

Explanatory note i.t.o. the Regulations Pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations

SEPTEMBER 2017

ISSUE	AMENDMENTS PROPOSED
General (Across document)	
	<ul style="list-style-type: none"> • Deletion of the term “latent” and retain “residual” • Insertion of “holder” where appropriate
Chapter 1 – Regulation 1	
Definitions	
Definitions that are incorrect or unclear in intent and open to interpretation.	<ul style="list-style-type: none"> • Revision of certain definitions to provide clarity: • “Applicant”: split into two to include (a) an applicant for an environmental authorization in terms of the EIA Regulations or (b) a person applying for a transfer of or amendment to a MPRDA permit as contemplated in section 11 or 102 of the MPRDA. • “Holder”: to correct the old definition and to refer to holder of a right/permit issued prior to coming into effect of the 2015 Financial Provisioning Regulations, for which no closure certificate has been issued.

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	<ul style="list-style-type: none"> • “Specialist”: to specifically add specialists dealing with water concerns as the pumping and treatment of polluted or extraneous water is included in the scope of the Regulations.
Definitions that need to be inserted as consequential amendments to give clarity to the proposed amendments to the Regulation	<ul style="list-style-type: none"> • Insertion of the following definitions: • “CPI”: factored in based on the calculation of the financial provision proposed; • “Environmental Impact Assessment Regulations”: editorial; and • “Residual environmental impact”: to cover risks that may manifest after closure and to clarify the scope of the financial provisioning sum determination.
Definitions that need to be deleted as consequential amendments to the Regulation	<ul style="list-style-type: none"> • Deletion of the following definition: • “Care and maintenance plan”: due to the deletion of all care and maintenance provisions.
Regulation 2 - Purpose of Regulations	
Latent risks cannot be quantified, and thus cannot form part of the financial provisioning sum because it cannot be included in financial statements, causing problems with International Financial Reporting Standard (IFRS) for auditors.	<ul style="list-style-type: none"> • Deletion of the term “latent” and retained “residual” together with definition for “residual environmental impact”.
Regulation 3 - Application of Regulations	

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The place of provisions on care and maintenance and deemed closure in a regulation dealing with financial provision not understood.	<ul style="list-style-type: none"> • Deletion of subregulation 3(2). Clarification that entities finding themselves in care and maintenance, as per section 52(1) of MPRDA, must still comply with these Regulations.
<p style="text-align: center;">Chapter 2</p> <p style="text-align: center;">Regulation 7 - Availability of Financial Provision</p>	
<p>Costs for the annual rehabilitation plan are operational costs and would result in double provisioning.</p> <p>Concern on how to calculate the FP.</p> <p>Financial provision must maintain real monetary value by providing for inflation.</p> <p>Clarity regarding the inclusion or exclusion of VAT in the calculation</p> <p>Committing FP for 10 years upfront will have negative financial impacts on a company.</p>	<ul style="list-style-type: none"> • The cost of the activities in the annual rehabilitation plan will no longer form part of the calculation of financial provision; however the annual rehabilitation plan still forms part of the plans to be submitted. • Calculation methodology described in Annexure 1 or 2. • Clarification that sum must be multiplied by CPI plus 2%. • Calculation must include VAT. • Availability period reduced from 10 years to 3 years (for right holder) and 1 year (for permit holder) for the implementation of the final rehabilitation plan and environmental risk assessment report (residual impacts).
<p style="text-align: center;">Regulation 8 - Financial Vehicles Used for Financial Provision</p>	

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<p>The financial vehicles provided in the Regulations and the appendices related to these, are not suitable for the offshore oil and gas sector's exploration and production activities.</p> <p>Current provisions potential conflict and duplication with the Income Tax Act</p> <p>Concern regarding the limitation on the use of trust funds.</p> <p>Industry often use a single financial vehicle for purposes of financial provision for multiple rights and permits. Need to enable the DMR to ensure that sufficient funding is provided, for specific operations.</p>	<ul style="list-style-type: none"> • Inclusion of rehabilitation fund as contemplated in the Income Tax Act. Other proposed vehicles require further investigation. • Alignment of provisions with Income Tax Act and new Financial Regulator Act. • No restriction on trust funds. Rather, financial guarantee cannot be used for residual impacts. • Financial vehicle will be clearly linked to one or more permits/rights and the apportionment of the financial provision relating to each permit/right must be identified. • In case of withdrawal of a guarantee, notification to the Minister of Finance is also required.
Regulation 9 - General Requirements for Financial Provision	
<p>Requirement for a team of specialists to undertake the work even in instances where internal expertise exists.</p> <p>Clarification of what will happen to interest earned on the amounts deposited in the account administered by the DMR.</p> <p>Ceding not allowed or enabled in NEMA or the Income Tax Act. In addition there are water related actions that happen after closure for which the DMR would not be responsible.</p>	<ul style="list-style-type: none"> • Allows for applicant, holder and holder of a right or permit to undertake the determination, review and assessment, but with external review by independent specialists appointed by said applicant, holder or holder of a right or permit. • No interest will be payable by the Minister responsible for mineral resources to the holder of a right or permit for any amounts deposited in the account administered by the DMR • Provision requiring ceding of financial vehicle to Minister of Mineral Resources deleted.

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Regulation 10 - Determination of Financial Provision by Applicant	
<p>Consequential amendments related to definition of applicant including those applying for transfer or amendments of MPRDA rights/permits.</p>	<ul style="list-style-type: none"> • Consequential amendment resulting from the split in the definition of “applicant”. • Proof of payment required in all cases; “arrangements of guarantee” inserted as a guarantee is not regarded as “payment” of funds. • Timing of providing proof of payment clarified.
Regulation 11 - Review, Assessment and Adjustment of Financial Provision by Holder of a Right or Permit	
<p>Link between the review of plans, followed by the assessment of adequacy of the financial provision and identification of the adjustment required clarification.</p> <p>Timing of adjustment of financial provision problematic.</p> <p>Requirement to conduct an audit annually is excessive and unreasonable.</p>	<ul style="list-style-type: none"> • Clarity provided on the frequency of carrying out the review, assessment and adjustment of the FP • Holder of right or permit must do this annually • Detail on the requirement of the plans and their submission moved to regulation 12. • Proposal was made to make the audit frequency 3 years, however, NEMA first to be amended to provide for the submission of an audit report every 3 years.
Regulation 12 - Preparation and Submission of Plans and Reports	

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<p>Templates for plans and report difficult to be used by offshore oil and gas industry</p> <p>Requirement to submit declaration and financial statement onerous</p> <p>Uncertainty as to whether or not the plans were to be submitted as an attachment or as a component of environmental management programmes (EMPr) or</p>	<ul style="list-style-type: none"> • Specific plans and reports for offshore oil and gas exploration or production provided. • Plans no longer require approval, only the financial provisioning adjustment flowing from the review of these plans. • Timeframes for submission of plans and adjusted financial provisioning clarified and simplified. • Requirement deleted. • Clarity provided that the results of the assessment of the adequacy of the financial provision and the adjustment of the financial provision must be included in an environmental audit report and submitted in terms of the Environmental Impact Assessment Regulations. The following must be attached to said environmental audit report and the environmental management programme submitted in terms of section 24N of the Act - <ul style="list-style-type: none"> - plans and report (detailing annual rehabilitation, final rehabilitation, decommissioning and mine closure and environmental risk assessment) ; - sum of the financial provision (including an indication of the calculation of the sum) and - auditor's report (of the results of the assessment of adequacy of the financial provision) <p><i>(Consequently deleted in the Appendices too)</i></p>

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Regulation 13 - Responsibility of Holder or Holder of a Right or Permit	
<p>Concern about the transparency of the calculation of the financial provision to ensure that the calculations are accurate and defensible.</p> <p>Concern was raised about the accessibility of sensitive information.</p> <p>Concern on the responsibility of independent auditors versus that of the Chief Executive Officer, or person appointed in similar position.</p> <p>Concern about the requirement to have an approved final rehabilitation, decommissioning and mine closure plan, including financial provision for such, as well as an environmental risk report, including financial provision for latent or residual environmental impacts in place before submitting an application for a closure certificate in terms of Section 43 of the MPRDA.</p> <p>No provision was previously made for instances where liquidation proceedings have been initiated.</p>	<ul style="list-style-type: none"> • Clarity on documentation to be made publicly accessible. • The concern about accessibility of certain information has not been addressed as the Regulations still requires it to be made available once submitted to the competent authority (the DMR). The provision is no longer making the EIA Regulations related provisions to submit certain information relevant to the Financial Provisioning Regulations, but is now directly linked to the mandate and scope of the latter. • Distinction provided on information to be signed off by the Chief Executive Officer or independent auditor. • Provision requiring approved plans to be in place prior to applying for a closure certificate deleted. • Provision is now made for a liquidator of an estate to be responsible, where liquidation proceedings have been

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	initiated, for implementing the plans and report related to the review, assessment and adjustment of financial provision by holder of a right or permit
Regulation 14 - Powers of Minister Responsible for Mineral Resources	
<p>The retaining of a portion of the financial provision when a closure certificate is issued does not align with section 43(1) of the MPRD Act. The MPRDA never made provision for retaining financial provision post closure. Holders remained liable only until a closure certificate was issued by the Minister responsible for mineral resources.</p> <p>Previous regulations did not provide for instances where liquidation processes are initiated, nor for the Minister to act in such instances.</p>	<ul style="list-style-type: none"> • Regulation 14(4) which dealt with the retention of a portion of the financial provision deleted. • Regulation 14 now also provides for Minister responsible for mineral resources to undertake rehabilitation and use the financial provision or portion of such, in instances where a liquidator fails to act.
REGULATION 15 - Timeframes for acknowledgement and consideration of plans and reports related to financial provision	
Minister responsible for mineral resources was previously required to approve plans, reports and findings of reviews and assessment of the financial provision.	<ul style="list-style-type: none"> • Regulation 15 no longer requires approval of the plans, reports and findings of reviews and assessment of the financial provision but only requires approval of the financial provision by the Minister responsible for mineral resources.
<p style="text-align: center;">Chapter 3:</p> <p style="text-align: center;">Regulation 16 - Care and Maintenance</p>	

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<p>Unease about the DEA mandate to address care and maintenance.</p> <p>It is deemed that the provisions in this section are also fundamental to many other aspects of the MPRDA and therefore care and maintenance and deemed closure aspects would be better placed within the regulatory framework of the MPRDA.</p>	<ul style="list-style-type: none"> • Deletion of Regulation 16 – Care and Maintenance
<p style="text-align: center;">Chapter 4:</p> <p style="text-align: center;">Regulation 17 - Transitional arrangements</p>	
<p>Concern by some holders that they would not be able to comply with the requirement for the three additional plans under the transitional provisions and timeframes</p>	<ul style="list-style-type: none"> • Consequential amendments to accommodate the repeal of the 2015 FPR and rewording of provisions relating to the updated financial provision and audited report • Consequential amendments from insertion of reference to “holder” resulting in reduction in the number of transitional provisions • New date set for compliance by applicants, holders and holders of a right or permit. Such will no longer be required to comply with the Regulations by February 2017, but instead approximately only 2 years later, i.e. by 19 February 2019. • In the case of a holder of an offshore oil and gas production right, by no later than 19 February 2024.

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<p>Regulations previously allowed for a payment agreements not exceeding 5 years.</p> <p>Holders of a right or permit who applied for such right or permit prior to the commencement of the Financial Provisioning Regulations, 2015, but who obtained such right or permit after the commencement of such Regulations, was not previously included.</p> <p>Regulation 17 conflicts with the other earlier Regulations such as Regulations 11 and 8.</p>	<ul style="list-style-type: none"> Provisions regarding the role of the Minister responsible for mineral resources streamlined. Regulation 16 (7) allows for payment agreement changed from 5 years to 3 years; not available for mining permit holder. Provision is now made to include a holder of a right or permit who applied for such right or permit prior to the commencement of the Financial Provisioning Regulations, 2015, but who obtained such right or permit after the commencement of such Regulations.
<p>Chapter 5:</p> <p>Regulations (17), 18-20</p>	
	<ul style="list-style-type: none"> Consequential amendments to regulations on offences and penalties Addition of "Repeal of Financial Provisioning Regulations, 2015"
<p>Appendices</p>	
Provisions that are not aligned with the Income Tax Act	<ul style="list-style-type: none"> Alignment with Income Tax Act requirements is now provided for in the Trust Fund Appendix

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Requirements of financial institutions/commercial banks	<ul style="list-style-type: none"> • Practical amendments to the Appendices were made based on feedback received from financial institutions/commercial banks and the industry • Reference to environmental risk assessment report in the Financial Guarantee appendix was deleted, as it cannot be used for the rehabilitation of residual impacts. • Reference to the annual rehabilitation plan, final rehabilitation, decommissioning and mine closure plan and environmental risk assessment forming part of the EMP, in the Appendices, was deleted. • Appendix for Care and Maintenance Plan deleted. • Addition of appendices for - <ul style="list-style-type: none"> – ‘Methodology for calculation of financial provision for new development’; – ‘Methodology for calculation of financial provision for existing development’; – ‘Minimum content of an annual rehabilitation plan for offshore oil and gas exploration or production’; – ‘Minimum content of a final rehabilitation, decommissioning and mine closure plan for offshore oil and gas exploration or production’; – ‘Minimum content of an environmental risk assessment report for offshore oil and gas exploration or production’.

