Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

Department of Forestry, Fisheries, and the Environment (DFFE)
The Director-General: Dr Dee Fischer
Private Bag X447
Pretoria
0001

By email: dfischer@environment.gov.za

25 August 2022

Dear Dr. Fischer

COMMENTS ON THE PROPOSED REGULATIONS PERTAINING TO FINANCIAL PROVISIONING FOR MITIGATION AND REHABILITATION OF ENVIRONMENTAL DAMAGE CAUSED BY RECONNAISSANCE, PROSPECTING, EXPLORATION, MINING, OR PRODUCTION, 2022

1. These comments are submitted by the undersigned civil society members and organisations on the proposed regulations pertaining to financial provision for the mitigation and rehabilitation of environmental damage caused by reconnaissance, prospecting, exploration, or production operations published for comment on 11 July 2022 in Government Gazette 47112 under GN 2272 (proposed FP Regulations).

2. These comments are submitted on behalf of the following organisations;

   2.1. The Centre for Environmental Rights[1] (CER);
   2.2. The Centre for Applied Legal Studies [2] (CALS);
   2.3. The Federation for a Sustainable Environment[3] (FSE);
   2.4. Lawyers for Human Rights[4] (LHR);

[1] http://www.cer.org.za/
[2] https://www.wits.ac.za/cals/
[3] http://fse.org.za/
[4] http://www.lhr.org.za/

Cape Town: 2nd Floor, Springtime Studios, 1 Scott Road, Observatory, 7925, South Africa
Johannesburg: The Cottage, 2 Sherwood Road, Forest Town, Johannesburg, 2193, South Africa
Tel 021 447 1647 (Cape Town)
www.cer.org.za

2.5. Mining and Environmental Justice Community Network of South Africa[5] (MEJCON);
2.6. Khuthala Environmental Care Group, Ermelo (Khuthala);
2.7. Endangered Wildlife Trust[6], (EWT);
2.8. Green Connection.

3. We welcome the opportunity to provide further comments on the Proposed FP Regulations. It is an opportunity that civil society considers a crucial step in protecting the rights, particularly of those living in the vicinity of mines, including operational mines where little to no concurrent rehabilitation is underway, mines in the process of being abandoned and derelict and ownerless mines. The signatories to these comments include such communities and organisations working with and for those communities and have first-hand experience of the dire consequences of failed and/or absent rehabilitation. We urge that the primary purpose of the proposed FP Regulations must be protection against those consequences. Given the cost to society, of collapsed ecosystems, polluted water, air and soil, resulting poor health, resettlement, displaced livelihoods, and reduced resilience to adapt for climate change, it is not the place of financial provision regulations to prioritise ensuring the profitability or even affordability of extractive operations to corporations. If it is too expensive to rehabilitate, if post extraction economies/livelihoods are not feasible, or even if it is impossible to cost rehabilitation, financial provision regulations should be the check and balance to ensure against the violation of the Constitutional right to an environment that is not harmful to the health or well-being of those who live in South Africa[7]. We submit that this is the background against which the FP Regulations must ensure that extractive companies consult, plan and provide for closure and provide adequate financial security for the cost of rehabilitation before extractive activities commence; that those funds are used exclusively for rehabilitation of the impacts of the operations, and are accessible to the relevant authorities for the event of mine or well abandonment by the operator.

4. TABLE 1 - COMMENTS ON SPECIFIC SECTIONS IN THE DRAFT FINANCIAL PROVISIONING REGULATIONS

	PROPOSED REGULATIONS	COMMENTS
	Chapter 1 – Definition, Purpose, and Application of these Regulations	
1	**Regulation 1** - Definitions	
1.1.	**"applicant"** means a person who applies for— (a) a permit, right and permission in terms of the Mineral and Petroleum Resources Development Act, excluding permits, rights or	We reiterate our concern that the definition excludes applicants for Ministerial consent for the transfer of rights under section 11 of the MPRDA (Mineral and Petroleum Resources Development Act). It has been our experience, and that of our clients and partners, is that the transfer of rights in terms of section 11 of the MPRDA frequently serves as a gateway to mine abandonment and that the point of transfer is a critical one for the environmental liability to be reassessed and financial provision secured in respect thereof. This to ensure that the transfer of rights does not result in the State becoming liable for the costs of mitigation, rehabilitation and management of negative environmental impacts and environmental damage from operations conducted by previous rights holders.

[5] https://cer.org.za/programmes/mining/mining-envrionmental-justice-community-network-south-africa
[6] https://www.ewt.org.za/
[7] Section 24 of the Constitution of the Republic of South Africa, 1996

	PROPOSED REGULATIONS	COMMENTS
	permissions contemplated in regulation 3(2) and 3(3)(a) and (b); (b) a consent in terms of section 102 of the Mineral and Petroleum Resources Development Act relating to a mining permit or a prospecting, exploration, mining or production right, excluding any consent for amendment or variation of an environmental management programme or works programme where there is no change to the scope of the operation; and (c) an environmental authorisation in terms of the Environmental Impact Assessment Regulations for an activity for which the Minister has issued an exemption in terms of section 106(1) of the Mineral and Petroleum Resources Development Act;	Anglo American recently divested its coal mining rights to Thungela, together with the environmental liabilities associated therewith. On 14 February 2022 an unknown volume of contaminated water burst from one of those mines, the South Shaft of the old Kromdraai coal mine near Emalahleni. It is public knowledge that due to the "spill" the Department of Water and Sanitation issued a directive against Thungela for its failure to take all reasonable measures to contain and minimise the effects of the incident. There is a criminal investigation pending. The acid mine drainage resulted in the deaths of at least three tonnes of fish (from 23 different species) and has caused water contamination and widespread devastation to ecosystems up to 60km from the spill. Had Anglo American and Thungela been obliged to conduct a comprehensive audit of their environmental liabilities at the point of transfer, compromised well integrity and increased contaminated water volumes may have been detected and provided for. The spill may have been prevented but if not, an updated costing of the environmental liability would at least have been undertaken and financial provision put in place. The department's response to our proposal to include the transfer of rights under section 11 of the MPRDA is that *"It is not intended that the assessment would be redone should there be no change in scope which would increase the impact on the environment. A change in ownership would not lead to more environmental impact simply by the name change. As a new owner it would be required that FP be made available to cover the FP requirements already determined by the previous owner. The DMRE is required to consider the applicant's ability to set aside the FP as part of the approval process for the permission, right or permit. These provisions must simply be enforced*[8] We draw attention to the fact that a section 11 transfer is not a mere name change. The Thungela incident highlights the importance of an assessment at the point of transfer of rights, particularly of rights granted before 2015. We also reiterate that we do not support the exclusion in part (a) of the definition to the extent that applicants referred to in regulation 3(3) would not be bound by the draft regulations. This proposed exclusion provides that applicants or holders of a reconnaissance or exploration permit for offshore operation, doing seismic surveys, do not need to comply with these Regulations. We are most concerned by the Department's response as follows: *"Should there be impacts related to ocean surveys, these impacts would be related to ocean fish and mammals could not be quantified or costed."* Seismic surveys risk environmental impact. We refer to our detailed comments on draft Regulation 3 and the reports cited there. The Department's response is in conflict with the precautionary principle read with the polluter pays principle. In an era of climate emergency where a healthy ocean plays a significant role in the regulation of the climate, the current inability to quantify impacts

[8] 1.6

	PROPOSED REGULATIONS	COMMENTS
		and cost rehabilitation, is an irrational basis for absolving those who cause those impacts from the regulations in place to ensure the implementation of those principles. For that is what our experience demonstrates: without financial provision set aside for the rehabilitation of environmental impacts, operations are abandoned when no longer profitable and their impacts are born by the state. **We submit that subsections (a) and (b) of the definition be amended as follows:** "(a) a permit, right and permission in terms of the Mineral and Petroleum Resources Development Act, excluding permits, rights or permissions contemplated in regulation 3(2) and 3(3)(a) **[and (b)]**; (b) a consent in terms of sections 11 and 102 of the Mineral and Petroleum Resources Development Act relating to a mining permit or a prospecting, exploration, mining or production right, excluding any consent for amendment or variation of an environmental management programme or works programme where there is no change to the scope of the operation; and…."
1.2	**"Closure rehabilitation trust"** means a trust provided for in section37A of the Income Tax Act. 1962 (Act No. 58 of 1962) and which is set up in terms of the Trust Property Control Act, 1988 (Act No. 57 of 1988);	In our submissions[9] we raised the issue of how from a tax perspective, it appeared to us that there is a disparity in the tax treatment of the different financial provisioning vehicles. "For example, whereas contributions to a section 37A rehabilitation trust or company are fully tax deductible, … contributions in respect of financial guarantees are typically not tax deductible[10]. Further, how "despite the tax benefits of section 37A vehicles, the disadvantages include the punitive measures that may apply should the provisions of section 37A be contravened, as well as severe cash flow constraints." In response to our submission the Department states that while it notes our inputs "*it is at the discretion of the holder as to which vehicle to choose. The vehicles have not changed from what was provided before other than the introduction of a parent and affiliate guarantee. This still includes the payment of cash into the closure rehabilitation trust of the DMRE. The guarantee has the advantage that it is not fully funded for some time and therefore the holder can utilise the cash, whereas the trust attracts interest and is tax deductible which was specifically provided for to allow the financial provision to build up over time. The holder will need to decide on the best options. With respect to the DMRE closure rehabilitation trust, it has been identified that the account which was previously referred to in the Regulations was in fact such a trust, therefore it is in place*."[11] [our emphasis] We submit that the Department's response is confusing. An account is not a trust, nor is a "trust account" (such as those that are held by attorneys and property practitioners which are specifically regulated by other legislation) a trust. In South African law, a trust must be registered, and letters of authority issued by the Master of the High Court to the trustees. Therefore, until a trust is

[9] https://cer.org.za/wp-content/uploads/2021/10/CER-and-Others-Financial-Provisioning-Comments-6-October-2021.pdf
[10] Please see an article by Renmere advisory firm, dated August 2019, explains the problem with this disparity: https://renmere.co.za/is-your-financial-provisioning-in-need-of-rehabilitation/
[11] DFFE's "comment and response Report" to the Financial Provisioning Regulations – August 2021 https://www.dffe.gov.za/sites/default/files/crr.pdf

	PROPOSED REGULATIONS	COMMENTS
		registered, and letters of authority issued there can be no trust. So, we seek clarity firstly on who the trustees of this trust which apparently already exists are, and secondly who are the beneficiaries?
1.3.	**"holder"** means the holder of- (a) an environmental authorisation for an activity for which the Minister has issued an exemption in terms of section 106(1) of the Mineral and Petroleum Resources Development Act; and (b) permission, permit and right issued in terms of the Mineral and Petroleum Resources Development Act for which no closure certificate has been issued, excluding permits, rights or permissions contemplated in regulation 3(2) and 3(3)(a) and (b); and an old order right for which a conversion as contemplated in schedule II to the Mineral and Petroleum Resources Development Act, is pending	As before, we do not support the exclusion, in part (b) of the definition to the extent that holders referred to in regulation 3(3) would not be bound by the draft regulations and are concerned about the Department's stance, namely that: "The impacts that related to offshore seismic surveys would not be able to be costed and would be uncertain to occur. Therefore as the regulations attempt to provide certainty with respect to finances to be sterilised this is limited to terrestrial mining only." The Department's response is in conflict with the precautionary principle read with the polluter pays principle and refer to our comments above in this regard.
1.4.	**"Low risk commodities"** means minerals which pose a low latent environmental risk when mined and are (a) clay (CY); (b) aggregate (RM; Gn;St;Stw; M;) (c) slate (MS); (d) pebbles; (e)Limestone (L) (f) diamonds (D); (g) dimensional stone (M); (h) gravel (gra); and (i) sand (Q and Codes QY, QH, Qwd); but excludes— (i) base metals (B); and (ii) minerals identified in (a) to (i)	We reiterate our support for a dual system, however, reiterate our concerns expressed in the previous process as follows: 1. We are concerned that what seems a low risk commodity isn't always so and that there are factors other than and/or in addition to mineral type that must be considered for risk. For example, depth: the deeper the operation, no matter what the mineral: o the more risk is posed to groundwater o the more potential for toxins to be exposed (or just things that should not be exposed to oxygen) o the bigger the overburden, slimes dams, etc with all the knock-on impacts that these then have 2. Method and location also have a bearing on risk. For example, while the draft regulations list diamonds as a low risk commodity, this is certainly not the case for alluvial diamonds given where these are mined. 3. Sand mining is not at all low risk and we have seen devastating impacts where river beds have been destroyed and water courses altered to the detriment of downstream users and increased siltation due to sand mining. It is a cheap and easy form of mining and resource access and is often under the radar, it cannot be seen as low impact.

	PROPOSED REGULATIONS	COMMENTS
	mined through underground mining methods	4. While we support the introduction of a dual system, what constitutes "low risk" and should fall into a draft regulation 7 process, is complex. We therefore propose the development of a screening tool the application of which is prescribed by the draft regulations. That tool should take spatial data into account as the environmental sensitivity and hydrological importance of the receiving environment are also relevant factors for risk. We submit that the response that *"the low-risk commodity is limited to a permit holder who has specific timeframe and size of plot to mine or prospect on the risk is therefore felt to be limited and a reduced level of complexity to calculation acceptable*[12] is inadequate. There are factors other than "*specific timeframe and size of plot to mine or prospect on"*[13] that must be considered. The approach of only taking into consideration the type of material being mined, the size of footprint or the risk of leachate, though an important criterion is not defensible. A small footprint in a priority area could have greater environmental impacts than a large footprint in a largely modified area and some latent risks that relate to the likelihood of pollution associated with the specific mineral (for example leachate), significant long-term loss of biodiversity, changes in ecological infrastructure and ecosystem services. Limiting the definition of 'low risk commodities' to 'latent' risks means that a large part of the potential risks is removed and/or would be covered by 'residual' impact. We continue to propose the development of a screening tool the application of which is prescribed by the draft regulations. Furthermore, the tool should take spatial data into account as the environmental sensitivity and hydrological importance of the receiving environment are also relevant factors for risk. We record that the current biodiversity screening tool is not sufficiently resolved to really drill down to the right receiving environment informants.
	"mitigate" means to alleviate, reduce or make less severe;	We reiterate our comment in the previous process that In terms of the 2014 EIA Regulations "mitigation" means to anticipate and prevent negative impacts and risks, then to minimise them, rehabilitate or repair impacts to the extent feasible. We submit that there should not be varying definitions of this word between Regulations and that this definition should be deleted or it should mirror the definition of "mitigate" under the EIA Regulations. It should by no means water down the meaning or depart from the full spectrum catered for in the mitigation hierarchy. We take issue with the Department's response, which is not supported, namely: *"It is not possible to prevent negative impacts and risks once mining commences or to repair impacts. It is possible to reduce the impacts. In the context of mining the impacts*

[12] 1.51 of the comment and response table https://www.dffe.gov.za/sites/default/files/crr.pdf
[13] 1.51 of the Comment and Response table.

	PROPOSED REGULATIONS	COMMENTS
		that could have been avoided must have been considered through the EIA process. Therefore it is not possible to align the definitions."
	"parent and affiliate company guarantee" means is a National Treasury approved, legally binding commitment, by the parent or affiliate company of the applicant or holder, registered in a country which is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (New York Convention) and maintains throughout the life of the guarantee, a long term global scale rating which is at least BBB- from one of Standard and Poor's Ratings Services or Fitch Ratings, or Baa3 from Moodys Investors Service, who guarantees to fulfil environmental liability obligations for and on behalf of the holder or applicant in question;	We support the alterations to the definition but reiterate most of our comments on the previous iteration, particularly that we are concerned that this is not an appropriate tool - in the context of control of the funds, which should not be in the control of the right holder, or its parent company; and also in the context of an our experience, and that of our clients, of being passed from pillar to post when trying to ascertain what financial provision is set aside for a specific mining operation. If financial provision doesn't attach to a particular mine, then accessing it for rehabilitation of that mine after it has been abandoned or sold proves impossible. We take issue with the response of the Department, namely: "*This tool has been used successfully internationally and is required by the industry due to the high capital costs and the upfront nature of the activities. FP would be very high when no funds have yet been generated which would make oil and gas project unviable in the country*." And "*In the context of oil and gas, it is intended that the relief would be in terms of rehabilitation, as there is little/no expertise in the country to do this type of rehabilitation so should funds be provided to DMRE, rehabilitation would not be able to be undertaken in the short term, which would be the requirement in terms of oil and gas."* How a multinational corporation conducts itself in one jurisdiction is, unfortunately, no indication of how it will conduct itself in our country. We have seen in the mining context how multinational corporations are compliant in jurisdictions where there is a culture of compliance coupled with state capacity to enforce the law but in South Africa where the state's capacity to monitor and enforce environment, water and transparency licences and laws is poor, that those companies are frequently in violation. The Department's response is therefore no comfort. Secondly, we submit that the Department's approach to the oil and gas industry appears to utterly disregard the precautionary principle and the polluter pays principle, which, given the extreme environment, water and known climate impacts of the industry is of the utmost concern. The special treatment of the mining industry, first in relation to its chief environmental regulation sitting in the MPRDA, instead of NEMA, as it does for all other industries, and still, in relation to the processing of applications for environmental authorisations and for compliance monitoring and enforcement of those environmental licences, which is undertaken by the minerals authorities, unlike all other industries where the environment authorities bear that those responsibilities, has led to rampant non-compliance, extreme environmental degradation and loss, serious health impacts on affected communities, should be a lesson. Our regulatory regime should under no circumstance give special treatment to industries with such severe impacts.

	PROPOSED REGULATIONS	COMMENTS
1.5.	**"Risk profiling – risk threshold"** means to provide a non-subjective understanding of risk posed b a prospecting, mining, exploration, or production operation, as opposed to the large scale works at the end of the operation;	We note the Department's response to our comments in the previous process and wish to underline that it was not our suggestion that the DMRE should determine the sustainable end use. Rather we said that we accept that it would not be realistic to take all judgement out of risk assessment. However, there are significant benefits associated with trying to define what an acceptable risk is as much as possible along with who gets to decide on whether something is acceptable, using what criteria and process. We submit that the phrase "which is regarded as being acceptable" is problematic unless it is more clearly contextualised. It should not, for example, refer to the regard of the developer (or that of the specialist appointed by the developer). The determination referred to needs to be made by the regulator after meaningful consultation with stakeholders, including affected communities, particularly given the role the "risk threshold" plays in the definition of "sustainable end state". In practice, we see the DMRE rubber-stamping rehabilitation and closure plans that are proposed by the developer without meaningful consultation with affected communities. This is not supported. However, it is not realistic to expect affected communities to appoint the technical experts necessary to determine risk thresholds, rehabilitation limits and the like. Realistically therefore, if the Constitutional rights of affected communities to an environment not harmful to their health or wellbeing are not to be violated, as far as possible, defining acceptable risk, including criteria and process for determining it must be regulated.
1.6.	**"Sustainable end state"** the site specific situation for land, water and air at the time of reaching the risk threshold'	We appreciate the Department's response to our submission on this definition, namely, "*End state can have more than one end use. The end state can be determined scientifically i.e what should be the quality of soil, air, and water. An end use can change over time and can lead to very unrealistic expectations which can change at the very end of the mining operations when the mine sees that they cannot meet certain end uses which were agreed to as there are third parties involved. To be more sure of a possible end use, it is preferrable to set achievable and measurable conditions for the end state of the land."* However, we submit that if sustainable development is to be achieved, and with a key purpose of the draft FP Regulations being to "facilitate environmentally sustainable mining", the regulations must recognise the importance of a sustainable end state that includes the use of the land post mining. We therefore reiterate that a crucial objective of mine closure, in addition to a strategic approach to managing water and the other aspects mentioned, is a strategic approach to managing land. That objective should prioritise both land uses that support livelihoods and access to land and land reform as a political and economic imperative. Inequality in our country is sharply aggravated by the resettlement of communities to make way for mining. This practice perpetuates centuries of dispossession through slavery, colonialism and apartheid. Access to land and land reform in the first instance by and for those most affected by mining must be a central objective in conceptualising a sustainable end use. A sustainable end state must prioritise access to land for women and the inclusion of women in community controlled economic sectors. We submit that it makes sense not to require the impossible (and augment rehabilitation with the use biodiversity offsets where restoration is not possible or is likely to be inadequate). However, it should be made clear what is most likely to be possible and

	PROPOSED REGULATIONS	COMMENTS
		acceptable post closure for ends states. If this is not done, then there is a risk of moving targets and society can't be reasonably sure what end state they are going to be left with. Our view is that a sustainable end state and closure objectives to achieve this must be approved by the Regulator and that the process of this approval can only occur through the process of public participation, meaningful consultation and consent.
2	**Regulation 2 –** Purpose of these Regulations "(e) facilitate environmentally sustainable mining"	If the wording of regulation 2(e) is intended, we ask the Department for an explanation. Alternatively we propose that the subregulation is amended as follows: "(e) facilitate environmentally sustainable **[mining]** extractive activities" alternatively, "(e) facilitate environmentally sustainable prospecting, mining, exploration and production"
3	**Regulation 3 –** Application of these Regulation	We reiterate our comments on the previous iteration of the FP Regulations, regarding the impacts of seismic surveys as well as our comments above on the definitions of "applicant" and "holder", taking issue with the stance of the Department. We submit that draft regulation 3(3)(b) should be deleted. **Response from Department** – *"The assessment on marine life would be undertaken through the EIA and it is not the objective of the FP Regulations to assess impacts. The FP Regulations must determine what amounts must be set aside for the assessed impact. The impacts on marine life is identified as being able to be mitigated through various measures such as avoidance of sensitive breeding times, distance from fish and mammals and no rehabilitation is anticipated or could be quantified. Should there be an impact on the fishing and compensation is required this will be provided for through insurance as it would need to be quantified on a case-by-case basis*".
Chapter 2 – The environmental obligation of an Applicant and Holder		
	Regulation 4 – Obligation of an applicant and holder to plan for, finance and implement environmental mitigation, rehabilitation and management measures	We welcome the revised content of the regulation.
Chapter 3 - Financial Provisioning		
	Regulation 5 – General principle	We welcome the revisions to regulations 5(1) and 5(3).

	PROPOSED REGULATIONS	COMMENTS
	Regulation 6 – Purpose of financial provisioning	While we agree that offsets are distinct from rehabilitation, we submit that they are part of the mitigation and thus that it is appropriate that they are incorporated in these regulations "pertaining to financial provision for the mitigation and rehabilitation of environmental damage….". If the purpose of these Regulations is to 'ensure that the State does not become liable for the costs of mitigation, rehabilitation and management of negative environmental impacts and environmental damage which should be covered by a holder', and 'facilitate environmentally sustainable mining (extractive operations)' – as set out in 2, then it is not appropriate to restrict the regulations to rehabilitation. The very definition of 'financial provisioning' in 5 covers the iterative process of impact assessment and mitigation to achieve an 'approved sustainable end state'. This must cover offsets/ compensation. Stopping short at rehabilitation and mitigation of latent impacts is a contradiction. As with failure to rehabilitate, failure to implement an offset/ compensation, where required, results in a burden on the State and must be catered for. The fact that offsets are included as a condition of authorisation, does not remove them from the need for financial provision and related assurance. It could be argued that rehabilitation is also a condition of authorisation, yet the financial provisioning regulations cover it. As submitted in the previous process, we have noted in practice that the financial burden of offsets can be substantial and, without guarantees or the evidence of capacity of the developer to deliver the requisite funds, they fail.
	Regulations 7 and 8 – Determining of the financial provision using the prescribed templates, spreadsheet, and master rates	We submit that the Department's response to our comment on the previous iteration is inadequate. We reiterate our comments as they pertain to the identification of "low risk" and our proposal on a screening tool that better takes the receiving environment into account. We also reiterate our submission regarding applicants for consent in terms of section 11 of the MPRDA, applicants for renewals of rights in relation to regulations 7 and 8 and applicants for exploration rights including onshore seismic survey. We disagree strongly that the renewal of a right does not change the scope of the operation. We submit that both regulations must be rendered applicable to holders of the rights mentioned and not merely applicants for those rights. We welcome the fact that the *"master rates are to be reviewed through a project which will be initiated shortly and then updated on a national basis*" [14] We reiterate the need for the master rates amount to be reviewed and adjusted every year even if this

[14] 7.13

	PROPOSED REGULATIONS	COMMENTS
		means that they are merely adjusted for inflation. The failure to update the master rates would also be in conflict with or at least counter to the spirit of, the Public Finance Management Act 1 of 1999 (PFMA). Consideration should also to be given to the need for master rates to be current market-related rates and updated and signed off by Qualified Quantity Surveyors annually to ensure accuracies. The method of rehabilitation might also have to be adjusted and amended and a template restricts this and often excludes very important line items. The closure objective must be achieved but a set template and master rate should be assessed for accuracy throughout the operation.
	Regulation 9 – Availability of the financial provision	We commend the revisions to this regulation. We draw the Department's attention to the following: Regulation 9(4) states that "when submitting the original financial guarantee contemplated in subregulation (3)(b), proof of registration of the institution providing such a financial guarantee in terms of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017) must be provided". This section also refers to Regulation 9(3)(b) which provides that a "holder…must provide…proof of the availability of the financial provision in the case of…a financial guarantee and parent or affiliate company guarantee, the original guarantee." This means that proof of the registration of the bank or insurer which provides the financial guarantee must be provided. However, regulation 9(3)(b) also deals with parent or affiliate company guarantees, and there is no provision requiring the proof of the rating of any entity providing a parent or affiliate company guarantee. Since these requirements are for the same purpose that is to ensure that the guaranteeing entity is of substance), proof of the rating of the parent or affiliate company guarantor must be provided together with the original, and it must thereafter be provided annually, since ratings can change on short notice. We had further submitted a comment in relation to regulation 9(5) and 10(4), that proof of the applicable rating of the financial guarantor must also be provided. However, we submit that the payment plan and timeframe must be subject to approval by the Minister of Finance, and not merely "supported" by them. That National Treasury will determine the requirements "on a case-by-case basis" does not change the fact that the parent or affiliate company guarantee does not fulfil the requirements of the Regulations if it is not issued by an appropriately rated entity, and clearly the Minister cannot accept such a guarantee unless they can be satisfied that the guarantee complies with the Regulations. Proof of rating, just as with proof of financial institution registration, must be provided.
	Regulation 10 - Financial vehicles available for setting aside financial provision	• Regulation 10(2) o We are still concerned that the reading of Regulation 10(2). Regulation 10(2) states that "w*here the financial vehicle used is a closure rehabilitation trust contemplated in subregulation (1)(a), [**no interest]** will be payable by the Minister*

	PROPOSED REGULATIONS	COMMENTS
		for any amounts deposited in such a closure rehabilitation trust. It is our view that this is contrary to good practice and might be a disincentive to using this vehicle. ○ Our concern with the addition of words 'no interest.' If the intention is to use the interest on funds held in the closure rehabilitation trust to defray the costs of that trust, this should be stipulated. Furthermore, the provision that "the Minister" will not pay any interest is not correct, since the funds will be held by the trust, not the Minister, so the Minister would in any event have no such obligation. The trust will pay no interest to the holder because the funds are to be used to defray expenses. • Regulation 10(4) ○ We submit that regulation 10(4) should be amended as follows: ○ *"When submitting the original financial guarantee contemplated in subregulation (3)(b), proof of registration of the institution providing such a financial guarantee in terms of the Financial Sector regulation Act, 2017 (Act No. 9 of 2017) must be provided <u>the guarantee upon delivery.</u>* • Regulation 10(5) ○ We submit that proof of rating must still accompany the guarantee on delivery. Further, if National Treasury places any additional requirements on the applicable guarantor, proof of compliance with those requirements must also accompany the guarantee on delivery. Thus, we suggest that regulation 10(5) should be amended as follows: ○ *The parent or affiliate company guarantee contemplated in subregulation (1)(d) must be prepared in accordance with the requirements of National Treasury <u>the guarantee upon delivery.</u>* • Regulation 10(8) ○ We support the provisions in Regulation 10(8) which provide that a financial guarantee may not be used as a financial vehicle for the costs associated with mitigation, rehabilitation, and management of latent environmental impacts. However, we are concerned that this has the effect that although a financial guarantee can't be used, a parent or affiliate company guarantee can be used for provisioning for latent defects. Clearly guarantees should be treated on the same basis, as the same risks pertain, so both forms of guarantee should be excluded here.
	Regulation 11 - <u>Review and update of templates, spreadsheets, plans and reports and confirmation or adjustment of the financial provision</u>	We strongly reiterate our comments on the previous iteration of this regulation, pertaining to annual review and update of the template, spreadsheet, plans, report and calculation contemplated in regulation 7 or 8 for the reasons we indicated. It is cold comfort that the DMRE finds annual intervals to be useful in circumstances where levels of environmental compliance monitoring and enforcement by the DMRE are so low. In our experience, the DMRE cannot provide access to rights and licences at times because it no longer has copies of these important documents against which it should be enforcing compliance. This underlines the rationale for our submission that annual review and update 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

	PROPOSED REGULATIONS	COMMENTS
		basis. Annual reassessment that requires procurement, investigation, analysis and revision will lead to an endless (and possibly fruitless and ineffective) cycle of reassessment. Moreover the regulation provides that this annual review and update many be undertaken by *internal* specialists. This is a problem given the strong doubt that the DMRE will monitor and enforce compliance with the obligation. We reiterate our submission that review and update should be undertaken every three years.
	Regulation 12 - Audits and related requirements	We are concerned with the time frame for conducting independent audits which has been increased to 5 (five) years in the 2022 draft regulations whereas the 2021 draft regulations made provision for the audit process to be concluded in a period not exceeding 36 months. We draw attention to the confusing wording of regulation 12(2)(a) which should include the words "and every 5 (3) years thereafter". We submit that the review and update should be required every three years and that the audit should be required within 12 months of that review and update – i.e. also every three years We strongly object to the special treatment of the oil and gas industry in regulation 12(2)(b). We submit that the audit must be conducted by independent specialists and not by specialist from a parent or affiliate company, who clearly lack independence.
	Regulation 13 - Cancellation and claiming against a financial guarantee or parent or affiliate company guarantee	• Regulation 13(1) o The initial drafting remains wrong as it refers to the financial institution intending to cancel either a financial guarantee or a parent or affiliate guarantee. A financial institution cannot cancel a parent or affiliate guarantee since it can't issue them. The drafting previously suggested must be used "in the event that a financial institution which has provided a financial guarantee, or a parent or affiliate company which has provided a parent or affiliate company guarantee (in each case which supports a financial provision) intends to cancel the applicable guarantee, the financial institution or parent or affiliate company must…" • Regulation 13(6) o There is no ability to call on provisioning when a holder is placed under supervision for business rescue or if it reaches or attempts to reach a compromise with its creditors under section 155 of the Companies Act 2008 – both should be included together with liquidation as a trigger event for a call on guarantees. This is market standard regarding insolvency triggers and will give the Minister the ability to deal with a business rescue practitioner from an appropriate position. The realities are that any business going into business rescue or compromise is usually insolvent and is at least "financially distressed" as defined in the Companies Act, as this is a requirement for business rescue. This means it will not be able to meet its debts as they fall due in the ensuing 6 months (which would include concurrent rehabilitation obligations). If the holder (post compromise or as part of the compromise arrangement) or a business rescue practitioner can provide an alternative acceptable to the Minister, that is fine, but the funds must be secured in the interim.

	PROPOSED REGULATIONS	COMMENTS
		• Regulation 13(6)(b) o We submit that word "liquidator" should be deleted since the trigger with respect to liquidation is already fulfilled under Reg 13(6)(a). Similarly, the words "business rescue practitioner" should also be deleted, because being in business rescue should be a trigger as noted above, but also because the actions taken are still legally those of the holder, even if the holder is at any applicable time being represented by a business rescue practitioner. o We propose amending the wording of Regulation 13(6)(b) as follows (b) the holder, [liquidator] or [business rescue practitioner] has –
	Regulation 14 – Claiming against a closure rehabilitation company or a closure rehabilitation trust to effect mitigation and rehabilitation	• Regulation 14(1) o We suggest that the references to liquidator and business rescue practitioner be deleted. o A notice must be given to the legal entities themselves, not the people representing them. Regulation 5(3) already establishes some degree of individual responsibility. The holder may be in liquidation or under business rescue, but in any event notice to the holder will, in law, be to its liquidator or practitioner, if one exists. The wording should therefore be: "...the Minister must provide the holder and the closure rehabilitation trust and/or the closure rehabilitation company with written notice of the intention to…" • Regulation 14(2)(a) o We propose that the order is to again, is to the entities, not the people representing them. We suggest that this section should rather read as: "order the closure rehabilitation trust and/or the closure rehabilitation company to deposit an identified amount…". • Regulation 14(3) and Regulation 14(4) o As per our previous suggestions, the reference must be to the closure rehabilitation trust and/or the closure rehabilitation company, not the directors, trustees, liquidators, or practitioners.
	Regulation 15 - Withdrawal against a financial provision to facilitate decommissioning and final closure activities	Although the Department has indicated that it has taken up our proposed additional wording in regulation 15(1)(e)(i), the 2022 draft FP regulations to not reflect this. We therefore reiterate that draft regulation 15(1)(e)(i) should be supplemented as follows:

	PROPOSED REGULATIONS	COMMENTS
		"Mitigation and rehabilitation having been achieved in the form of, amongst others, survey reports, photographs and satellite imagery as identified in the approved final rehabilitation, decommissioning and mine closure plan signed off by an independent specialist who has conducted a site inspection."
	Regulation 16: Responsibility of an applicant or holder to consult and disclose information	We take issue with the exclusion in regulation 16(2) of holders contemplated in regulations 7(1)(e) and (f) and submit that they too must be required to publish. In the same regulation we submit that publication must also take the form of notice being put up at the site of the operations and within affected communities' settlements. We reiterate our earlier comments on regulation 16(4) and take issue with the Department's suggestion that it is too administratively burdensome to require consultation with affected communities on revised plans and reports. Those communities must be able to participate in processes around environmental impacts, closure objective and sustainable end states, closure planning and implementation. The administrative burden would be dramatically and necessarily reduced where review and update occurs on a triennial, rather than annual basis.
	Regulation 17 – Powers and Duties of the Ministers	We take issue with the Department's response to our submissions in relation to regulation 17(2). Given the state of record-keeping and access to information held by the minerals authorities, it certainly cannot be assumed that a database would be kept up to date. Given specifically the problems in accessing information from the minerals authorities, even through PAIA where requests for access to information frequently go unanswered, or are only answered after many months of frequent follow-ups, whereafter, even in the rare event of access to the requested records being granted, the records themselves are not forthcoming, it is urged that that authority must publish the database on its website. In relation to regulation 17(4), should the Minister not be empowered to suspend the right in these circumstances and pending their approval?
	Chapter 4 Transitional Arrangement	
	Regulation 18 – Transitional arrangement	We welcome the manner in which the department has revised the provisions of regulation 18. We do not support the additional leeway extended to the oil and gas industry in the transitional provisions in the form of additional time afforded to off-shore oil and gas companies to comply with the draft regulations. Those companies have been aware since before the promulgation of the 2015 Financial Provision Regulations that they would be required to make financial provision under NEMA. They have had sufficient time to prepare themselves for compliance. We welcome the addition of "the review and re-assessment contemplated in subregulation (2) must be undertaken by independent specialists in regulation 18(3).

	PROPOSED REGULATIONS	COMMENTS
		We submit that the reference to "annual" in draft regulation 18(5) should be a reference to "triennial" for reasons indicated in our comments on regulations 11 and 12. We support the consultation obligation in draft regulation 18(6). We continue to suggest that the Minister, in considering the duration of the payment plan, consider the duration of the right or permit and that the text of the regulation specifically provides for this, we note the department's response that *"This will cause an unnecessary administrative burden and is not supported."* The view that it will cause an administrative burden is insufficient given the impact of unrehabilitated mines on communities. We maintain our proposal that regulation 18(13) requires the following amendment: The payment plan or agreement contemplated in subregualtion (11), as well as proof [any indication] of compliance with such plan or agreement, must be included in the annual review and assessment of the adequacy of the financial provision and must be submitted together with the plans and reports as required in terms of these Regulations.
	Chapter 5 - General Matters	
	Appendix 1	We reiterate that the annual rehabilitation plan must aim to record the activities that were <u>not</u> undertaken and the targets <u>not</u> achieved in the preceding 12 months <u>with an accounting or explanation for this</u> an a plan to address these in the current 12 months. This is important for accountability and, where appropriate or necessary, compliance enforcement. We support the content requirements of the annual rehabilitation plan but, submit that all non-compliances with the plan from the preceding period should be recorded. The Department has responded that this is included in the information to be submitted as part of Appendix 1, however we do not agree. Our experience with compliance reports by mining companies is frequently that targets not achieved are overlooked. This creates transparency obstacles as well as compliance monitoring obstacles. Unless required, in our experience, companies will not report on missed targets and account therefore in their plans.
	Appendix 2	We support the proposed final plan but reiterate our comments elsewhere herein regarding the need for closure objectives and a sustainable end state (use) to be subject to public participation and approval by the regulator and not simply "agreed", "preferred", "proposed", "identified" etc. The latter terms need to be deleted from this Appendix and "approved" or "authorized" substituted. These references can be found in paragraphs 1, 2.1, 2.2, 2.6, 3, 3.2.2.2, 3.5, 3.6.6, 3.6.6.3,
	Appendix 4	Despite indicating that the error has been amended, that is not reflected in the Appendix. We therefore reiterate that the formula in Appendix 4 must be Total 1 + Total 2 = sum + (plus) VAT.
	Appendix 5	Despite indicating that the error has been amended, that is not reflected in the Appendix. We therefore reiterate that the formula in Appendix 4 must be Total 1 + Total 2 = sum + (plus) VAT.

5. We thank you for the opportunity to submit comments on the draft regulations and invite discussion any aspect thereof in more detail should this be necessary or useful.

Yours faithfully,

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

Tarisai Mugunyani
Attorney
Direct email: tmugunyani@cer.org.za