



the federation for a sustainable environment

(Reg. No. 2007/003002/08)  
NPO NUMBER 062986-NPO  
PBO No. (TAX EXEMPT) 930 039 506  
Postnet Suite #113, Private Bag X153, Bryanston, 2021

#### MINE WASTE SOLUTIONS: KAREERAND TSF EXPANSION APPLICATION

The following comments are submitted on behalf of the Federation for Sustainable Environment (FSE).

The FSE is a federation of community based civil society organisations committed to the realisation of the constitutional right to an environment that is not harmful to health or well-being, and to having the environment sustainably managed and protected for future generations. Their mission is specifically focussed on addressing the adverse impacts of mining and industrial activities on the lives and livelihoods of vulnerable and disadvantaged communities who live and work near South Africa's mines and industries.

These comments should be read in conjunction with our previous comments.

We apologise for typographic errors and reserve the right to refine and augment our comments.

#### COMPLEX CORPORATE STRUCTURE

We were informed during the public participation meeting on the 1<sup>st</sup> of September, 2020 (please refer to the audio recordings of the second session) by the Environmental Assessment Practitioner (EAP) that:

1. Mine Waste Solutions (MWS) is the Applicant in this Application
2. The Application falls under the National Environmental Management Act (107 of 1998) (NEMA) and the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA) is not applicable to this Application
3. MWS does not have a Mining Right
4. Since MWS does not have a Mining Right the MPRD Regulations pertaining to closure do not apply to MWS
5. MWS will be held accountable for the rehabilitation, ecological damage and pollution
6. MWS (and Chemwes) are subsidiaries of AngloGold Ashanti (AGA). AGA owns MWS (and Chemwes)

7. The Financial Regulations do not apply to MWS since financial provisioning is not required under the NEMA

We now respond as follows to the above statements:

We infer from the above responses from the EAP that there is a governance gap between corporate influence (AGA and its successor in title, namely Harmony Gold) and corporate accountability (MWS). It appears that the existence of this governance gap is not accidental but deliberately structured or designed by AGA. This strategy will allow the holding company (AGA and its successor in title, namely Harmony Gold), which we assume, holds the Mining Right, to continue to operate with impunity while its subsidiary, MWS (which does not own the Mining Right) will be responsible and liable for the rehabilitation, ecological damage and pollution associated with this Application. It is, we respectfully submit, a strategy for the holding company (AGA or its successor in title) to avoid liability.

Concisely stated, this Application appears to be structured and organized in such a manner to prevent responsibility from flowing along the same channels as profit. The ecological damage and degradation and pollution will therefore not be attributed to the parent (holding) company (AGA or its successor in title, namely Harmony Gold) despite the power, influence and command the holding company may wield at the top of the corporate structure.

This strategy allows for AGA ( or its successor in title) to disengage with its subsidiary, MWS (if there are ecological degradation and damage, and pollution) in order to avoid having to mitigate the impact and/or redress the harm.

The abovementioned corporate structure is obfuscating interested and affected parties, mining affected communities and stakeholders, which limits the ability of affected parties to seek a remedy in the event of environmental crimes or human rights violations. The recent case of the Mintails Group provides an example of the irresponsible disengagement by its Australian parent company (Mintails Limited) from its South African subsidiaries, which abandoned its operations with an unfunded environmental liability of R460 million. These liabilities have been externalised to local communities and the State.

In the light of the aforementioned, we hereby request that the Applicant or its EAP clarify in simple terms, its corporate structure and to explain why MWS (which holds no mining right) will be held liable for the rehabilitation, ecological damage and pollution in terms of this Application and not AGA (or Harmony Gold).

Our response to the EAP's statements that:

- MWS is not the Mining Right Holder
- The Application falls within the provisions of the NEMA and not the MPRDA and its Regulations and following hence, the closure obligations and financial provisions are not applicable

is as follows:

If MWS is not the Mining Right Holder, it is inferred that AGA is the Mining Right Holder and that this Mining Right has been transferred with the consent of the Minister of Mineral Resources and Energy (DMRE) to Harmony Gold.

ASA as the Mining Right Holder or Harmony Gold, as its successor in title, is therefore obligated to prepare a closure plan.

In terms of the **NEMA 2014 EIA Regulations** a closure plan must contain the information set out in Appendix 5 to these Regulations. A closure plan must include:

*1 (1)(a) details of -*

*(i) the EAP who prepared the closure plan; and*

*(ii) the expertise of that EAP;*

*(b) closure objectives;*

*(c) proposed mechanisms for monitoring compliance with and performance assessment against the closure plan and reporting thereon;*

*(d) measures to rehabilitate the environment affected by the undertaking of any listed activity or specified activity and associated closure to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development, including a handover report, where applicable;*

*(e) information on any proposed avoidance, management and mitigation measures that will be taken to address the environmental impacts resulting from the undertaking of the closure activity.*

(Emphasis added.)

And,

In terms of the **National Environmental Management Act (107/1998)**: Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations:

*“5. An applicant or holder of right or permit must make financial provision for—*

*(c) remediation and management of latent or residual environmental impacts which may become known in future, including the pumping and treatment of polluted or extraneous water.”*

(Emphasis added.)

Please reply to our above-mentioned response in order for us to have clarity on this matter.

We also request clarity on the following matter, namely:

In terms of the MPRDA’s definitions of “*residue stockpiles*” and “*residue deposits*”, residue stockpiles refer to waste materials where mining rights in terms of the MPRDA exist. Residue deposits refer to dumps when rights have lapsed. Thus, residue stockpiles convert into residue deposits when mining rights or permit mining permits terminate.

**Please clarify if the dumps which are to be remined or reprocessed by MWS is defined as residue stockpiles or as residue deposits in terms of the MPRDA.**

According to section 5(b) of the MPRDA, it is an illegal act to mine without a mining right or mining permit. "Mine", used as a verb in the MPRDA, does not include extraction activities in residue stockpiles. Extraction of minerals from residue stockpiles constitutes processing that does not require a separate mining permit or mining right. This means that, while their rights exist, holders of mining rights and mining permits, granted in terms of the MPRDA, may automatically extract minerals from waste material that they created.

**However, the EAP informed us that AGA (or Harmony Gold) is not the Applicant for the extraction of gold from the historic tailings storage facilities. The Applicant is MWS.**

The MPRDA is silent regarding the ability of holders of mining rights and mining permits to transfer the ability to process stockpiles to others. However, nothing in the MPRDA indicates that holders of mining rights and mining permits are not permitted to dispose of, and allow another to process stockpiles, while their rights exist.

**In the light of the aforementioned, please advise whether AGA as the Mining Right Holder has allowed MWS to process its stockpiles or has it disposed of its stockpiles to MWS?**

The MPRDA does not create a similar favourable position for holders of mining rights and mining permits when their rights lapse. **Contrary to residue stockpiles, the definition of mine as a verb in the MPRDA includes mining in residue deposits. It is therefore illegal to mine a residue deposit without a mining right or mining permit.** Former holders of mining rights and mining permits whose activities created the deposit cannot mine the deposit automatically when their rights lapse. These previous holders will have to apply for new rights in terms of the MPRDA if they wish to mine the deposit in future. Applications will only be successful if applicants comply with the requirements of the MPRDA for granting of rights. Applicants must show, for example, that they have the technical, financial and other abilities to exploit minerals optimally, to comply with health and safety requirements and to comply with the government's empowerment targets.

## SOCIO-ECONOMIC IMPACT ASSESSMENT

We consider the socio-economic impact assessment (SEIA) to be independent, unbiased and professional.

We request the DMRE not to authorise the project unless the following knowledge gaps, which were identified in the SEIA, have been addressed. These gaps include:

- *The unknown impact on soil and water quality in the case of potential spillages along the new or existing pipelines (the specialist studies focused on the TSF area and not the supporting infrastructure).*
- *The status and impacts of the rehabilitation of the historical TSFs are unknown.*

The likelihood of pipelines spillages find support in the historic pipeline failures by Mine Waste Solutions. The subjoined photographs adduce authentic photographic evidence of the pipeline failures, spillages and unrehabilitated footprints of the reclaimed TSFs.





- *“Expand the current community forum into an Environmental Management Working Group that incorporates an external ombudsman function to monitor compliance and provide advice on the implementation of the Environmental Management Plan (EMP). It is recommended that such a working group could consist of an independent representative NGO with capacity and that has experience and trust in the local area, local community representatives from Khuma, Stilfontein and surrounding farms (not benefiting or seeking gain from the project through employment or procurement), representatives from JB Marks and CLML and representatives from the DMR, DEA and DWS.”*

## PUBLIC PARTICIPATION PROCESS

In terms of the NEMA principles:

- *“The participation of all interested and affected parties in environmental governance must be promoted and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective*

*participation and the participation by vulnerable and disadvantaged persons must be ensure.*

- *“Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.”<sup>1</sup>*

We report that the public participation meetings on the 1<sup>st</sup> of September 2020, did not make sufficient provision for disadvantaged and vulnerable persons to meaningfully participate and failed to take into consideration the local knowledge of affected communities.

**We submit that the above process was prejudicial to the interests and rights of affected communities of Khuma and the Margaret Village.**

## FINANCIAL PROVISIONING

We refer to the subjoined response from the Applicant’s EAP in response to the FSE’s issue of concern.

ISSUE OF CONCERN	CONTRIBUTOR	DATE OF CONTRIBUTION	MEANS OF CONTRIBUTION	RESPONSE
<p>REQUIREMENTS IN TERMS OF THE AMENDED MPRD REGULATIONS</p> <p>On page 47 of the DSR we are informed that Khuma’s population totalled 45 895 individuals, which totals approximately 10% of the total municipal population.</p> <p>We hereby request that the Applicant in terms of the Amended MRDA Regulations consult with mining affected communities on the Social and Labour Plan (SLR) and thereafter publish the approved SLP in English and one other dominant official language commonly used within the mine community using the following avenues:</p> <p>(i) Company website/s, local newspaper/s;</p> <p>(ii) Hard copies of the approved Social and Labour Plan to be placed in local libraries, municipal offices, traditional authority offices, company /mine offices; and</p> <p>(iii) Announcements may be made, where feasible, in local radio stations and relevant news outlets about the availability and content of the approved Social and Labour Plan.</p> <p>We furthermore request that a review of the SLP must be done in consultation with affected mine communities and adjacent communities in terms of the above Regulations.</p>	<p>Ms Mariette Liefferink Federation for Sustainable Development (FSE)</p>	<p>2 February 2020</p>	<p>E-Mail Correspondence</p>	<p>The MPRDA does not govern this application as this is not a mining activity, but a reclamation/deposition activity. The activities are governed by NEMA and NEMWA, therefore no SLP as prescribed by the MPRDA is required.</p>

<sup>1</sup> Section 2, subsection 4 (f) & (g)

<p>Of relevance too in this regard are the directives of the SAHRC's pertaining to SLPs pursuant to its National Hearings on the Underlying Socio-Economic Impacts of Mining Affected Communities in South Africa. Please see attached Report</p>				
<p>(Page 29 of the Comments and Response Report)</p> <p>The FSE is not opposed to the reclamation activities as such, but only opposed to the incorrect or insufficient rehabilitation of the old TSFs that are being reclaimed. The FSE is concerned about the contaminant plumes from the current unlined TSF. Complaints have been received from neighbouring farmers regarding the dust pollution. Will the financial provision be adequate to deal with the latent and residual effects of the TSFs in future.</p>	<p>Ms Mariette Liefferink</p>	<p>4 February 2020</p>	<p>Telephonic Contribution</p>	<p>A hydrogeological impact assessment will be conducted during the EIA phase and the IWULA to investigate the potential impacts of the existing and expansion TSF's.</p> <p>The potential impact of dust will be addressed through the EIA. An Air Quality Assessment will be included in the EIA.</p> <p>MPRDA not relevant therefore no financial provisioning is required by law. However, EIA Phase will provide estimated closure.</p>

To arrive at clearness in judgement, the FSE, on the 10<sup>th</sup> of June 2020, requested the Department of Environmental Affairs, Forestry and Fisheries and the Department of Human Settlements, Water and Sanitation's regulatory reply to the response from the EAP, namely that *"MPRDA not relevant therefore no financial provisioning is required by law"* and that *"the MPRDA does not govern this application as this is not a mining activity, but a reclamation/deposition activity. The activities are governed by NEMA and NEMWA, therefore no SLP as prescribed by the MPRDA is required."*

The correspondence is subjoined hereunder.

**From:** Mariette Liefferink  
**Date:** Wednesday, 10 June 2020 at 1:10 PM  
**To:** Dee Fischer, Dee Fischer  
**Cc:** Linda Garlipp, Ishaam Abader, Amanda Van Reenen, 'Anelle Lotter', "[georgina@gcs-sa.biz](mailto:georgina@gcs-sa.biz)", "Human, Charl"  
**Subject:** FINANCIAL PROVISIONS

Dear Dr Fischer,

This enquiry is submitted on behalf of the Federation for a Sustainable Environment.

The FSE is a registered interested and affected party in a number of reclamation applications by gold mining companies, that is, the applications for the extraction (or "reprocessing"; also referred to as "re-mining" – please refer to the treatise by DM van Tonder, H Coetsee of the Council of Geoscience and others titled "South Africa's Challenges Pertaining to Mine Closure – The Concept of Regional Mining and Closure Strategies", 2008) of residual gold from historical tailings storage facilities and the deposition of the residues from this reprocessing activities on a single large dump, commonly referred to as a super dump or regional tailings storage facility.

In response to our question whether the financial provisions will be adequate to deal with the latent and residual effects of the footprints of the reclaimed TSFs and the super dump in future, the Applicant responded as follows:

*"MPRDA not relevant therefore no financial provisioning is required by law."*

The Applicant in this particular application is Mine Waste Solutions, whom I take the liberty to copy on this e-mail.

May we kindly request your learned opinion on whether the current (2015) and proposed (2019) *"Regulations pertaining to financial provisioning for the rehabilitation and remediation of environmental damage caused by reconnaissance, prospecting, exploration, mining or production operations"* in terms of the NEMA are applicable to reclamation or re-mining operations and in particular section 5 of the said Regulations namely *"the financial provision must guarantee the availability of sufficient funds for (a) progressive rehabilitation and remediation; (b) rehabilitation, remediation, decommissioning and closure activities; and (c) remediation and*



management of residual and latent environmental damage including the ongoing pumping and treatment of polluted or extraneous water where relevant”?

In anticipation, please accept our sincere thanks.

Best Regards  
Mariette Liefferink  
CEO: FEDERATION FOR A SUSTAINABLE ENVIRONMENT  
TEL. (+27) 11 465 6910  
(+27) 73 231 4893  
Postnet Suite #113, Private Bag X153, Bryanston, 2021  
E-MAIL: [mariette@pea.org.za](mailto:mariette@pea.org.za)

Adv Anil Singh, the DDG of DWS: Regulation and Mr Bashan Govender of the DWS: Chief Directorate – Mine Water Management responded as follows:

**From:** Singh Anil <[SinghAn@dws.gov.za](mailto:SinghAn@dws.gov.za)>  
**Sent:** 23 June 2020 06:21 AM  
**To:** Govender Bashan (DHQ) <[GovenderB@dws.gov.za](mailto:GovenderB@dws.gov.za)>; Mariette Liefferink <[mariette@pea.org.za](mailto:mariette@pea.org.za)>  
**Cc:** Keet Marius (DHQ) <[KeetM@dws.gov.za](mailto:KeetM@dws.gov.za)>  
**Subject:** Re: FINANCIAL PROVISIONS

Good morning Bashan

Many thanks for your response to Mariette

Dear Mariette

I trust that you are well and staying safe

Please consider the response from Bashan as having my approval as DDG responsible

Please indicate that you are satisfied or if not we can set up a virtual engagement asap

Kind Regards

Anil Singh  
DDG REGULATION

----- Original message -----

From: "Govender Bashan (DHQ)" <[GovenderB@dws.gov.za](mailto:GovenderB@dws.gov.za)>  
Date: 2020/06/22 22:03 (GMT+02:00)  
To: Mariette Liefferink <[mariette@pea.org.za](mailto:mariette@pea.org.za)>  
Cc: "Keet Marius (DHQ)" <[KeetM@dws.gov.za](mailto:KeetM@dws.gov.za)>, Singh Anil <[SinghAn@dws.gov.za](mailto:SinghAn@dws.gov.za)>  
Subject: RE: FINANCIAL PROVISIONS

Dear Mariette

Our telecom this evening refers.

It is an incorrect for the Applicant to claim that gold tailings reprocessing/ reclamation is not a MPRDA activity and hence that financial provisioning (FP) does not apply.

I would love to understand the rationale behind such a response.

Let me point out that if FP did not apply to reclamation, then the other companies whose core business focuses on reclamation like DRD, Sibanye, etc would also not have to set aside FP. Even Mintails whose business was almost exclusively reclamation had a budget set aside for FP, albeit on a substantially reduced quantum.

For the proposed Mine Waste Solutions KareeRand TSF expansion, I suggest you register your comment as part of the consultation process. I will link the EAP and ask them to ensure your comment is registered and that a factual response is given. This is a legal obligation on the part of the EAP and consultation records form part of the document that must be submitted to the DMR in determination of granting of the authorisation.

Please also escalate your concern to DDG Susan Malebe in DMR Head Office and to the DMR FS Provincial Head.

And let me know if you need any other assistance.

Regards  
Bashan

Dr Dee Fischer of the Department of Environmental Affairs: Legal Authorisations, Compliance and Enforcement responded as follows:

**From:** Dr Dee Fischer <[DFischer@environment.gov.za](mailto:DFischer@environment.gov.za)>  
**Sent:** 23 June 2020 02:30 PM  
**To:** Mariette Lieferrink <[mariette@pea.org.za](mailto:mariette@pea.org.za)>  
**Cc:** Linda Garlipp <[LGarlipp@environment.gov.za](mailto:LGarlipp@environment.gov.za)>; Ishaam Abader <[labader@environment.gov.za](mailto:labader@environment.gov.za)>; Amanda Van Reenen <[avanreenen@environment.gov.za](mailto:avanreenen@environment.gov.za)>; 'Anelle Lotter' <[anelle@gcs-sa.biz](mailto:anelle@gcs-sa.biz)>; [georgina@gcs-sa.biz](mailto:georgina@gcs-sa.biz); 'Human, Charl' <[CHuman@AngloGoldAshanti.com](mailto:CHuman@AngloGoldAshanti.com)>  
**Subject:** Re: FINANCIAL PROVISIONS

Dear Ms Lieferrink

My apologies that we have not yet responded to you. We are currently considering your request and will provide you with a response shortly. We have also seen the response from the Department of Human Settlements and Water Affairs.

Kind Regards

Dr D Fischer  
Department of Environmental Affairs  
Branch: Legal Authorisations, Compliance and Enforcement  
**A:** 473 Steve Biko Street, cnr Soutpansberg & Steve Biko  
**C:** +27 827729837  
**E:** [dfischer@environment.gov.za](mailto:dfischer@environment.gov.za)  
**W:** [www.environment.gov.za](http://www.environment.gov.za)

**SUBMITTED BY:**  
Mariette Lieferrink  
CEO: FEDERATION FOR A SUSTAINABLE ENVIRONMENT  
8 September 2020.