BIZCOMMUNITY

Small law changes have huge impact on mining and oil & gas industries

By Hillary Botha, Tamzyn Cooper, Garyn Rapson

11 Aug 2017

Financial provisioning is a legislative attempt to promote a greener and healthier environment by holding mining and petroleum companies responsible for the rehabilitation of the environment impacted by their operations.

©discovod 123rf.com

For example, when applying for a mining right, a mining company is required to indicate the manner in which they are going to rehabilitate their mining area after the mine is closed and set aside an amount of money for this rehabilitation, before the Department of Mineral Resources (DMR) will grant a mining right.

History of financial provisioning

Financial provisioning and rehabilitation was initially regulated under section 41 of the Mineral and Petroleum Resources Act, 2002 (MPRDA), which required an applicant for a right or permit to make prescribed financial provision for the rehabilitation or management of negative environmental impacts associated with the operation. The quantum of the financial provision was determined in accordance with Regulation 53 and 54 of the MPRDA Regulations, 2004 and the guideline document provided by the DMR. These provisions have now been superseded by the Financial Provisioning Regulations published under Government Notice Regulation 1147 in Government Gazette 39425 on 20 November 2015 ("Financial Provisioning Regulations"), in terms of section 24P of the National Environmental Management Act, 1998 (Nema).

The Nema provisions and Financial Provisioning Regulations are in line with the move towards the One Environmental System, which looks to transfer environmental governance of the mining and petroleum industries from the MPRDA to the Nema. The Financial Provisioning Regulations are more onerous than the previous financial provisions under the MPRDA, and came into effect on 20 November 2015. However, the transitional provisions (as amended) indicate that existing holders of mining rights will only need to comply with the Financial Provisioning Regulations by 19 February 2019.

Under the MPRDA, financial provisioning was required to take the following into account: costs for the rehabilitation of the surface area of operations; costs for the decommissioning and final closure of the operation and post-closure management of residual and latent environmental impacts. These requirements provided for a broad description of the types of rehabilitation and remediation that were to take place. However, no detail was provided as to exactly what this would entail or what closure standards should be achieved.

Under the Financial Provisioning Regulations, there is more certainty surrounding what should be considered as part of a mines financial provisioning. The holder of a right/permit is now required to ensure that an Annual Rehabilitation Plan, an Environmental Risk Assessment Report and a Final Rehabilitation, Decommissioning and Mine Closure Plan, as set out in the Financial Provisioning Regulations, (the Three Plans) are undertaken and submitted prior to the right being granted. The Three Plans require specific actions for annual and progressive concurrent rehabilitation to take place.

Nema Bill, 2017 and financial provisioning

Similar to the provisions of the MPRDA, section 24P(3)(a) of NEMA requires the holder of a right/permit to perform an annual review of their environmental liabilities and increase their financial provisioning accordingly. The National Environmental Management Laws Amendment Bill, 2017 was published under Government Notice 245 in *Government Gazette* 40733 on 31 March 2017 (Nemla Bill) and was tabled in Parliament on 24 May 2017. The Nemla Bill introduces a significant proposed change in relation to financial provisioning and the required annual assessments of same.

The Nemla Bill looks to amend section 24P(3)(a) of Nema to read that the holders must "..annually assess his or her environmental liability in a prescribed manner and must adjust his or her financial provision accordingly…" This change brings section 24P(3)(a) in line with Regulation 11(2) of the Financial Provisioning Regulations which already provides for an annual adjustment of financial provisioning as opposed to a forced increase, which has previously been required under the MPRDA and Nema.

This change from "increase" to "adjust" is very significant for the mining and petroleum industries and may present several opportunities that allow for operations to decrease their financial provisioning over the life of the operation, instead of unnecessarily having to increase it for no reason other than avoiding contravening the financial provisioning legislation.

New opportunities for the mining industry

The Financial Provisioning Regulations are more onerous than previous financial provisioning requirements, because they stipulate a comprehensive minimum content for each of the Three Plans to inform the quantum of financial provisioning. This itemised and detailed approach to financial provisioning presents as an extra cost for the mining and petroleum industries, however, it also allows for adjustments to the mine's financial provisioning to be made based on the mine's actual operational requirements. Furthermore, it ensures that the on-going annual rehabilitation that is required to take place as per the Annual Rehabilitation Plan will be taken into account and the financial provisioning can be adjusted and decreased accordingly.

The change proposed to be implemented by the Nemla Bill presents an opportunity for mining and petroleum companies to decrease their rehabilitation liability by implementing effective and innovative mechanisms that promote rehabilitation and remediation throughout the life of operations and not only at the closure of the operation. This on-going remediation and rehabilitation will result in a reduced financial provision being required at the closure of the operation. Initiatives such as captive power and captive water should accordingly become more appealing to mining and petroleum operations.

Captive power and captive water

A captive power plant is a power generation facility that allows for an industrial or commercial energy user to produce its own electricity. Captive power presents an opportunity to the mining and petroleum industries by putting them in a position to produce their own power. Electricity generally amounts to up to 40% of a mines annual budget. A captive power facility would alleviate the dependence on the grid and studies show that over time, the cost of captive power will be at parity with grid power.

In addition to this commercial benefit, laying out the capital cost for such a plant during the operational phase of an operation will reduce the liability of the closure phase as the plant can continue to supply power to the operation well into the closure and post-closure stages. It is believed that by establishing a captive power plant, an operation could adjust and decrease its rehabilitation provisioning over time.

Captive water is a similar concept to captive power, in that it presents an opportunity to create a cost-effective, reliable and high quality supply of water to an operation. Captive water introduces the idea of an operation constructing an internal treatment facility. This entails dirty water produced during operations being recycled and treated on-site to be re-used by the operation. For operations that anticipate having to pump and treat water well into the closure phases of their life, a captive water solution will be particularly attracted to reduce the rehabilitation costs associated with this latent or residual environmental risk.

Both captive power and captive water solutions could be pursued on either an EPC or an independent power/water producer basis.

Conclusion

Initiatives such as captive power and captive water are not only beneficial for the environment, but they are also perfectly positioned to take advantage of the opportunity presented by the proposed amendment in the Nemla Bill, which provides operations with the ability to decrease financial provisioning, as they assist in necessitating lower rehabilitation costs for a mine. This proposed amendment should be welcomed by the mining and petroleum industries as it presents an opportunity to implement numerous initiatives that may reduce their financial provisioning over time.

ABOUT THE AUTHOR

Hillary Botha is a candidate attorney), Tamzyn Cooper is an ssociate) and Garyn Rapson, a partner at Webber Wentzel