The Centre for Environmental Rights' Full Disclosure series of reports assesses the public disclosures of listed South African companies with significant environmental impacts. The reports analyse the extent to which these companies accurately reflect their environmental compliance records, and their environmental impacts and liabilities, in their reports to shareholders.

The Centre for Environmental Rights' (CER's) latest *Full Disclosure* report analyses disclosures by eleven listed mining companies about their financial provision for environmental rehabilitation, i.e. the money that mining companies must set aside to rehabilitate the environmental damage they cause.

Most of the information about financial provision for environmental rehabilitation is found in the mining companies' annual financial statements. Intellidex, a leading financial analysis and research company, conducted the initial assessments of financial disclosures. The CER then wrote to each of the assessed companies, on the basis of Intellidex's findings, to request further information and clarification in relation to their disclosures.

The key findings set out below are based on the Intellidex report, the CER's own research and correspondence with the companies, and the CER's extensive work on mining, environmental regulation, and corporate reporting.

Key Findings

Neither the law, nor the accounting standards governing company disclosures, ensure the necessary transparency and accountability about financial provision for environmental rehabilitation. The information disclosed by mining companies, about the costs of rehabilitation of the environmental damage that they cause, and about the money that they are obliged to set aside to fix it, is inconsistent, unclear, in some cases unreliable, and not comparable between companies. It is therefore impossible for shareholders or taxpayers to hold companies or regulators to account.

Without consistent, clear, reliable and comparable information, it extremely difficult to know whether or not mining companies are properly setting aside and ring-fencing environmental rehabilitation funds. It is also impossible to check whether the estimates given by mining companies of how much it will cost to rehabilitate are accurate, and whether or not the money that they do set aside is actually used for rehabilitation. To further complicate matters, the disclosures do not mirror legal obligations in relation to financial provision for environmental rehabilitation. The correlation between the information provided to the Department of Mineral Resources (DMR), and the disclosures in the annual financial statements, is unclear.

Mining causes severe, long-term damage to the environment. It destroys ecosystems and pollutes water, soil and air. These impacts have consequences for the health and well-being of affected communities. In South Africa, mining is encroaching on our strategic water source areas. In Mpumalanga, which contains most of the country's high yield soils, and where coal mining has dramatically reduced the availability and productivity of this land, its impacts have potential implications for our future food security. Mining is also increasingly being permitted near to or in protected areas and environments, including national parks and reserves, which will negatively impact our tourism industry.

It is therefore crucial for mining companies to mitigate and rehabilitate negative environmental impacts. This is expensive. But by law, in accordance with the "polluter pays" principle, the mining company that causes the environmental impacts (and reaps the profits from doing so) must pay these costs.

Environmental laws in South Africa require mining companies, before they start mining, to prepare detailed studies setting out the damage that the mining will cause, and how they will rehabilitate it. Mining companies are required to determine the costs of rehabilitation, and are required to set aside money to cover those costs.

The money that is set aside is supposed to be ring-fenced, to ensure that if the company fails to rehabilitate its environmental damage, the state can step in, access that money and carry out the rehabilitation itself. In this way, taxpayers are, in theory, protected from having to foot this bill.

The reality

In reality, however, this system has failed in South Africa. There are presumably companies which do fully comply with their legal obligations to rehabilitate. **But it is difficult to ascertain whether this is the case for any given mining operation. This is because we cannot easily tell how much money is held for rehabilitation, where and how it is held, who administers it, who has access to it, how it is spent, who calculates it and how it is calculated. The problem is compounded by the fact that the DMR's compliance monitoring and enforcement of rehabilitation obligations is poor.**

It is clear from the situation on the ground that rehabilitation is often not happening at all: our landscape is littered with unrehabilitated mines. In addition to operational mines which simply fail to comply with rehabilitation obligations, the following scenarios are common, and are facilitated by the failure of the DMR to enforce financial provision regulations and to allow public scrutiny of the processes for calculating and transferring environmental liabilities:

a. When a particular operation encounters financial, operational, or other difficulties, it is common practice for mining companies to place it on so-called “care and maintenance”. This is not a legal concept, but a term used by the mining industry to describe the situation where production ceases, but the mine is not closed. A skeleton staff is retained, and environmental expenditure is kept to a minimum, with no rehabilitation taking place. Mining companies usually justify this step by stating that they are hoping for a change in market conditions that would make restarting the mining operation profitable. However, there is no timeframe for this and it can lead to an indefinite postponement of closure and rehabilitation obligations.

b. Large mining companies, left with major environmental liabilities after most of the resource has been extracted, sell their mines to smaller companies. These smaller companies are often either unwilling or unable to fulfil the rehabilitation obligations imposed by the mining rights for these operations. The DMR does not allow public participation when it authorises these sales, as it should in terms of the Promotion of Administrative Justice Act, 2000. The transactions take place behind closed doors, without public scrutiny. The new owners often do not comply with rehabilitation obligations, and there are insufficient protected funds available to cover their liabilities. They then become the responsibility of the state, and therefore of the taxpayer.

c. When an operation ceases to be profitable, the mine is simply abandoned, and the company goes into liquidation or its directors resign. The state does not have the resources to track down those responsible for rehabilitation. Again, there are often insufficient protected funds available to cover the rehabilitation costs.

Company financial disclosures and reporting

Intellidex assessed the annual financial disclosures of 11 JSE-listed coal and platinum mining companies in relation to their financial provision for environmental rehabilitation. Intellidex concluded that the disclosures that companies are currently making are not adequate to provide meaningful comparative information about financial provision for rehabilitation and mine closure. The primary reasons for this are:

- The roles of management and independent experts in the estimation of environmental liabilities are not clearly described.
- Any specialist assessments of the costs of environmental rehabilitation are not publicly available. The manner in which auditors verify these figures is unclear. There is no way for stakeholders to assess the adequacy or accuracy of the calculations, and whether the amount of funds set aside is sufficient to cover the rehabilitation costs in the event of premature closure.
- There is limited information about the financial vehicles used to hold rehabilitation funds, including how (and by whom) they are managed, how (and by whom) the funds are accessed, and whether or not the funds are adequately protected.
- It was complicated and time-consuming to locate information and to understand it.

The annual financial statements of the assessed companies are prepared in accordance with the International Financial Reporting Standards (IFRS). IFRS states on its website that “our mission is to develop IFRS Standards that bring transparency, accountability and efficiency to financial markets around the world. Our work serves the public interest by fostering trust, growth and long-term financial stability in the global economy”.

There may be many aspects of the operations of listed companies that can be satisfactorily reduced to numbers on a balance sheet. Environmental rehabilitation obligations, however, require the disclosure of much more detailed information if the goals of transparency, accountability, and trust are to be achieved. The specific information required is set out in our recommendations.

The legal framework

The confusion created by inconsistent, unclear, and incomparable disclosures is compounded by amendments and proposed amendments to the applicable environmental laws, and a lack of clarity as to how financial provision will be regulated in the future.

Historically, financial provision was regulated under the Mineral and Petroleum Resources Development Act, 2002 (MPRDA), and the Mineral and Petroleum Resources Development Regulations. This system has been repealed and replaced through amendments to the MPRDA and the National Environmental Management Act, 1998 (NEMA), and through the publication of Financial Provisioning Regulations under NEMA in 2015 (the 2015 FP Regulations). However, the old MPRDA system currently still applies to mining companies that obtained their authorisations prior to November 2015 (in terms of transitional arrangements).

Adding to this complexity, draft Proposed Regulations Pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations were published in 2017 (draft 2017 FP Regulations). These draft 2017 FP Regulations were intended to replace the 2015 FP Regulations. However, after considering various inputs on the draft 2017 FP Regulations, the Department of Environmental Affairs has indicated, during its 2018 stakeholder engagement meetings, that the draft 2017 FP Regulations will be replaced by a new draft set of regulations, to be published in 2018 for comment.

This report includes a number of recommendations for these new regulations.

Recommendations

Our recommendations for changes to financial reporting and disclosure, as well as the legal framework, are aimed at:

- achieving transparency, consistency, clarity, and comparability in company disclosures; and
- supporting a legal system that ensures that mining companies fix and pay for the environmental damage they cause.

Recommendations for financial reporting and disclosure

1. Companies should clearly describe and distinguish the roles of management and independent experts in carrying out the specialist assessments which determine the costs of environmental rehabilitation.
2. Companies should disclose the names of the service providers contracted to calculate the financial provision for environmental rehabilitation. The experience and expertise of individual consultants should also be disclosed. If it is not practical to do so in the annual financial statements (AFS), then the AFS should refer to the specific page on the company's website where this information can be found. This disclosure will assist stakeholders in assessing the adequacy and accuracy of financial provision, and will encourage a culture of accountability amongst service providers.
3. Companies should publish all assessments (including reviews) of financial provision for environmental rehabilitation on their websites. The AFS should clearly refer to the specific page on a company's website where this information can be found.
4. Companies should disclose all information relating to financial provision at the level of each operation.
5. Companies should provide a clear, understandable commentary to explain any significant changes in the figures for financial provision for environmental rehabilitation, as they appear in the AFS from year to year.
6. Companies should clearly explain how they account for financial provision for environmental rehabilitation for joint ventures.
7. Companies (and auditors) should make it clear in the AFS that there is a difference between the financial provision (i.e. the amount that will be required to fix all the damage at the planned closure date), and the amount of funds that have actually been set aside to cover a portion or all of this liability.
8. Auditors should provide assurance that, should an operation be prematurely closed, there are sufficient funds set aside to cover the rehabilitation costs associated with the damage caused to date.
9. Auditors should reconsider the language used in the notes to the financial statements relating to the estimates of financial provision. These notes contain disclaimers to the effect that financial provision estimates require significant "management judgment", and that the estimates are based on costs, legal requirements and technologies that are inherently uncertain. While there are inevitable uncertainties in determining future liabilities, these disclaimers create the misleading impression that the calculation of financial provision is judgment-based and non-scientific. In fact, financial provision calculations are based on laws that are currently in force, and on specialist technical assessments of the costs of fixing the damage that the company has caused, and plans to cause.

10. Companies should provide a narrative description of the type and extent of damage caused by their operations, as well as what rehabilitation work has been undertaken in the preceding financial year, and whether or not this has impacted the company's overall assessment of its liability for environmental rehabilitation. This description should include information about the most significant environmental risks posed by its operations, and the remedial steps taken to minimise these risks.

11. Companies should disclose the following information about trusts that are used as the financial vehicle for rehabilitation funds:

    a. The identity of trustees and beneficiaries;

    b. The trusts' annual financial statements;

    c. How the funds in the trust are accessed;

    d. Whenever funds from the trust are used for rehabilitation and/or closure of any operations; and

    e. Whether the funds are used for concurrent rehabilitation or reserved exclusively for the purposes of closure.

12. Companies should avoid fragmented disclosures in relation to financial provision for environmental rehabilitation. Information should be easily accessible, and where it is not possible to have all information in the same location, it must be appropriately cross-referenced.

The International Financial Reporting Standards Board should consider amending financial reporting standards to support transparency and accountability in relation to disclosures of financial provision for environmental rehabilitation. IFRS 10 requires financial statements to present the assets, liabilities, equity, income, expenses and cash flows of a parent and its subsidiaries as those of a single economic entity. A number of the companies assessed referred to this requirement as a justification for not disclosing information about financial provision for environmental rehabilitation at an operations level. This information is much more useful to stakeholders when liabilities are broken down per site. The fact that there are a number of companies that already do this indicates that IFRS 10 is not a barrier to doing so, but the IFRS Board could assist in transparency and ease of use of information by recommending that this be done by all mining companies.

Recommendations for the legal framework

1. It is crucial that the language used in all laws regulating financial provision for environmental rehabilitation be clear and unambiguous. The laws should include clear, detailed definitions of the terms "mitigate", "remediate" and "rehabilitate" in relation to mining operations.

2. The law must specify that the assessment of financial provision must be undertaken by independent specialists.

3. The law must require that the determination, review and any adjustments of the financial provision, as well any audits of such financial provision, are publicly accessible on the company's website.

4. The law must require that at any point in time there must be sufficient funds actually set aside by a mining company to cover the full costs of environmental rehabilitation (including the rehabilitation of latent and residual impacts), should any operation be prematurely shut down.

5. The law must clearly specify that financial provision must be calculated based on a detailed itemisation of all activities and costs based on **actual** costs of implementation of the measures identified for

rehabilitation. The outdated *Department of Minerals and Energy Guideline Document for the Evaluation of the Quantum of Closure-Related Financial Provision Provided by a Mine* should be scrapped.

6. The law must specify that an environmental authorisation for prospecting or mining cannot be granted unless the applicant has provided proof of payment of the applicable financial provision to the issuing authority.

7. The financial vehicles in which financial provision funds can be held lawfully must be appropriate for their purpose, and must ensure that the funds are properly protected, such that they can only be used for environmental rehabilitation.

8. The law must clearly specify exactly who can access the funds, and under what circumstances, and must require proof that any funds withdrawn from a financial vehicle for rehabilitation have in fact been used for that purpose.

9. The Departments of Environmental Affairs, Mineral Resources and Water and Sanitation should publish jointly a publicly available and easily accessible register of the funds set aside for environmental rehabilitation. The register should be updated in accordance with the legal requirements for review of financial provision, and should include:

    a. The name and licence number of each right holder;

    b. The financial vehicle/s and financial institution/s in which rehabilitation funds are held;

    c. The amount of available rehabilitation funds per right holder; and

    d. The amounts held for environmental rehabilitation in accounts administered by the Department of Mineral Resources, how those funds are invested, who has access to them and under what circumstances, and how they are apportioned.

10. The law must specify that assessments of financial provision must include assessments of the costs of the pumping and treatment of polluted or extraneous water, and that these costs must be included in the calculation of the amounts set aside for environmental rehabilitation.