

## High Level Summary of the Financial Provisioning Regulations Promulgated on 20 November 2015 (R1147)

On 20 November 2015, Bomo Edith Edna Molewa, Minister of Environmental Affairs for South Africa, promulgated the Regulations for financial provision for prospecting, exploration and mining operations (the Financial Provisioning Regulations - Regulation 1147). These regulations were promulgated under section 44(aE), (aF), (aG), (aH) read with sections 24(5)(b)(ix), 24(5)(d), 24N, 24P and 24R of the National Environmental Management Act, 1998 Act No.107 of 1998 (NEMA).

The transitional arrangements defined within R1147 state that all operations holding any authorisation in terms of the Mineral and Petroleum Resources Development Act (MPRDA), Act 28 of 2002 (as amended) must ensure that a review, assessment and adjustment of the financial provision is conducted in accordance with R1147, and submit an updated financial provision:-

- a. within three months of its financial year end following the coming into effect of the R1147 and annually thereafter; or
- b. within 15 months after the coming into effect of R1147 and annually thereafter.

A summary of the amendments is provided in the sections which follow.

### Historical provisioning requirements

Historically, the requirements for addressing rehabilitation liability have fallen under two main acts: The MPRDA and the NEMA.

#### The Minerals and Petroleum Resources Development Act

- Section 41 of the MPRDA requires an applicant for a prospecting right, mining right or mining permit to make a prescribed financial provision for the rehabilitation or management of negative environmental impacts before the Minister approves the Environmental Management Plan.
- Regulations 53 & 54 of the MPRDA regulations of 2004 regulate the making of financial provisions and have their own way of payment method.

#### The National Environmental Management Act

Mine closure is addressed in the NEMA, in Section 24R, in the following terms:-

- (1) NEMA 24R (1) Every holder of an old order mining right and owner of works remain responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of extraneous water, the management and sustainable closure thereof until the Minister of Minerals and Energy has issued a closure certificate in terms of the Mineral and Petroleum Resources Development Act, 2002, to the holder or owner concerned.

- (2) When the Minister of Minerals and Energy issues a closure certificate, he or she must return such portion of the financial provision contemplated in section 24P as the Minister may deem appropriate to the holder concerned, but may retain a portion of such financial provision for any latent and or residual environmental impact that may become known in the future.
- (3) Every holder of an old order mining right or owner of works must plan, manage and implement such procedures and requirements in respect of the closure of a mine as may be prescribed.
- (4) The Minister may, in consultation with the Minister of Minerals and Energy and by notice in the Gazette, identify areas where mines are interconnected or their impacts are integrated to such an extent that the interconnection results in a cumulative impact.
- (5) The Minister may, by notice in the Gazette, publish strategies in order to facilitate mine closure where mines are interconnected, have an integrated impact or pose a cumulative impact.

### Provisioning requirements arising from the promulgation of R1147

The Ministers of Governmental Affairs, Water Affairs and Mining have determined that the requirements for making of financial provision for the management, rehabilitation and remediation of environmental impacts from mining operations will be regulated under NEMA and no longer under the MPRDA. This agreement has been formalised through the amendment of the various relevant environmental, water and mining legislation.

Section 44 of NEMA has been amended to empower the Minister of Environmental Affairs to promulgate regulations with respect to:-

- the assessment and determination of environmental liability;
- auditing and reporting of environmental liability; and
- any other matter necessary to facilitate the implementation of the financial provision.

#### Regulations Pertaining to the Financial Provision for Prospecting Exploration, Mining or Production Operations (Financial Provisioning Regulations – R1147)

The purpose of R1147 is to regulate the determination of financial provision as contemplated in the NEMA for the costs associated with the undertaking of management, rehabilitation and remediation of environmental impacts. This is applicable from commencement of exploration activities, through the lifespan of prospecting and mining operations. Importantly, R1147 also requires the consideration of and provision for residual environmental impacts that may become known in the future.

R1147 regulates the following aspects of rehabilitation, decommissioning and closure:-

- financial guarantee;
- deed of trust;
- minimum content of an annual rehabilitation plan;
- minimum content of a final rehabilitation, decommissioning and mine closure plan;
- minimum content of an environmental risk assessment report; and
- care and maintenance plan.

### Transitional arrangements

The transitional arrangements in terms of the application of R1147 are as follows:-

- Any actions undertaken in terms of regulations 53 and 54 relating to financial provision in the Mineral and Petroleum Resources Development Regulations, 2004 which can be undertaken in terms of a provision of these Regulations must be regarded as having been undertaken in terms of the provision of the regulations.
- Financial provision submitted in terms of regulations 53 and 54 of the Mineral and Petroleum Resources Development Regulations, 2004 for which approval is pending when R1147 takes effect (20 November 2015), must despite the repeal of regulations 53 and 54 of the Mineral and Petroleum Resources Development Regulations, 2004 be dispensed with in terms of regulations 53 and 54 the Mineral and Petroleum Resources Development Regulations, 2004 as if regulations 53 and 54 of the Mineral and Petroleum Resources Development Regulations, 2004 were not repealed.
- A financial provision approved in terms of the Mineral and Petroleum Resources Development Regulations 2004 must be regarded to be the financial provision approved in terms of R1147, on condition that a holder that operates in terms of a financial provision approved in terms of the Mineral and Petroleum Resources Development Act 2002 at the time of the coming into operation of R1147, must review and align such approved financial provision with the provisions of R1147, after the coming into operation of R1147, as set out in sub-regulations (5) to (10), and annually thereafter as set out in regulations 9 and 11, read with the necessary changes.
- A holder must:-
  - a. within three months of its financial year end following the coming into effect of R1147 and annually thereafter; or
  - b. within 15 months after the coming into effect of R1147 and annually thereafter:-
    - ensure that a review, assessment and adjustment of the financial provision is conducted in accordance with regulation 11 of R1147, read with the necessary changes, and submit an updated financial provision, including the plans and report contemplated in regulation 11(1), a copy of the independent auditor's reports and proof of payment or arrangements to provide the financial provision for approval by the Minister responsible for mineral resources, which updated financial provision must be included in:-
      - a. any audit required in terms of an environmental authorisation issued in terms of the Act; and
      - b. any amendment of an environmental management programme to be submitted in terms of the Environmental Impact Assessment Regulations 2014.

### Scope

The scope of R1147 requires that all holders or applicants make financial provision for:-

- rehabilitation and remediation;
- decommissioning and closure activities at the end of prospecting, exploration, mining or production operations; and
- remediation and management of latent or residual environmental impacts which may become known in the future, including the pumping and treatment if polluted or extraneous water.

An applicant, or right holder must determine the financial provision through a detailed itemisation of all activities and costs, calculated based on the actual costs of implementation of the measures required for:-

- annual rehabilitation;
- final rehabilitation, decommissioning and closure; and
- remediation of latent or residual environmental impacts which may become known in the future, including pumping and treatment of polluted or extraneous water, as reflected in the environmental risk assessment report.

In the determination of the closure and rehabilitation liability and associated requirements for financial provision, the holder of a mining or prospecting right must:-

- make the determination of the financial provision and submit the plans contemplated in R1147 prior to the consideration by the Minister responsible for mineral resources of an application for environmental authorisation, the associated environmental management programme and the associated right or permit in terms of the MPRDA 2002; and
- provide proof of payment or arrangements to provide the financial provision prior to commencing with any prospecting, exploration, mining or production operations.

When performing an assessment, review and adjustment of financial provision, the holder of a mining or prospecting right must assess and review the adequacy of the financial provision by reviewing the:-

- annual rehabilitation, as reflected in an annual rehabilitation plan;
- final rehabilitation, decommissioning and closure of the prospecting, exploration, mining or production operations at the end of the life of mine, as reflected in a final rehabilitation, decommissioning and mine closure plan; and
- remediation of latent or residual environmental impacts which may become known in the future, including the pumping and treatment of polluted or extraneous water, as reflected in an environmental risk assessment report.



Annually, the holder of a mining or prospecting right must submit for approval a revised rehabilitation plan, environmental risk assessment report, audit report and financial provision.

Where prevailing economic conditions cause a substantive decrease in the profitability for a continuous period of 12 months or more or where there is a substantive curtailment in mining operations affecting employment, a holder of a right or permit may apply at any time to the Minister, on an application form provided by the competent authority, to be placed under care and maintenance.

### Applications for Care and Maintenance

When applying for an operation to be placed under care and maintenance, the holder of a mining or prospecting right must include in the application:-

- a detailed explanation by the holder of a right or permit of the merits to be placed under care and maintenance; and
- a care and maintenance plan.

The Minister may:-

- approve such application and place a holder of a right or permit under care and maintenance for a period not exceeding 5 years, after which the approval must be reviewed; or
- direct a holder of a right or permit in writing to take such measures subject to such terms and conditions as the Minister may determine.

During the period that a holder of a right or permit is placed under approved care and maintenance, the following conditions must be met:-

- the care and maintenance plan must be audited and updated annually;
- the audited and updated care and maintenance plan must be submitted, together with an update on the merits to remain placed under care and maintenance and a forecast of when care and maintenance may no longer be required, for approval to the Minister; and
- financial provision must be maintained/reviewed, assessed and adjusted in accordance with regulation 11.



*Please note that Venmyn Deloitte is not qualified to provide qualified legal opinions. The interpretations above have been provided through close consultation with the regulatory authorities, and are intended to assist Deloitte mining clientele in the process of assessing what impacts the changes in legislation may have on the closure and rehabilitation liability.*

Should there be any queries regarding the above, please contact:

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