

Proposed mining financial provisioning regs will overhaul the NEMA

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The *Proposed Regulations Pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations*, designed to completely overhaul the National Environmental Management Act (NEMA) Financial Provisioning Regulations, were published for comment last week.



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Proposed changes

1. Less financial provisioning needs to be made available

- Although the method to determine the full quantum of required financial provisioning ie preparation of Annual Plan (Appendix 5), Final Plan (Appendix 6) and Risk Assessment Report (Appendix 7) remains the same, less provisioning will actually need to be made available;
- provisioning will need to be made available for the sum of the costs to implement activities identified in the Final Plan and the Risk Assessment Report for three years looking-forward, or one year (in the case of an applicant or holder of a mining permit). This is reduced from 10 years under the Financial Provisioning Regulations, 2015 and the costs associated with the Annual Plan are no longer included (as these costs are paid for as part of OPEX);
- and methodologies are now provided to calculate the quantum of provisioning to be made available for both new (Appendix 1) and existing (Appendix 2) developments.

2. Changes to the use of financial vehicles for setting aside financial provisioning

- The restricted use of trust fund contributions for residual environmental impacts only, will be done away with - these funds can now also be used to implement measures set out in the Final Plan. Unfortunately, the Draft FP Regulations continue to provide for a template trust deed (Appendix 4) and it appears as though existing trust funds will need to be re-structured to align with this template;
- A new restriction is proposed for the use of financial guarantees for residual environmental impacts; and
- Contributions to 'rehabilitation companies' have been recognised as a permissible financial vehicle, a development that promises to open up the rehabilitation market (NEMA will, however, need to be amended to

ensure the lawfulness of such companies).

3. Section 11 and 102 applications proposed to be brought into the fold

- a fundamental proposed change is that the Draft FP Regulations seek to expand the definition of applicant to include applications for section 11 consent or section 102 amendments under the MPRDA; and
- such applicants are likely to be required to amend or replace their financial provisioning in accordance with the financial provisioning regulations before they can obtain section 11 consent or a section 102 amendment.

4. Care and Maintenance

- These regulations are proposed to be removed entirely and will not be formally regulated under the financial provisioning regulations.

5. Extension of compliance timeframe for holders of offshore oil and gas production rights

- Holders of offshore oil and gas production rights will have until 19 February 2024 to comply with the Draft FP Regulations; and
- The Draft FP Regulations also distinguish between offshore oil and gas exploration and production in terms of the content required to be included in their Annual Plan (Appendix 8), Final Plan (Appendix 9) and Risk Assessment Report (Appendix 10).

6. Detailed transitional arrangements

- Various transitional arrangements apply which now distinguish between compliance with the old MPRDA system and work completed under existing Financial Provisioning Regulations, 2015.

Conclusion

While many of the changes currently proposed by the Draft FP Regulations are likely to be welcomed by the mining and petroleum industries, significant work will need to be done to ensure compliance by the 19 February 2019 deadline, except for holders of offshore oil and gas production rights.

The public comment period closes on 10 December 2017. We urge the mining and petroleum industries to submit comments before the Draft FP Regulations are finalised. Don't wait to have to challenge the rules of closure in the courts.

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