



NOVEMBER NEWSLETTER 2020

Dear Readers,

We hope that you are safe and looking forward to the Festive Season as we continue to push through the COVID pandemic!



The November edition of our newsletter looks at sustainable mine closure, while also focusing on recent legal notices and amendments.

NATIONAL LEGISLATION

❖ **NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998**

GN R1026 in GG 43747 of 30 September 2020 - Draft Regulations to prohibit the production, distribution, import, export, sale and use of persistent organic pollutants - for comment

GN 575 in GG 43820 of 19 October 2020 - Environmental Management Framework Regulations, 2010, reg. 3 - Draft updated Gauteng Provincial Environmental Management Framework – for comment

❖ **NATIONAL WATER ACT 36 OF 1998**

GN 1008 in GG 43726 of 18 September 2020 - Determination of classes of water resources and resource quality objectives for the Breede-Gouritz Water Management Area

GN 1008 in GG 43726 of 18 September 2020 - Proposed reserve determination for water resources of the Mokolo and Matlabas catchments - for comment

GN 1010 in GG 43726 of 18 September 2020 - Extension and alignment of compliance period on the instruction to install water measuring devices for water taken for

irrigation purposes in terms of GN 141 in GG 41456 of 23 February 2018 (water users within water management institutions) and GN 34 in GG 42956 of 17 January 2020 (water users who are not members of water management institutions)

GN 1019 in GG 43734 of 25 September 2020 - Reserve determination for the water resources of the Vaal Water Management Area

GN 1050 in GG 43758 of 2 October 2020 - Proposed Reserve of water resources for the Crocodile West and Marico catchment - for comment

GN 1079 in GG 43784 of 9 October 2020 - Proposed amendment of the Breede-Gouritz Water Management Area through extending the boundary and area of operation to include the Berg-Olifant Water Management Area - for comment

❖ **NATIONAL FORESTS ACT 84 OF 1998**

GN 1023 in GG 43742 of 29 September 2020 - Extension of time period to comment on notice of intention to declare the Grey Dell and Fort Grey forest areas as natural forest and controlled forest area published for comment in GN 972 in GG 43699 of 10 September 2020 and GN 973 in GG 436700 of 10 September 2020

❖ **NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT 10 OF 2004**

GN 1003 in GG 43726 of 18 September 2020 - Alien and Invasive Species Lists, 2020 published and any Alien and Invasive Species lists published under the Act including GN 864 in GG 40166 of 29 July 2016 repealed and replaced with effect from 30 days from date of publication in the *Gazette*

GN R1020 in GG 43735 of 25 September 2020 - Alien and Invasive Species Regulations, 2020 published and Alien and Invasive Species Regulations, 2014 published in GN R598 in GG 37885 of 1 August 2014 repealed with effect from 30 days from date of publication in the *Gazette*

❖ **NATIONAL HERITAGE RESOURCES ACT 25 OF 1999**

GN 1016 in GG 43734 of 25 September 2020 - Declaration of the Rocklands Community Hall: Mitchell's Plain, Cape Town, Western Cape as a National Heritage Site

GN 1017 in GG 43734 of 25 September 2020 - Declaration of the historical portion of the Phoenix Settlement, Inanda, Ethekwini, KwaZulu-Natal as a National Heritage Site

❖ **NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT 39 OF 2004**

GN R994 in GG 43712 of 11 September 2020 - National Greenhouse Gas Emissions Reporting Regulations, 2016 published in Gen Notice 275 in GG 40762 of 3 April 2017 amended

Gen Notices 580 in GG 43827 of 22 October 2020 - Clarification of due date for the submission of 'Subsequent Pollution Prevention Plans' in terms of the National Pollution Prevention Plans Regulations as published under GN R712 in GG 40996 of 21 July 2017 and proposed process to manage carbon budgets for the period 1 January 2021 to 31 December 2022

❖ **MARINE LIVING RESOURCES ACT 18 OF 1998**

GN 1129 in GG 43834 of 23 October 2020 - Proposed Resource Split between Local Commercial and Small-Scale Fishing in the Traditional Linefish, Squid and Abalone Fishing Sectors – for comment

GN 1130 in GG 43834 of 23 October 2020 - Proposed Reclassification of the White Mussel, Oyster and Hake Handline Fishing Sectors as Small-Scale Fishing Species - for comment

❖ **DEPARTMENT OF ENVIRONMENT, FORESTRY & FISHERIES**

GN 989 in GG 43706 of 11 September 2020 - Draft 7th National Greenhouse Gas Inventory Report for the Republic of South Africa – for comment

GN 1079 in GG 43784 of 9 October 2020 - United Nations Framework Convention on Climate Change (UNFCCC) - Draft Biennial Update Report-3 for the Republic of South Africa – for comment

GN 1103 in GG 43823 of 19 October 2020 - United Nations Framework Convention on Climate Change (UNFCCC): Incorrect publication for comment of Draft Biennial Update Report-3 for the Republic of South Africa in GN 1079 in GG 43784 of 9 October 2020

PROVINCIAL LEGISLATION

❖ **GAUTENG**

Nature Conservation Ordinance 12 of 1983 – Gen Notice 677 in PG 166 of 11 September 2020: Open Season: Ordinary Game

❖ **KWA-ZULU NATAL**

Constitution of the Republic of South Africa, 1996 and National Environmental Management: Waste Act 59 of 2008 - MN 83 in PG 2233 of 22 October 2020
Maphumulo Local Municipality: Waste Management By-laws

❖ **WESTERN CAPE**

Bergrivier Local Municipality: By-law Relating to the Control of Vessels and Boating Activities on the Berg River Estuary (2020) published and previous bylaws repealed (LAN 20533 in PG 8338 of 23 October 2020)

National Environmental Management: Protected Areas Act 57 of 2003 - PN 109 in PG 8339 of 23 October 2020 - Intention to declare a nature reserve: Cedar Rock Nature Reserve - for comment

Nature and Environmental Conservation Ordinance 19 of 1974 - PN 110 in PG 8339 of 23 October 2020 - Hunting seasons, daily bag limits and hunting by the use of prohibited hunting methods, 2021

❖ **EASTERN CAPE**

National Environmental Management Act 107 of 1998 - PN 173 in PG 4460 of 19 October 2020 - Final Eastern Cape Biodiversity Conservation Plan (2019) for implementation

❖ **MPUMALANGA**

PN 102 in PG 3195 of 2 October 2020 - Environmental Impact Assessment Process

SUSTAINABLE MINE CLOSURE – FURTHER LEGAL ASPECTS

By Adam Gunn

In our April newsletter, we covered some aspects of mine closure and in particular, how relinquishment and sustainable closure could be achieved. Feedback from readers was very positive with a number of requests to provide more detail on the overarching legal framework. The legal framework is complex as multiple laws are applicable. But we have tried to present some of the most important aspects in a reader friendly and digestible format in this month's newsletter. As Albert Einstein famously said *"Everything should be as simple as possible, but not simpler."*

South African Legislation

Mine closure in South Africa is governed principally by the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**"), the National Environmental Management Act 107 of 1998 ("**NEMA**") and The National Water Act 36 of 1998 and subordinate legislation.

The MPRDA and Regulations ("MPRDA Regulations**")**

Under section 43 of the MRPDA, holders of a prospecting right, mining right, retention permit or mining permit are responsible for environmental liability, amongst other consequences of mining activities.

An environmental management programme ("**EMPr**"), as per section 51 of the MPRDA Regulations, must include a description of the environmental objectives and specific goals for, *inter alia*, mine closure and the management of identified environmental impacts emanating from the proposed mining operation. Under section 52, an environmental management plan ("**EMP**") must include closure and environmental objectives.

Section 55 requires that, as part of the EMPr and EMP, a holder of a permit or right must conduct monitoring continuously, as well as conduct annual performance assessments of the EMPr and EMP and submit the performance assessment to the Minister within specified time frames. When the holder of a right or permit intends closing an operation, a final performance assessment must be conducted and a report submitted to the Minister to ensure, *inter alia*, that the closure objectives as described in the EMPr or EMP have been met.

Regulation 56 under the MPRDA Regulations outlines the principles for mine closure, with Regulation 56(e) being the most pertinent to this brief.

"In accordance with applicable legislative requirements for mine closure, the holder of a prospecting right, mining right, retention permit or mining permit must ensure that –

(e) the land is rehabilitated, as far as is practicable, to its natural state, or to a predetermined and agreed standard or land use which conforms with the concept of sustainable development."

Regulations Pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations (“the Financial Provision Regulations”)

Regulation 5 is relevant as it obliges an applicant or the holder of a right or permit to make financial provision for, *inter alia*, decommissioning and closure activities.

Regulation 6 sets out how the financial provision must be determined, with specific reference made to mine closure plans.

NEMA

Regarding mine closure, NEMA states the following under section 24 (Environmental Authorisations):

“(5) The minister, or an MEC with the concurrence of the Minister, may make regulations consistent with subsection (4) –

...

(b) laying down the procedure to be followed in respect of-

....

(viii) mine closure requirements and procedures, the apportionment of liability for mine closure and the sustainable closure of mines with an interconnected or integrated impact resulting in a cumulative impact.”

Section 44 of NEMA grants the Minister wide powers to promulgate regulations dealing with any matter under NEMA. An example of regulations made under the above sections, amongst others, is Government Notice R1147 (the Financial Provisioning Regulations, 2015).

The National Water Act 36 of 1998

The National Water Act, under section 21, lists the water uses for which a water use license (“WUL”) is required. Almost every mine will require a WUL and this will not only provide the entitlement to use water and impact on water resources, but will also contain compliance obligations during the operation of the mine and also towards closure. Compliance with the mine’s WUL (and the National Water Act) will be a critical element of closure, especially as water impacts can be one of the most long-lasting and severe impacts of mining.

The National Environmental Management Laws Amendment Bill (“NEMLA IV”)

NEMLA IV was passed by the National Assembly on 27 November 2018 and is currently with the National Council of Provinces for concurrence. If enacted as is, the Minister (or a Member of the Executive Committee) may prescribe additional activities for which financial provisioning must be provided.

Any application for an environmental authorisation for these additional activities would be required to make financial provision for progressive rehabilitation, decommissioning and closure and post closure activities. This would ensure that mitigation, rehabilitation and remediation of the environmental impacts, including latent and residual impacts extending to the pumping and treatment of extraneous and polluted water.

Other applicable laws

Each mine will have a number of other laws that will be applicable. This will be determined by the specifics of the mine – it's location, size, type and so on. Various zoning and planning regulations may also be applicable.

INTERESTING ENVIRONMENTAL TOPICS

- ❖ **Mitigation and the South African Carbon Tax**
<https://www.bizcommunity.com/Article/196/710/209624.html>
- ❖ **South African community wins right to access mining application. But who will win the war?**
<https://www.bizcommunity.com/Article/196/608/209286.html>
- ❖ **Covid-19 has taught us we cannot separate social from environmental justice**
<https://www.dailymaverick.co.za/article/2020-10-26-covid-19-has-taught-us-we-cannot-separate-social-from-environmental-justice/>
- ❖ **Ghost fishing gear an 'immortal menace' in oceans**
<https://mg.co.za/environment/2020-10-24-ghost-fishing-gear-an-immortal-menace-in-oceans/>

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Disclaimer:

This newsletter does not aim to provide a summary of all the legal developments in the environmental, mining and natural resources sectors. For professional legal advice on any particular issue, please contact us.