furthermore, while there are a large number of jobs in mining, there is also increasing evidence that overall, rather than alleviating poverty and inequality, many communities in South Africa are worse off as a result of mining.¹</p>
Cl 2 - Definitions Compensation	“Compensation” means cash payments or in-kind contributions for assets acquired or affected by a resettlement project”.	<p>This definition is too limited. The definition should contemplate all manner of things impacted by a resettlement, including specific assets damaged or lost and more general losses such as pain and suffering and loss of quality of life, taking into account the massive disturbance that comes with resettlement.</p> <p>We propose that the definition be amended to include the following: “compensation” means cash payments or in-kind contributions for assets damaged or lost and more general losses such as pain and</p>

¹ viz South African Human Rights Commission’s Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa <https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf>; Zero Hour: Poor Governance of mining and the Violation of Environmental Rights in Mpumalanga <https://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf>; Mining in South Africa: Whose Benefit and Whose Burden https://www.osf.org.za/wp-content/uploads/2019/02/sar-5.3_online.pdf

		suffering and loss of quality of life by resettlement and the process thereof including but not limited to payments and/or contributions for any loss of livelihood, heritage or cultural connection to the land as a result of resettlement.
Cl 2 – Definitions Meaningful consultation	<p>“Meaningful consultation” for the purposes of these Guidelines means consultation with landowners, lawful occupiers, interested and affected parties, holders of informal and communal land rights, mine communities and host communities by an applicant or a holder of a mining right, prospecting right or mining permit with a view to:</p> <ol style="list-style-type: none"> 1. Provide for the opportunity for landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities to comment and obtain clear, accurate and understandable information about all the impacts of the proposed mining activity or implications of a decision on resettlement; 2. Determine whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner’s rights to use the property is concerned; 3. Provide opportunities for clearing up misunderstandings about technical issues, resolving disputes and reconciling conflicting interests; 4. Encourage transparency and accountability in decision-making; and 5. Give effect to the requirement for procedural fairness of administrative action as contained in the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000). 	<p>Taking into the devastating impacts resettlement can have on family and community life and cohesion we are of the view that consultation only is not the appropriate standard for resettlement. The principle of Free Prior and Informed Consent (FPIC) should be required. The application of FPIC would, amongst many other things, empower communities to negotiate better terms for resettlement. Currently families and communities lose their homes, ways of life and livelihoods to make way for mining. FPIC would ensure that families would be able to restore their status quo post resettlement or even better their lives.</p> <p>It is in either event not clear why ‘meaningful consultation’ is defined differently in the draft Guideline to the draft Amendments to the Mineral and Petroleum Resources Development Regulations.</p> <p>Should the requirement of FPIC not be implemented, we propose the following definition:</p> <p>‘Meaningful consultation’ for the purposes of these Guidelines means the applicant <u>for</u>, or a holder of a mining right, prospecting right or mining permit, <u>has in good faith engaged</u> the landowners, lawful occupiers, interested and affected parties, holders of informal and communal land rights, mine communities and host communities, with a view to:</p> <ol style="list-style-type: none"> 1. Provide for the opportunity for landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities to [comment and] obtain clear, accurate, [and] understandable <u>and comprehensive</u> information about all the

		<p>impacts of the proposed mining activity [or] over the life of the mine, and the implications of a decision on resettlement, in order for these parties to make an informed decision;</p> <p>2. Determine whether some accommodation is possible between the applicant for a prospecting right and the landowner, <u>lawful occupiers, holders of informal and communal land rights, mine communities and host communities</u> insofar as the interference with their [landowner's] rights [to use] in respect of the property [is] are concerned;</p> <p>3. Provide opportunities for clearing up misunderstandings about technical issues, resolving disputes and reconciling conflicting interests;</p> <p>4. Encourage transparency and accountability in decision-making; and</p> <p>5. Give effect to the requirement for procedural fairness of administrative action as contained in the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).</p>
<p>Cl 2 – definitions</p> <p>Resettlement</p>	<p>“Resettlement” means the voluntary or involuntary displacement and relocation of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities as a result of planned or operational mining activities.</p>	<p>We are of the view that resettlement encompasses more than just displacement and relocation. Definition should also take into account the need to re-establish the key physical, economic, cultural, social and spiritual infrastructure that enables a community.²</p> <p>Also, Communities should be able to properly consent to their own displacement. The purpose of a resettlement agreement seems to be undermined in situations where involuntary displacement occurs.</p>

² <http://ccsi.columbia.edu/2019/09/20/13179/>

<p>Cl 5 (a) - fundamental principles</p> <p>Meaningful consultation</p>	<p>(a) Meaningful consultation: an applicant or a holder of a prospecting right, mining right or mining permit must consult meaningfully with landowners, lawful occupiers, interested and affected parties, holders of informal and communal land rights, mine communities and host communities.</p>	<p>(a) Meaningful consultation: an applicant or a holder of a prospecting right, mining right or mining permit must, [consult meaningfully] <u>engage in good faith</u>, with landowners, lawful occupiers, interested and affected parties, holders of informal and communal land rights, mine communities and host communities.</p> <p>We note that most parts of the guidelines refer to “consultation” and not “meaningful consultation” except where a resettlement action plan is required. We propose a consistent reference of ‘meaningful consultation’ throughout the guidelines,</p>
<p>Cl 6</p> <p>Scope and applicability of the Guidelines</p>	<p>6.1. The guidelines apply to an application for prospecting right, mining right, mining permit.</p> <p>6.2. Depending on when the demand for land emerges, displacement or resettlement of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities can occur during project planning and construction or during active mining operations. It may also occur as a result of incremental project expansion.</p> <p>6.3. An applicant or holder of a prospecting right, mining right or a mining permit shall comply with these guidelines at all the stages of development, when such development will have the effect of displacement or resettlement of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities.</p> <p>6.4. To this end, the Guidelines also apply to existing prospecting rights, mining rights or mining permits where incremental project expansion will have the effect of displacement or resettlement of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities.</p> <p>6.5. The Guideline shall be applicable from the date it is published in the gazette for implementation.</p>	<p>The MPRDA needs to be amended to make provision for resettlement so as to facilitate the escalating of the Guidelines to (enforceable) Regulations.</p> <p>In this clause: The guidelines should apply to existing holders. There should be a duty to determine the need for resettlement at a project-planning stage so that the guidelines apply as early as the scoping phase. Other than where incremental resettlement is planned and agreed at the planning stage, incremental resettlement should be prohibited.</p>

<p>CI 7.1.1 – Meaningful Consultations</p> <p>Duty to consult</p>	<p>An applicant or a holder of a prospecting right, mining right or a mining permit shall:</p> <p>7.1.1 Provide for the opportunity for landowners, lawful occupiers, interested and affected parties, holders of informal and communal land rights, mine communities and host communities to comment and obtain clear, accurate and understandable information about all the impact of the proposed mining activity or implications of a decision on resettlement;</p>	<p>We commend the intention to require that affected persons be given <u>clear, accurate and understandable</u> information about <u>all</u> of the impacts of the proposed activity or implications of a decision on resettlement. We submit that that information must also be <u>comprehensive</u>.</p> <p>We propose that this clause be amended in light of our comments on clause 2 and 5 on meaningful consultation – to ensure that the words '<u>engagement in good faith</u>' are always included when describing meaningful consultation.</p> <p>Clause 7.1.2 must, in addition to landowners, also refer to <u>lawful occupiers, holders of informal and communal land rights, mine communities and host communities</u> insofar as the interference with <u>their rights in respect of the property</u> are concerned.</p>
<p>CI 7.2.</p> <p>Stakeholders to be consulted</p>	<p>The affected stakeholders to be consulted will be informed by the nature and extent of the proposed operation and area specific considerations. An applicant or a holder of a prospecting right, mining right or mining permit must conduct stakeholder mapping to identify and profile stakeholders that must form part of the meaningful consultation process. The meaningful consultation process may comprise a broad range of stakeholders including but not limited to:</p> <p>7.2.1 Host Community; 7.2.2 Mine Community; 7.2.3 Landowners (Traditional and Title Deed owners); 7.2.4 Lawful occupiers; 7.2.5 Holders of informal land rights; 7.2.6 Holders of communal land rights; 7.2.7 Traditional Authority; 7.2.8 Land Claimants; 7.2.9 Non-Governmental Organisation; 7.2.10 Community Based Organisations;</p>	<p>We appreciate and welcome the range of stakeholders referred to in this clause. We also endorse the obligation for conduct stakeholder mapping.</p> <p>We recommend the explicit inclusion of the Department of Social Development – we recognise that this may be covered under clause 7.2.14, however we call for its explicit exclusion due to the fact that, this is a department that has been largely overlooked when it comes to mining related matters. The Department "<i>endeavours to create a better life for the poor, vulnerable and excluded people in society</i>". It is tasked with reducing poverty, promoting social integration, and creating conditions for sustainable livelihoods.</p>

	<p>7.2.11 The Department of Rural Development and Land Affairs;</p> <p>7.2.12 Any other person (including on adjacent and non-adjacent properties) whose socio-economic conditions may be directly affected by the proposed mining operation;</p> <p>7.2.13 The Local Municipality; and</p> <p>7.2.14 The relevant Government Departments, agencies and institutions responsible for the various aspects of the environment and infrastructure which may be affected by the proposed project.</p>	
<p>CI 7.3</p> <p>Methods of consultation with stakeholders</p>	<p>An applicant or a holder of a prospecting right, mining right or a mining permit may use appropriate tools and platforms to engage landowners, lawful occupiers, interested and affected parties, holders of informal and communal land rights, mine communities and host communities about the proposed mining development as outlined in the Consultation Guideline which may include:</p> <p>7.3.1 Regular meetings or workshops;</p> <p>7.3.2 Surveys or roadshows; and</p> <p>7.3.3 Announcements of the consultation process may be made in local radio stations, newspapers and relevant media.</p>	<p>It is proposed that the requirements of this provision should create a clear obligation on the applicant or holder of any right to inform the community of consultation processes and consult with them using appropriate means rather than to make it a discretionary provision. The provision should therefore read as follows:</p> <p>An applicant or a holder of a prospecting right, mining right or a mining permit must [may] use appropriate tools and platforms to engage landowners, lawful occupiers, interested and affected parties, holders of informal and communal land rights, mine communities and host communities about the proposed mining development as outlined in the Consultation Guideline which [may] must include, but not be limited to:</p> <p>7.3.1 Regular meetings or workshops;</p> <p>7.3.2 surveys or roadshows; [and]</p> <p>7.3.3 announcements of the consultation process must [may] be made in local radio stations, newspapers and relevant media[.]; <u>and</u></p> <p><u>7.3.4 scientific and other technical information presented in plain language, translated into the dominant language used in the area.</u></p>
<p>CI 8</p> <p>Obligations of an applicant or a</p>	<p>8.1 When an applicant or a holder of a prospecting right, mining right or a mining permit intends to relocate landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities to an alternative area, the</p>	<p>We commend the Department for the broad range of requirements in this clause.</p> <p>We propose the insertion of an additional provision that says:</p>

<p>holder of a prospecting right, mining right or mining permit</p>	<p>applicant or a holder of a prospecting right, mining right or a mining permit shall;</p> <p>8.1.1 Consult with the landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities by offering choices and options that are practical and economically suitable.</p> <p>8.1.2 Ensure that landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities are informed about the options and rights concerning the resettlement by providing them with all relevant information and documents to make informed decisions.</p> <p>8.1.3 Provide the landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities with compensation for any losses to their property and livelihoods.</p> <p>8.1.4 Assist with the resettlement by providing financial and related support to affected landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities.</p> <p>8.1.5 Provide the landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities with residential housing, housing sites or agricultural land.</p> <p>8.1.6 Offer support after resettlement to ensure people's livelihoods and standards of living are restored.</p> <p>8.1.7 Assist with sustained development within the resettled mine community or host community after resettlement.</p> <p>8.1.8 The cost of resettlement shall be borne by an applicant or a holder of a mining right or a mining permit agreed by the landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities.</p>	<p>An applicant for or a holder of a prospecting right, mining right, or a mining permit must ensure that the resettlement of interested and affected parties, including landowners, lawful occupier, holders of informal and communal land rights, mine communities and host communities is undertaken in a manner that first avoids and thereafter minimises physical and emotional disruption to the aforementioned parties and ensures that their constitutional rights are adhered to at all times.</p> <p>We are also concerned that although the guidelines refer to holders of informal and communal land rights, the guidelines fail to recognise their rights in terms of the Interim Protection Informal Land Rights Act as guaranteed in the recent court judgement in the case of <i>Baleni and Others v Minister of Mineral Resources and others</i>.</p> <p>Holders of informal and communal land rights have the right to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom and community on whether they consent or not to a proposal to dispose of their rights to their land.</p>
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<p>CI9.2</p> <p>Resettlement and compensation</p>	<p>9.1 Resettlement of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities to make way for mining activities must as far as possible enhance and improve affected communities' livelihoods such as housing, schools, health facilities and recreational facilities.</p> <p>9.2 No mining activity shall take commence until a resettlement agreement is reached on the appropriate amount of compensation as a result of resettlement of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities. Resettlement agreement to reflect the contents of the Resettlement Plan and Resettlement Action Plan.</p>	<p>We commend the Department for the intention in this clause.</p> <p>The provision in the guidelines that no mining activity shall commence before a resettlement agreement is reached on the appropriate amount of compensation is not provided for in the MPRDA, particularly section 54. The Constitutional Court in <i>Bengwenyama</i> held that "the MPRDA does not impose an obligation to reach an agreement, the parties ought to engage in good faith and reach some accommodation" This provision is therefore unenforceable and the MPRDA must be amended accordingly.</p>
<p>CI9.4</p> <p>Calculation of compensation amounts</p>	<p>9.4.1 There is no standard formula for determination of sufficient compensation as a result of resettlement. Compensation rates should be determined based on the local context and current full replacement values. A transparent, participatory approach to determining compensation should be undertaken. An experienced Independent Valuer deemed acceptable to companies and communities should be used. The compensation policy should be consistent. The methods used for valuation should be clearly documented and disseminated. Compensation rates should be updated if the process is undertaken over a long period.</p>	<p>Although communities and contexts will be different, some form of guiding mechanism for the calculation of the compensation is crucial. Without such mechanism, it will be difficult for the parties concerned to determine what constitutes adequate compensation, particularly in circumstances where poverty and inequality exacerbates the power differential at the negotiating table.</p>

	<p>9.4.2 The rate of compensation for lost assets must be calculated at full replacement cost, that is, the market value of the assets plus transaction costs. With regard to land and structures, replacement costs are defined as follows:</p> <p>(a) Agricultural and grazing land: the market value of land of equal productive use or potential located in the vicinity of the affected land, plus the cost of preparation to levels similar to or better than those of the affected land, plus the cost of any registration and transfer taxes.</p> <p>(b) Land in urban areas: the market value of land of equal size and use, with similar or improved public infrastructure facilities and services preferably located in the vicinity of the affected land, plus the cost of any registration and transfer taxes.</p> <p>(c) Household and public structures: the cost of purchasing or building a new structure, with an area and quality similar to or better than those of the affected structure, or of repairing a partially affected structure, including labour and contractors' fees and any registration and transfer taxes.</p>	<p>Although the guidelines seek to provide processes for resettlement with regards to the communities' property, livestock and restoring their livelihoods, the guidelines fail to address the issue of graves and loss of other heritage or cultural sites. The Guidelines must also consider the emotional burden that the resettlement process presents and factor in how to <i>compensate</i> affected parties for this aspect and we propose that notions of pain and suffering and loss of quality of life are visited.</p>
<p>Cl 12</p> <p>Resettlement agreement</p>	<p>12.1 The Resettlement Agreement shall not be valid unless it is in writing and signed by authorised representatives of mine communities, land owners and lawful occupiers and the applicant or holder of a prospecting right, mining right, or mining permit.</p>	<p>The provision that a settlement agreement shall be signed by authorised representatives of mine communities is concerning considering the nature of mining communities. These communities are often divided. It is not clear how the leaders will be identified and if those leaders represent the interests of the community.</p> <p>We often see traditional leaders taking advantage of their positions and signing off on documents that are binding on the community without consulting the community. There need to be measures in place to ensure a representative and fair process.</p> <p>The requirement for meaningful consultation has the potential of being overpowered by the provision in the Traditional and Khoisan Leadership Bill (section 24) which effectively gives traditional leaders</p>

		the right to sign agreements with corporations on behalf of their subjects without having to seek their consent.
<p>CI13 – Dispute Resolution mechanism</p> <p>13.1 – Legal representation</p>	An applicant or a holder of a prospecting right, mining right or mining permit shall where feasible provide financial assistance to affected landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities to obtain competent representation in the dispute resolution processes.	<p>We welcome this provision and commend the Department on its intent.</p> <p>We recommend that it be made clear that the representation for landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities, must be independent and not connected to the applicant/holder at all, to ensure fairness.</p>
<p>CI13.2</p> <p>Party to Party dispute resolution process</p>	<p>If there is a dispute about any aspect of the resettlement, an applicant or a holder of a prospecting right, mining right or mining permit shall endeavor to resolve the dispute amicably through engagements and mutual agreement with affected landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities. In this regard an applicant or a holder of a prospecting right, mining right or mining permit shall:</p> <p>(a) Create a grievance management mechanism and an effective, formal and structured grievance procedure to track and attend to project and resettlement related grievances from the start of resettlement planning.</p> <p>(b) Affected landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities should be informed and receive continuous communication about grievance procedures.</p> <p>(c) Identify a site or community-based location where grievances can be received in writing.</p> <p>(d) Response time to grievances received is critical, particularly once a commitment is made to respond within a certain time period. Management of grievances can be a time-intensive activity, and may require a full-time, dedicated staff member to be responsible for receiving, documenting and processing grievances.</p>	<p>We commend the Department on its intent in this clause also.</p> <p>We recommend that the grievance management mechanism be decided upon by both interested and affected parties and applicants or holders of rights a prospecting right, mining right or mining permit, to ensure that the mechanism works for all parties.</p> <p>We recommend that there be specific time-frames for the dispute resolution process.</p>

	<p>(e) Emphasis on locally appropriate grievance resolution mechanisms (e.g. through traditional leaders or local structures) can result in conflict being handled faster and at a lower cost. Ensure that every complaint has an internal “owner” who is responsible for ensuring that it is effectively closed out.</p> <p>(f) Monitor and close out complaints on the basis of “outcomes” not just by recording that a corrective action has been completed. At a minimum verify whether the complainant was satisfied with the corrective action or not, and check whether they were happy with the process.</p>	
<p>CI13.3</p> <p>Regional Manager led process</p>	<p>If a resettlement related dispute cannot be resolved through the party to party dispute resolution process and grievance mechanisms and procedures the applicant or a holder of a prospecting right, mining right or a mining permit shall notify the Regional Manager about the dispute and the Regional Manager shall initiate a negotiation process as contemplated in section 54(3) of the MPRDA. In this regard the Regional Manager shall;</p> <p>(a) Constitute a negotiation team comprising representation from all affected parties (the applicant, the right holder, representatives of affected community/ies, traditional leadership etc).</p> <p>(b) Develop Terms of Reference for the negotiation team with clear parameters regarding the role of the team, scope of its work, meeting dates and times and timeframes to resolve the dispute.</p> <p>(c) Require all affected parties to submit all relevant information (documents, agreements etc) that pertains to the dispute.</p> <p>(d) Chair the meetings as per the terms of reference objectively with a view to facilitate a speedy resolution of the dispute.</p> <p>(e) Ensure that the meetings quorate and that every party is represented and mandated.</p>	<p>The negotiation team that will also comprise of representatives of affected communities must factor the different interests within communities and ensure that there is a balance of representatives that caters for all the relevant interests. Accordingly, these representatives should not only be limited to leaders within the communities, but also representatives of marginalised members of the community.</p> <p>The process must also make sure that all parties are sufficiently able to submit the relevant information, in a manner and language that they are comfortable. Where certain parties need assistance in</p>

	(f) Refer complicated matters to the Deputy Director General, Director General or the Minister where warranted.	executing some of their obligations, the process must ensure that such assistance is provided.
CI 14	Reporting, Monitoring and Evaluation	We commend the Department on its intent in this clause also.
CI 15	Resettlement Benefits and MPRDA Commitments	We commend the Department on its intent in this clause also. We submit that it should refer to 'resettlement compensation' and not to 'resettlement benefits'.