

Considerations for Mine Closure

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Since the advent of the One Environmental System there has been much focus on the implications of the System for the commissioning of new mines. What of the environmental compliance requirements for the decommissioning or closure of mines?

An environmental authorisation is required for the closure of a mine in terms of section 24 of the National Environmental Management Act 107 of 1998 ("**NEMA**"). Listed activity 22 of Listing Notice 1 of the EIA regulations under NEMA specifies the following applicable activity for which authorisation is required:

*"The **decommissioning** of any activity requiring -*

- i. a closure certificate in terms of section 43 of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002); or*
- ii. a prospecting right, mining right, mining permit, production right or exploration right,*

where the throughput of the activity has reduced by 90% or more over a period of 5 years excluding where the competent authority has in writing agreed that such reduction in throughput does not constitute closure

... But excluding the secondary processing of a mineral resource.... in which case activity 6 in Listing Notice 2 applies."

The definition of **decommissioning** in these regulations means *"to take out of active service permanently or dismantle partly or wholly, or closure of a facility to the extent that it cannot be readily re-commissioned."*

It may be surprising to some that the decommissioning of a mine may only require the Basic Assessment process, which could be completed in about 6 months. This is the case provided that none of the listed activities in Listing Notice 2 are triggered, thus requiring the Scoping and EIA process. Amendments to NEMA and the regulations have ensured that the Department of Mineral Resources ("**DMR**") is the competent authority for such applications for mines. The DMR will also process the closure application in terms of section 43 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**").

A key trigger for the environmental authorisation within activity 22 is the need for a section 43 closure application in terms of the MPRDA. In terms of section 43(3) of the MPRDA the trigger for the closure application is one of the following:

- “(a) the lapsing, abandonment or cancellation of the right or permit in question;*
- (b) cessation of the prospecting or mining operation;*
- (c) the relinquishment of any portion of the prospecting of the land to which a right, permit or permission relate; **or***
- (d) completion of the prescribed closing plan to which a right, permit or permission relate.”*

It is arguable that the inclusion of the word “or” highlighted above implies that an applicant may elect, or the particular circumstances may determine, which particular act or omission precipitates the need for a closure application in terms of section 43 of the MPRDA.

The application for a closure certificate must be made within 180 days of the occurrence of the lapsing, abandonment, cancellation, cessation, relinquishment or completion and must be accompanied by the required information, programmes, plans and reports prescribed in terms of the MPRDA and the NEMA (section 43(4) of the MPRDA).

In terms of NEMA the Basic Assessment Report needs to be accompanied by an Environmental Management Programme (“**EMPr**”), or an amendment to the EMPr, in compliance with section 24N of NEMA and the requirements of the NEMA EIA regulations. A Closure Plan that meets the requirements of Appendix 5 of the NEMA EIA regulations must also be submitted. Depending on the nature of the closure activities, other authorisations such as Waste Management or Water Use Licences may also need to be applied for. Furthermore, health and safety requirements are a crucial component of the closure process and - *“No closure certificate may be issued unless the Chief Inspector and each government department charged with the administration of any law which relates to any matter affecting the environment have confirmed in writing that the provisions pertaining to health and safety and management pollution to water resources, the pumping and treatment of extraneous water and compliance to the conditions of the environmental authorisation have been addressed.”* (section 43(5) of the MPRDA) In addition, compliance with financial provision requirements, section 52 of the MPRDA on the “notice of profitability and curtailment of mining operations affecting employment”, as well as section 189 of the Labour Relations Act 66 of 1995, must be ensured.

In tandem with the wide ranging duty of care provisions in section 19 of the National Water Act 36 of 1998 ("**NWA**") and section 28 of the NEMA, the crucial consideration for closure to be borne in mind is that the holder remains "*responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of polluted or extraneous water, the management and sustainable closure thereof **notwithstanding the issuing of a closure certificate** by the Minister responsible for mineral resources*" (section 24(R)(1) of NEMA), leading to the risk of potential limitless liability.