

2 SEPTEMBER 2021

# ENVIRONMENTAL LAW AND MINING & MINERALS ALERT

## IN THIS ISSUE

### Proposed overhaul of mining sector's financial provisioning regulations: Third time's the charm?

After more than two years since the publication of the last set of draft regulations aimed at replacing the heavily criticised 2015 Financial Provisioning Regulations (2015 FP Regulations), the Minister of Forestry, Fisheries and the Environment published a further new set of draft financial provisioning regulations for comment on 27 August 2021 (2021 Draft FP Regulations).



INCORPORATING  
KIETI LAW LLP, KENYA

[CLICK HERE](#) 

FOR MORE INSIGHT  
INTO OUR EXPERTISE  
AND SERVICES

## Proposed overhaul of mining sector's financial provisioning regulations: Third time's the charm?

In comparing the 2021 Draft FP Regulations to the previous set of draft regulations published in May 2019 (2019 Draft FP Regulations), several noteworthy changes are being proposed.

After more than two years since the publication of the last set of draft regulations aimed at replacing the heavily criticised 2015 Financial Provisioning Regulations (2015 FP Regulations), the Minister of Forestry, Fisheries and the Environment published a further new set of draft financial provisioning regulations for comment on 27 August 2021 (2021 Draft FP Regulations).

The 2021 Draft FP Regulations are the third iteration aimed at replacing the 2015 FP Regulations, which have been subject to numerous compliance extensions and proposed overhauls, as set out in this previous [alert](#). Most recently, the date for compliance for existing mineral rights holders with the 2015 FP Regulations was extended for the fourth time to 19 June 2022.

In comparing the 2021 Draft FP Regulations to the previous set of draft regulations published in May 2019 (2019 Draft FP Regulations), several noteworthy changes are being proposed, some of which are discussed below.

One of these changes is limiting the scope of application of the 2021 Draft FP Regulations by introducing a narrower definition of an "applicant", which was previously proposed to be significantly widened to include applicants for renewal of mineral rights; consents in terms of section 11 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA); and any variation or amendment in terms of section 102 of the MPRDA. Similar changes are proposed to the definition of "holder" to ensure alignment. Additionally, the 2021 Draft FP

Regulations expressly provide that they do not apply to applicants or holders of reconnaissance permissions or permits limited to desktop studies or aerial surveys, or to reconnaissance permits for offshore operations where a seismic survey is undertaken.

Several changes have also been introduced in the latest draft regulations that aim to circumscribe the extent of liability for environmental damage more clearly. These include:

- Limiting the scope of "latent environmental impacts" to impacts that are not only "existing" and that "may" manifest post-closure, but also "defined" impacts and those that "will" manifest.
- Removal of all references to "residual environmental impacts", which included impacts remaining after all actions to mitigate, rehabilitate and remediate have been undertaken and were required to be catered for in the environmental assessment report together with latent environmental impacts.
- Removal of all references to "remediate" and the associated definition, which entailed the repair or reversal of environmental damage. Generally, environmental impacts will be required to be mitigated, rehabilitated and managed. The definition of "rehabilitation" is also proposed to be deleted.
- Introducing a definition for "decommissioning", which has, to date, not been defined under the MPRDA, National Environmental Management Act 107 of 1998 (NEMA), 2014 Environmental Impact Assessment Regulations or MPRDA Regulations.

## Proposed overhaul of mining sector's financial provisioning regulations: Third time's the charm?...*continued*

Under Regulation 7(1), the new draft regulations also create a clear distinction for determining financial provision for applicants seeking to undertake operations with no or lower environmental impacts (Regulation 7(1) Applicants) and those operations with more significant environmental risks.

Under Regulation 7(1), the new draft regulations also create a clear distinction for determining financial provision for applicants seeking to undertake operations with no or lower environmental impacts (Regulation 7(1) Applicants) and those operations with more significant environmental risks. This distinction is novel to this set of draft regulations. Unlike before, Regulation 7(1) Applicants are required to determine financial provision with reference to a prescribed template, spreadsheet and master rate. What is problematic, however, is that no templates have been included in the 2021 Draft FP Regulations in this regard, with the master rate also still to be prescribed. Additional amendments may need to be introduced to cater for this "new" category under applicants, unless the prescribed forms and rates are otherwise made available.

In respect of financial vehicles available for setting aside financial provision, the 2021 Draft FP Regulations include:

- Requiring that, where a cash deposit is utilised as a financial vehicle, it be deposited into a trust established and administered by the Minister of Mineral Resources and Energy (Minister), instead of it being transferred to an account administered by the minister, as proposed under the 2019 Draft FP Regulations. This does not preclude a holder from establishing and administering its own rehabilitation trust.

- Prohibiting the use of a financial guarantee to provide for the costs associated with mitigation, rehabilitation and management of post-closure latent environmental impacts. This restriction was included in the 2017 draft set of regulations in respect of residual environmental impacts, but deleted in the 2019 Draft FP Regulations. The reason for the re-introduction of this restriction is unclear.

To the benefit of applicants or holders, the latest proposed regulations allow for more extended timeframes in specified instances, including to set aside adjusted financial provision based on annual re-assessments, and responding to a claim from the Minister against a financial guarantee.

They also include a requirement for applicants to undertake a public participation process as prescribed under the 2014 Environmental Impact Assessment Regulations in respect of all templates, spreadsheets, plans and reports prepared in determining the financial provision requirements, including any amendments. It is understood that this engagement will form part of the consultation process undertaken as part of the underlying application for an environmental authorisation or for an amendment to a right or permit that impacts on the scope of the operation.

## Proposed overhaul of mining sector's financial provisioning regulations: Third time's the charm?...*continued*

It is evident that extensive effort has been and continues to be made to respond to many of industry's concerns, whilst aiming to ensure a sustainable end state of land.

Aligned with the latest transitional arrangement extension, holders of mineral rights applied for prior to 20 November 2015 (when the 2015 FP Regulations came into effect) are required to comply with the 2021 Draft FP Regulations within three months of their first financial year ending after 19 June 2022. However, this timeframe is very much dependent on the ability to finalise the 2021 Draft FP Regulations. A separate transitional arrangement is provided for in respect of Regulation 7(1) Applicants that applied for and obtained a permission, right or permit after 20 November 2015, and which is still valid. In such instances, compliance with the requirements contained in such permission, right or permit is required until their expiry.

Important provisions previously included in the 2019 Draft FP Regulations and retained in the 2021 Draft FP Regulations include:

- The ability of a holder of a right applied for prior to 20 November 2015 to enter into a payment agreement with the Minister to bring its financial provision in line with the requirements of the 2021 Draft FP Regulations.
- Unlike the 2015 FP Regulations, which required that financial provision at any given time equal the sum of all costs for implementing annual, closure and post-closure rehabilitation for a period of at least 10 years, the methodologies provided in the 2021 Draft FP Regulations limit costs for new operations to those associated with rehabilitation and management of disturbances anticipated for the first year of mining and latent impacts associated with anticipated disturbances for the first year of mining operations. For existing operations, the same applies with the addition of costs for the currently disturbed area.

In addition to those discussed above, the implications of all proposed amendments should be closely scrutinized, with comments on the 2021 Draft FP Regulations due by 6 October 2021. As was the case with the previous two sets of draft regulations, there are several proposed changes that introduce some regulatory ambiguities and will require further clarification. It is hoped that the Department of Forestry, Fisheries and the Environment will, as was done for the 2019 Draft FP Regulations, host a virtual explanatory workshop that may assist where the purpose of certain proposed changes is unclear.

There is, however, an inter-dependence between finalisation of the 2021 Draft FP Regulations and promulgation of the long awaited National Environmental Management Laws Amendment Bill IV (NEMLA Bill) which is still under consideration by the National Council of Provinces. The NEMLA Bill proposes to insert specific provisions in respect of financial provision for mining in NEMA, which will need to align with the financial provision regulatory regime, including the regulations in effect at the time.

The road ahead is therefore unclear in terms of timing for the long-anticipated overhaul of the financial provision regulatory framework for the mineral industry. However, considering where this regulatory roller coaster started with the 2015 FP Regulations, it is evident that extensive effort has been and continues to be made to respond to many of industry's concerns, whilst aiming to ensure a sustainable end state of land.

---

*Alecia Pienaar, Margo-Ann Werner,  
and Allan Reid*

## OUR TEAM

For more information about our Environmental practice and services in South Africa and Kenya, please contact:



**Allan Reid**  
Mining & Minerals Sector Head  
Director  
Corporate & Commercial  
T +27 (0)11 562 1222  
E [allan.reid@cdhlegal.com](mailto:allan.reid@cdhlegal.com)



**Margo-Ann Werner**  
Director  
T +27 (0)11 562 1560  
E [margo-ann.werner@cdhlegal.com](mailto:margo-ann.werner@cdhlegal.com)



**Anton Ackermann**  
Associate  
Corporate & Commercial  
T +27 (0)11 562 1895  
E [anton.ackermann@cdhlegal.com](mailto:anton.ackermann@cdhlegal.com)



**Clarice Wambua**  
Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E [clarice.wambua@cdhlegal.com](mailto:clarice.wambua@cdhlegal.com)



**Alecia Pienaar**  
Senior Associate  
T +27 (0)21 481 6318  
E [alecia.pienaar@cdhlegal.com](mailto:alecia.pienaar@cdhlegal.com)



**Laura Wilson**  
Associate  
Corporate & Commercial  
T +27 (0)11 562 1563  
E [laura.wilson@cdhlegal.com](mailto:laura.wilson@cdhlegal.com)

## OUR TEAM

For more information about our Mining & Minerals sector and services in South Africa and Kenya, please contact:



**Allan Reid**  
Joint Sector Head  
Director  
Corporate & Commercial  
T +27 (0)11 562 1222  
E allan.reid@cdhlegal.com



**Willem Jacobs**  
Practice Head  
Director  
Corporate & Commercial  
T +27 (0)11 562 1555  
E willem.jacobs@cdhlegal.com



**Margo-Ann Werner**  
Director  
Corporate & Commercial  
T +27 (0)11 562 1560  
E margo-ann.werner@cdhlegal.com



**Fiona Leppan**  
Joint Sector Head  
Director  
Employment  
T +27 (0)11 562 1153  
E fiona.leppan@cdhlegal.com



**Aadil Patel**  
Practice Head  
Director  
Employment  
T +27 (0)11 562 1107  
E aadil.patel@cdhlegal.com



**Ben Cripps**  
Senior Associate  
Corporate & Commercial  
T +27 (0)11 562 1242  
E ben.cripps@cdhlegal.com



**Jackwell Feris**  
Director  
Dispute Resolution  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com



**Mark Linington**  
Director  
Tax & Exchange Control  
T +27 (0)11 562 1667  
E mark.linington@cdhlegal.com



**Alecia Pienaar**  
Senior Associate  
Corporate & Commercial  
T +27 (0)21 481 6318  
E alecia.pienaar@cdhlegal.com



**Verushca Pillay**  
Director  
Corporate & Commercial  
T +27 (0)11 562 1800  
E verushca.pillay@cdhlegal.com



**Deon Wilken**  
Practice Head  
Director  
Finance & Banking  
T +27 (0)11 562 1096  
E deon.wilken@cdhlegal.com



**Laura Wilson**  
Associate  
Corporate & Commercial  
T +27 (0)11 562 1563  
E laura.wilson@cdhlegal.com



**Nonhla Mchunu**  
Director  
Corporate & Commercial  
T +27 (0)11 562 1228  
E nonhla.mchunu@cdhlegal.com



**Rishaban Moodley**  
Director  
Dispute Resolution  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com



**Emil Brincker**  
Practice Head  
Director  
Tax & Exchange Control  
T +27 (0)11 562 1063  
E emil.brincker@cdhlegal.com



**Clarice Wambua**  
Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E clarice.wambua@cdhlegal.com

### BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

### PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

### NAIROBI

CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.  
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2021 10370/SEP



INCORPORATING  
**KIETI LAW LLP, KENYA**



**MINING & MINERALS** | [cliffedekkerhofmeyr.com](http://cliffedekkerhofmeyr.com)