

What NEMLA IV could mean for mine closures

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The implementation of the changes proposed by National Environmental Management Laws Amendment Bill, dubbed NEMLA IV will pave the way for a ground-breaking new specialist rehabilitation industry to emerge in South Africa.



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The National Environmental Management Laws Amendment Bill, dubbed NEMLA IV, is making its way through the parliamentary process: The Bill was passed by the National Assembly in late 2018 and is currently being considered by the National Council of Provinces. NEMLA IV proposes to amend the National Environmental Management Act, 1998 (NEMA) as well as a number of other specific environmental laws, including the Water Act, 1998, the Waste Act, 2008 and the Air Quality Act, 2004.

Many of the proposed amendments, if implemented in their current form, will provide much needed clarity for the mining industry, particularly in relation to the regulation of financial provisioning. Some of the proposed changes could even drive the growth of an entirely new specialist rehabilitation sector in South Africa, something akin to what is already in place in the United States.

Proposed changes to rehabilitation provisions

The changes proposed by NEMLA IV will go a long way to align the regulation of financial provisioning under NEMA with the soon-to-be-published revised financial provisioning regulations. One such change will provide for progressive rehabilitation concurrent with mining activities. If cleverly implemented, this could allow mining companies to reduce the amount of money that is required to be set aside for final rehabilitation. Another proposed amendment will allow drawdowns on the final rehabilitation provision to be permitted up to 10 years before closure, a proposal that is welcomed by the mining industry.

NEMLA IV will also introduce definitions for commonly used terms such as mitigation, remediation, rehabilitation, and residual and latent impacts. While definitions generally assist in interpreting the law, references to "reversing" environmental damage could be problematic. Any technical specialist will tell you that reversing environmental damage is often simply not possible.

Under NEMLA IV, the quantum of financial provision is required to be calculated by a specialist environmental consultant, reviewed every three years and audited every five years. Audits will also have to be signed off by the CEO. These amendments will greatly strengthen the credibility of the provision because the consultants, auditors and CEOs will be wary of incurring liabilities arising from inadequate provisioning.

Although the proposed changes to NEMA cannot address environmental problems arising from past mining activities, such as asbestos and acid mine contamination, the amendments will help to avoid similar mistakes being repeated in the future.

A new kind of closure

The proposed amendments create an exciting opportunity for asset transformation in the mining sector, signalling a shift away from traditional mine closure ideals. Previous legislation required mines to return the impacted land to its pre-mining state, an ideal that is far-fetched and impractical, particularly in the case of opencast pits. NEMLA IV recognises these practical difficulties and allows mining companies to propose a sustainable closure solution. Enter the concept of "asset transformation" and the chance to establish new industries on rehabilitated mine sites, thereby avoiding the prevalence of ghost towns which are often associated with mine closures.

This is a sensible approach given that these areas are usually well developed, with established infrastructure such as tarred roads, power and housing that can be used for alternative activities or developments. Why not leverage off an established brownfield site and kick start a new economy when a mine, which inherently has a limited shelf-life, stops operating? As an example, gold and platinum miner Sibanye-Stillwater is planning to establish agro-processing activities on a vast tract of land that has been undermined near Carletonville, west of Johannesburg. In Shanghai, a luxury hotel was recently opened in an old abandoned quarry - the world is moving beyond the archaic notion of mine closure, with South Africa following closely behind.

In support of this shift, NEMLA IV allows for the use of specialist rehabilitation companies as a new kind of financial vehicle to be used for financial provisioning. This innovative concept is already supported by other statutes e.g. the Income Tax Act, 1962 and the Mineral and Petroleum Resources Development Act, 2002, which provides for the transfer of the rehabilitation liability to another party as part of a closure process.

In our view, the implementation of the changes proposed by NEMLA IV will pave the way for a ground-breaking new specialist rehabilitation industry to emerge in South Africa. The result is that mining companies may one day be able to use these specialist rehabilitation companies to assist in implementing sustainable and transformative closure solutions. These specialist rehabilitation companies may also be able to take transfer of latent and patent liabilities to enable mining companies to obtain closure certificates.

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