

## ANNEXURE A

### MINERALS COUNCIL SOUTH AFRICA

#### WRITTEN REPRESENTATIONS ON THE DRAFT ARTISANAL AND SMALL-SCALE MINING POLICY 2021 PURSUANT TO GENERAL NOTICE 258 GG 44538 OF 5 MAY 2021

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#### INTRODUCTION

- 1 The Minerals Council South Africa (“*the Minerals Council*”) thanks the Minister of Mineral Resources and Energy (“*Minister*”) for affording it the opportunity to submit representations on the Draft Artisanal and Small-Scale Mining Policy, 2021 (“*Draft Policy*”) published in Government Gazette No 44538 on 5 May 2021 in terms of General Notice 258 of 2021.

#### ABOUT THE MINERALS COUNCIL

- 2 The Minerals Council is a voluntary membership, private sector employer organisation founded in 1889. The Minerals Council is an association of mining finance companies and mines for various different commodities. The Minerals Council exists as the principal advocate of major policy positions endorsed by the mining industry employers and represents these policy positions to various organs of South African national and provincial governments and to other relevant policy making and opinion-forming entities, both within South Africa and abroad. The Minerals Council also works closely with the various employee organisations in formulating these positions where appropriate. It represents mining companies producing about 90% of South Africa’s mineral production and employing about 90% of the employees employed in the mining industry.

#### APPROACH OF THE MINERALS COUNCIL IN THESE COMMENTS

- 3 In these representations, the definitions and abbreviations which appear in the Draft Policy will be used. The representations are divided into two parts. Part A deals the Minerals Council’s position on ASM generally. Part B provides comments and recommendations on the Draft Policy on a topic basis.

#### PART A: MINERAL COUNCIL’S POSITION ON ASM

##### 4 **Illegal mining**

- 4.1 The Minerals Council does not support illegal mining activities.

- 4.2 Penalties and other sanctions for illegal mining and/or disposal of minerals (as for example in sections 98 and 99 of the MPRDA, in the Diamonds Act, 1986 (“DA”), and in the Precious Metals Act, 2005 (“PMA”)) must be severe and serve as a worthy deterrent to discourage such criminal activities.

## 5 **Regularisation of ASM**

The Minerals Council and its members are fully committed to supporting the regularisation of ASM, where this can be undertaken safely, in an environmentally responsible manner, and without undermining the health, safety and security of other persons, including at other lawful mining operations. Such regularisation could ensure livelihoods for thousands of skilled ex-miners who had lost their jobs due to a decline of formal large-scale mining in South Africa.

## 6 **Compliance with legislation**

Accordingly, the Minerals Council is of the view that the DMRE must ensure that ASM activities and operations are performed according to all existing legal and other requirements and, where necessary, it must procure the necessary legislative amendments. This includes adherence to, amongst others:

- 6.1 Mining legislation such as the MPRDA (including the obligation to obtain a closure certificate in terms of section 43 of the MPRDA), the DA, and the PMA, and their respective regulations;
- 6.2 Health and Safety legislation such as the MHSA;
- 6.3 Financial legislation(including the ITA, the Value-Added Tax Act, 1991, the Mineral and Petroleum Resources Royalty Act, 2008 (“MPRRA”), and the Financial Provisioning Regulations, 2015 made in terms of the NEMA) related to amongst others the payment of royalties and the making of financial provision for environmental damage caused by mining activity;
- 6.4 Environmental legislation (including the NEMA and the SEMAs as defined therein, the NWA, and the environmental provisions in the MPRDA), especially relating to authorisations, licences, permits, closure liabilities, and rehabilitation, as well as mechanisms for the transfer of any environmental liability from LSM operators to ASM operators where appropriate. The Minerals Council suggests that the current environmental legislative framework be reviewed to make it more appropriate from an ASM operations perspective. It should be expressly stated that the onus to comply with environmental legislation and to rehabilitate an ASM permit area cannot and must not fall on the LSM operator, where such environmental damage was caused by an ASM operator;
- 6.5 Spatial planning and land use management legislation including the Spatial Planning and Land Use Management Act, 2013 (zoning being mentioned in paragraph 7 (o) in the Draft Policy), and including Local Municipality Integrated Development Plans;

6.6 Labour legislation; and

6.7 International conventions ratified by South Africa including the Minamata Convention on Mercury.

The Minerals Council notes that enforcing compliance with the regulatory regime by ASM operators may add a significant load to already overburdened government departments and enforcement agencies. As set out below, the government enforcement agencies will require extensive additional resources and training to monitor and enforce adherence to all the applicable legislation. The Honourable Minister should ensure that all relevant departments are sufficiently resourced prior to the formalisation of ASM operations within the regulatory regime.

## 7 **Regulatory regime**

The current regulatory regime encapsulated in the MPRDA does not make special provision for applications by artisanal miners for prospecting and mining rights and mining permits and, at the very crux of the issue of ASM, is the question of how to bring them within the already existing regulatory framework. In this regard section 27 of the MPRDA already makes provision for mining permits for which small-scale miners can apply. Rather than a complete overhaul of the current system, the DMRE should investigate how these processes could be simplified for ASM applicants and how the time for processing of these applications could be shortened.

## 8 **Suggested principles**

In dealing with ASM, all relevant role players should be involved and at least the following principles should apply.

### 8.1 ASM (ie both artisanal and small scale generally)

- (1) ASM should be limited to surface mining. Underground mining poses many significant challenges and can only be undertaken safely with access to large financial resources, appropriate machinery and equipment, and personnel with various areas of expertise and experience.
- (2) Given the nature of ASM, the Government enforcement agencies will require extensive additional resources and training to monitor and enforce adherence to all the applicable legislation. Non-compliance by ASM operators could create severe adverse consequences for the ASM operators, the State, surrounding mining communities, other legitimate miners (including LSM and those small scale miners with mining permits in terms of section 27 of the MPRDA under the current regime) and the environment. Unless there is proper law enforcement, it would also lead to additional illegal mining activities, often in competition with the legal ASM activities, thereby undermining the viability of the mining, and creating numerous social conflicts, particularly turf wars.

- (3) There should be local community involvement, and the establishment of co-operatives should be considered. The Minerals Council is pleased to note that this concept has been encapsulated in the Draft Policy.
- (4) There should be a clear delineation of what is expected from LSM in terms of their role in supporting ASM and such support should not become obligations or requirements and should be incentivised through recognition of the social contribution as an element of broad based empowerment.

## 8.2 Artisanal mining specifically

- (1) Artisanal miners should be legal South African residents or have legal working permits.
- (2) There should be formal channels for sale/dispatching and beneficiation and refining of the products of artisanal miners to avoid disposal into illicit markets and to prevent other illegal activities.
- (3) The selection of artisanal miners should benefit local communities and local employment.
- (4) There should be a legally valid transfer of environmental and health and safety liabilities (for example in terms of section 43(2) of the MPRDA, substitution of financial provisioning in terms of the Financial Provisioning Regulations, 2015 made in terms of NEMA, and/or in terms of section 79 of MHPA) to the artisanal miners if mining areas/rights are abandoned/partitioned by existing rights holders.

## 9 **Security of tenure for holders of existing rights and permits**

9.1 Security of tenure for holders of existing mining rights and permits must be protected at all times, i.e. an ASM operator should not be granted a right which could impact on another holder's pre-existing right or permit. An ASM operator should never be granted a permit over:

- (1) the same or adjacent land where a pre-existing right or permit for *any* mineral (i.e. not only the mineral which is to be the subject of the ASM permit and/or permit application) or where a pre-existing application for any such right or permit, exists, save with the consent of the relevant holder or applicant;
- (2) old order dumps, residue stockpiles and land on which such dumps and stockpiles are situated;
- (3) areas covered in an approved environmental management programme or plan approved in terms of the MPRDA or NEMA or an environmental authorisation issued under NEMA and which extends beyond the area covered by a mining right; and
- (4) areas covered by surface right permits and servitudes on which infrastructure required for mining purposes is situated or operations ancillary to mining are being conducted.

- 9.2 One of the biggest issues surrounds liability, and strong safeguards are required to ensure that responsibility for regulating ASM remains with the State with no potential for legal or reputational liabilities to be attracted by LSM operators due to ASM activities with which LSM operators have assisted and/or which occur on their land and/or mining right areas.
- 9.3 LSM operators should not be expected to assume legal responsibility for ASM permit holders, which must be directly administered by the DMRE. A formal subdivision and transfer should be required, of any portions of existing rights which the holder is prepared to relinquish or transfer voluntarily for the conduct of formalised ASM activities.
- 9.4 Suitable transitional arrangements should be encapsulated in the Draft Policy and any legislation governing ASM which follows.
- (1) Such transitional provisions should include provisions where existing right holders under the MPRDA are given a window period to apply for other minerals on the land concerned in addition to minerals already held under an existing right. This would provide an opportunity to incorporate such minerals into an existing mining right and thereafter to contract with an ASM operator to conduct the relevant mining activities on the holder's behalf, so that resultantly the holder of the right will have more control over the activities of the ASM operations whilst still furthering ASM.
  - (2) Furthermore, should section 27 of the MPRDA be wholly repealed and a new Act regulating ASM be enacted, which as set out in Part B below the Minerals Council does not propose, transitional provisions for existing mining permit holders issued in terms of section 27 of the MPRDA should be included.

## 10 Transfers of parts of rights

- 10.1 Currently, it is not possible to subdivide existing mining rights and to transfer subdivided portions of mining rights to other persons. Whilst section 11 of the MPRDA and sections 19, 20 and 24 of the Mining Titles Registration Act, 1967 ("*MTRA*") permit this, the Mineral and Petroleum Titles Registration Office is not willing to register such subdivided rights unless the subdivided right is consolidated with an existing mining right. This issue should be addressed and resolved to enable holders of mining rights to subdivide and transfer subdivided rights to small-scale miners. An alternative mechanism could be along the lines in clause 8(b) of the mooted Mineral and Petroleum Resources Amendment Bill B15D-2013 ("*2013 Amendment Bill*") which proposed to insert a new section 11(2A) into the MPRDA as follows:

*“(2A) Any transfer of a part of a prospecting right or mining right contemplated in subsection (1) must be granted if—*

*(a) the application for such transfer is accompanied by an application in terms of section 102 to vary the right;*

*(b) the transferee has simultaneously lodged an application in terms of section 16 or 22, as the case may be;*

*(c) the applicant has complied with the requirements contemplated in section 17 or 23, as the case may be; and*

*(d) the applicant has been granted a prospecting right or a mining right to which the transfer relates.”,*

and in which the reference to application for a prospecting right or mining right would be replaced by reference to an application for an ASM permit. This would have the consequence that unless there had also been an application in terms of section 43(2) of the MPRDA to transfer the “transferor’s” environmental liabilities to the “transferee” the “transferor” would retain the “transferor’s” environmental liabilities whereas the “transferee” would be liable for the “transferee’s” own environmental liabilities.

## 11 **Closure**

There should be proper planning to deal with closure of an ASM operation irrespective of whether the mineral has been mined out or is no longer mined for any reason, so that compliance with section 43 of the MPRDA would be required. This would include dealing with environmental and socio-economic issues (such as the re-settlement of communities, the relocation of private landowners or occupiers and compensation for loss or damage in relation to the use of land such as where farming activities may no longer be undertaken).

## 12 **Assistance for ASM**

12.1 LSM operators could, on a voluntary basis, explore how they could assist ASM miners. This could include identifying mineral holdings (or parts thereof) which are uneconomical for the LSM operators to mine; providing technical support to ASM miners; assisting with training of ASM miners, mentoring ASM miners; finding more permanent work opportunities for ASM miners; refining the product of ASM miners; assisting with onward disposal of the product; and incorporating ASM miners into existing workforces etc.

12.2 By way of incentives to LSM operators, consideration should be given as to how support by LSM operators to ASM operators could assist and be incentivised by way of recognition of such support for purposes of LSM social and labour plan commitments, mining charter commitments and other social commitments, and of other objects of sustainable social development and of attraction of mineral investment in South Africa, and through fiscal incentives, so that such support should not constitute a requirement additional to the foregoing.

12.3 Further assistance by government in the form of capacity building programmes is required in order to assist ASM operators to undertake assessment of and comply with the necessary environmental,

financial management, health and safety requirements and also to uphold the appropriate standards on those issues. This could be achieved possibly through government mandating state owned entities such as Council for Geoscience to assist in such programmes, or by invoking section 12 (assistance to historically disadvantaged persons) of the MPRDA.

### 13 **Involvement of all relevant state departments**

The DMRE will need to involve all relevant state departments, such as those which administer the NEMA, the NWA, and the COGTA, to ensure a holistic governmental approach, such as embodied in the One Environmental System agreement to which reference is made in section 50A of the NEMA.

## **PART B: COMMENTS ON SPECIFIC TOPICS RELEVANT TO THE DRAFT POLICY**

### 14 **Environmental and health and safety liability**

#### 14.1 TAs

- (1) One of the most pertinent issues which arises from the Draft Policy is in relation to liability. This is particularly relevant in the instance of TAs which are referred to in paragraph 7(m) of the Draft Policy which envisages that co-existence between LSM operators and ASM operators be enabled through these TAs. Whilst not explicitly stated these TAs are akin to a lease of the relevant mining right.
- (2) The Minerals Council submits that such TAs are however not an appropriate and effective mechanism and that a formal subdivision and transfer of any portion of an LSM operator's mining right, on a voluntary basis and through a streamlined process, is a prerequisite in order to ensure that the LSM operator is not liable for the liabilities which an ASM operator attracts during the ASM operator's activities.
- (3) Nevertheless, should TAs remain in the Draft Policy once adopted, there is concern that the LSM mining right holder will remain responsible for the liabilities of the ASM tributor so that it would be necessary for the liabilities of the ASM tributor and of the LSM mining right holder to be regulated separately, especially in instances where the ASM tributor reneges on the ASM tributor's obligations.
- (4) Furthermore, since all the statutory obligations in the MPRDA lie against the holder of the right, notices of intended suspension or cancellation in terms of section 47 of the MPRDA will be given to the holder, although rectification, suspension or termination orders or instructions in terms of section 93 could be given directly to the tributor.<sup>1</sup> Therefore, the parties to any TA should be statutorily required to inform the other of any such notices, orders or instructions it may receive

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<sup>1</sup> See Dale *et al*, *South African Mineral and Petroleum Law*, LexisNexis, 2005 (Loose Leaf) paragraph 128.3.2 (Service Issue 29) in relation to leases, and which commentary on leases by parity of reasoning applies also to TAs.

alternatively, it must be clear in the legislation that section 47 and 93 notices related to that portion of the mining right area of the LSM operator which is subject to an ASM operator TA is to be served on the ASM operator and will not affect the LSM operations. ASM operations should not be allowed to continue if the LSM operator's right has been suspended.

- (5) Given the nature of TAs (namely that they are akin to leases), such TAs would have to be entered into only with the consent of the Minister in terms of section 11 of the MPRDA. For the avoidance of any doubt, this should be included in the Draft Policy.
- (6) There is no provision in the MTRA for the registration of TAs so that TAs would not, under the current regime, be capable of registration. The old definition in section 1 of MTRA was removed by section 1(b) of MTRA Amendment Act, 2003 and which read:

*“(xxiii) “tributing agreement” means a notarial deed whereby the holder of mining title in respect of precious metals, base minerals or natural oil grants the right to mine in and under the land over which such mining title is held and to receive and dispose of, for the grantee’s own benefit and account, any precious metals, base minerals or natural oil lawfully won as a result of such mining, subject to the terms and conditions, if any, upon which the mining title has been granted and to the payment to such holder of a royalty in respect of the precious metals, base minerals or natural oil so won;”.*

- (7) Furthermore, guidance should be provided to LSM operators as to how to select participants and how social conflicts emanating from the grant of TAs to one co-operative instead of another will be addressed, to avoid different groups fighting for these limited opportunities and which could disrupt operations and be a deterrent to LSM operators in granting such TAs.

#### 14.2 Underground operations

- (1) Whilst the Draft Policy mentions at paragraph 5(g) that the possibility of underground ASM operations should be further investigated as prohibiting same could be seen as discriminatory, as set out in Part A above the Minerals Council submits that the ASM operations should be confined to surface mining. This is not discriminatory<sup>2</sup> but rather ensures that the relevant safety and environmental concerns are addressed. Should ASM operators be capable of complying with the relevant requirements for underground mining, they should be able to apply for the relevant mining permit in terms of section 27 of the MPRDA.
- (2) Furthermore, precious metals (specifically gold) should be excluded from the ambit of ASM permit applications, given that precious metals (especially gold) are predominantly associated with underground mining operations and are the primary target of illegal mining operations.

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<sup>2</sup> See for example section 36 of the Constitution of the Republic of South Africa, 1996 which provides factors where the limitation of rights is reasonable and justifiable in an open and democratic society.



- (3) Underground mining poses significant challenges and can only be undertaken safely with access to large financial resources, appropriate machinery and equipment and personnel with various areas of expertise and experience. The failure to include such an express qualification would increase the risk of, and adverse consequences flowing from, potential underground accidents. In addition to the potential for accidents, increased water management and seismic monitoring, underground mining gives rise to significant operational, safety and financial challenges which ASM operators are simply not in a position to address. This in turn may also have environmental and labour law implications, as well as liability issues between LSM operators and ASM operators.
- (4) Furthermore, in instances where an LSM operator holds a mining right and is conducting underground operations on land on which an ASM operator is conducting surface operations or where an ASM operator is conducting underground operations where an LSM operator is conducting opencast or surface operations pursuant to a mining right granted in terms of the MPRDA, access to and use of the Properties may be affected by:
- (a) Regulation 3.1.1 of the Minerals Act, 1991 which is still in force in terms of Schedule 4 (Transitional Provisions) of the MHSA, and which provides that no unauthorised person may enter onto a mine or works or any shaft or place or building where machinery has been erected;
  - (b) Regulations 17.8, 17.9 and 17.10 of the Regulations in terms of the MHSA, and which provide that no person may erect, establish or construct any buildings or any other structures whatsoever within a horizontal distance of 100 metres from the workings of the mine unless a lesser distance has been determined safe by a professional geotechnical specialist and all restrictions and conditions determined by him or her or by the Chief Inspector of Mines are complied with. The person(s) responsible for the activities must provide the Chief Inspector of Mines with the distance and accompanying restrictions and conditions for approval, and no such erecting, establishment, or construction may take place until such or approval has been obtained; and
  - (c) Regulation 4.16 of the Regulations in terms of the MHSA, and which relates to explosives and provides *inter alia* that no blasting operations may be carried out within a horizontal distance of 500 meters of any public building, public thoroughfare, railway line, power line, any place where people congregate or any other structure, which it may be necessary to protect in order to prevent any significant risk, save for in specific circumstances and furthermore provides that no person may smoke, light a fire or bring a naked light or flame, within a distance of 10 meters of where explosives are being loaded, transported, off loaded, handled or where explosive charges are being prepared.

- (5) Accordingly, the definition of Artisanal Mining at Chapter III on page 14 of the Gazette at the second paragraph (a) should be amended to remove the reference to “*usually available on surface, or at shallow depths*” and replaced with the words “*This is limited to the activities of individuals or groups using mostly rudimentary mining methods, manual and rudimentary tools to access mineral ore, available on the surface.*” (own emphasis). Furthermore, the definition of Small Scale Mining at Chapter III on page 14 of the Gazette at paragraph (b) should be amended to restrict operations to surface operations.

#### 14.3 *Closure and rehabilitation*

- (1) ASM operators should be responsible for the full rehabilitation of an ASM permit area and must be responsible for obtaining a closure certificate in terms of section 43 of the MPRDA. The necessary amendments to legislation, including the MPRDA and NEMA, if applicable should be made to ensure that the obligation to rehabilitate and obtain a closure certificate over an ASM permit area is on the ASM operator and that such obligation at no stage reverts to an LSM operator, should the ASM permit area be over a previous LSM operators right area.
- (2) The Draft Policy should be amplified to provide clarity on how ASM operators will be expected to make financial provision for the rehabilitation (both concurrent, latent and future) of an ASM permit area. The Minerals Council acknowledges that ASM operators may not be in a financial position to provide financial provision. However, this cannot be at the expense of environmental degradation. Therefore, the Draft Policy should set out:
  - (a) How ASM operators will be held accountable for rehabilitation where no financial rehabilitation funds are set aside; and
  - (b) That the DMRE will fund any rehabilitation where ASM operators are unable to do so.
- (3) Given that it will probably be difficult to locate and hold individual ASM operators responsible for rehabilitation once an ASM permit area is abandoned and/or mined out, possible solutions which could be investigated by the DMRE include:
  - (a) the ring fencing of a certain portion of royalties from ASM operators to fund rehabilitation obligations; and
  - (b) imposing obligations on ASM operators to set aside a portion of their monthly earnings to cover rehabilitation obligations. In order to more easily control and enforce this, such funds may be deposited into a specific vehicle such as a trust or account controlled by the DMRE.
- (4) The DMRE may also consider the prohibition of the granting of further ASM permits to a co-operative or an individual where a member of the co-operative or an individual has failed to

comply with its rehabilitation obligations and/or any conditions of the ASM permit. This would dissuade ASM operators from defaulting on their obligations and prevent non-compliance. There is a risk that ASM operators may continuously reconstitute themselves in order to avoid sanctions for non-compliance. It should therefore be an additional granting requirement that the applicant not be in contravention of any relevant provision of the legislation.

- (5) Whichever method is proposed by the DMRE to ensure environmental rehabilitation, stringent enforcement and monitoring mechanisms must be set out in the Draft Policy.

## 15 **Reservation of ASM areas and confining ASM permit areas**

- 15.1 The Draft Policy makes provision at paragraphs 5(f) and 7(g) for the reservation of areas for the ASM industry. There is however no prohibition on the reservation of areas over which existing rights or permits or applications for such rights or permits already exist. The Minerals Council submits that the Draft Policy should clearly set out that any areas subject to existing rights or permits granted in terms of the MPRDA and/or which are the subject of pending applications for such rights or permits in terms of the MPRDA for *any* mineral (i.e. not only for the minerals which are proposed to be the subject of such reserved areas), or any areas adjacent (perhaps within a specified distance) to such areas, should be excluded from being capable of reservation. Furthermore, the reservation of any areas should be made subject to a public consultation process which is gazetted for public comment prior to any areas being so designated and reserved. This is in line with the precepts of procedural fairness and will ensure that all relevant parties (including existing holders and existing applicants) have an opportunity to provide all relevant information and comments before the Minister reserves any land.
- 15.2 The Minerals Council notes however that for such a process to be effective, the current capacity constraints and backlogs at the DMRE flowing from a lack of resources and the SAMRAD system must be attended to. The Minerals Council respectfully submits that the Draft Policy should set out how the current capacity constraints and backlogs at the DMRE will be addressed. These issues will need to be attended to prior to the finalisation of the Draft Policy and any legislative amendments to enable the formalisation of ASM operations in order to avoid compounding an existing problem.
- 15.3 The Draft Policy should clarify the position in respect of expropriation of land for purposes of the reservation of ASM areas.
- 15.4 It is unclear whether the reservation of areas for ASM operations will be able to occur within areas protected under the National Environmental Management: Protected Areas Act, 2003. The Minerals Council submits that the DMRE should be obliged to obtain consent from all relevant departments.
- 15.5 Given that different ore bodies require different mining techniques and mechanisms, the Draft Policy must provide for the creation of a register of surface level ore-bodies that are to be made available for ASM operations.

15.6 Many of the risks associated with ASM, including the capacity constraints within government departments related to enforcement, could be mitigated by confining ASM permits to specified or designated areas. More particularly, confining ASM permits to specific or designated areas would reduce the:

- (1) security risks posed by illegal miners and criminal elements by reducing:
  - (a) the burden on the DMRE and the South African Police Service in relation to securing ASM sites and removing illegal miners;
  - (b) the security concerns (and associated costs) for ASM operators regarding access to their ASM permit areas;
- (2) oversight burden on the DMRE, South African Police Service and the Department of Employment and Labour as ASM operations will only be undertaken within specific identified areas. This would also reduce the potential for human trafficking, child labour, and the employment of illegal foreign nationals;
- (3) risk that ASM operators may simply abandon sites without completing rehabilitation;
- (4) risk that ASM permits will be granted over areas where LSM operators have existing rights, old order dumps or new order residue stockpiles or critical infrastructure (where this is not included within the mining right area);
- (5) risk that ASM permits will be used to gain access to and illegally occupy land (as a consequence of the reduced oversight burden on the competent authorities).

In determining the location and extent of these specified areas, the DMRE could conduct strategic impact assessments<sup>3</sup> to identify areas, based on amongst other things, the location of surface level ore and mineral reserves. More particularly, the DMRE could prioritise existing derelict and ownerless surface operations. This process must be coupled with the necessary public participation and consultation.

15.7 Separately, LSM operators could also offer up areas (properly incentivised and protected), on a completely voluntary basis for the reservation of ASM permit areas.

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<sup>3</sup> Similar to those conducted NEMA in relation to:

- *National Environmental Management Act: Identification of geographical areas of strategic importance for development of large scale wind and solar photovoltaic energy facilities* (GN 144/2021) read with *the identification of procedures to be followed when applying for or deciding on an environmental authorisation application for large scale wind and solar photovoltaic facilities, when occurring in renewable energy development zones* (GN 142/2021);
- *Identification of geographical areas important for the development of strategic gas transmission pipeline infrastructure* (GN 143/2021) read with *Procedures to be followed when applying for or deciding on an environmental authorisation for the Development or Expansion of Gas Transmission Pipeline Infrastructure when occurring in Strategic Gas Pipeline Corridors* (GN 411/2021)
- *Identification of procedures to be followed when applying for or deciding on an environmental authorisation application for the development of electricity transmission and distribution infrastructure when occurring in renewable energy development zones* (GN 145/2021).

15.8 Considering that the intention is for ASM permits to be obtained quickly, cost effectively and with fewer regulatory requirements, there are likely to be hundreds if not thousands of applications for ASM permits. Moreover, if the ASM permits are not confined to specific designated areas or reserved areas, these permits are likely to be spread across the country making the monitoring of these operations extremely difficult for the DMRE which already has capacity constraints.

15.9 In terms of the Draft Policy, co-operatives may only take place where the LSM operator still operates. This requirement is very limiting and must be extended to operations which are on care and maintenance but which can perhaps still be mined economically on an ASM basis.

16 The initially designated or reserved areas could be reviewed from time to time in consultation with the DMRE, LSM operators and the public.

## 17 **The position of foreign nationals**

17.1 As set out in Part A above, the position of the Minerals Council is that artisanal miners should be legal South African residents or have legal working permits. As such, the hurdle for acquisition of legal working permits for artisanal mining must not be restrictively high so as to dissuade potential applicants.

17.2 The Minerals Council is pleased to note that this concept has been encapsulated in the Draft Policy which in paragraphs 5(a) and 7(h) envisages a reservation of ASM permits for South Africans which includes South Africans and those with permanent residency. The Draft Policy does not however extend to those with legal working permits. The Draft Policy is silent on how foreign nationals will be managed despite the majority of persons currently involved in informal ASM constituting foreign nationals. The Draft Policy should address the topic of foreign nationals in order to curb the probable influx of illegal immigrants as this will inflate the current problem with illegal miners and immigrants. This should be coupled with efforts to curb xenophobic outbreaks.

17.3 Furthermore, in relation to the definition of “*South Africans*” on page 10 of the Gazette the Minerals Council submits that external companies registered in terms of section 23 of the Companies Act, 2008 should be excluded from such definition.

## 18 **Illegal Mining**

18.1 It is widely known that illegal mining activities in South Africa have resulted in unprecedented levels of violence, forced labour and ancillary criminal activity.

18.2 The work which has been done to date to combat illegal mining should continue and should not be replaced with the efforts to assist ASM. It should be viewed as two separate work streams and not on the basis that the ASM project will overtake and resolve the issue of illegal mining activities. The Minerals Council notes that Chapter VIII is dedicated to the government’s stance on illegal mining and welcomes the creation of a separate unit within the South African Police Service to combat

illegal mining. However, for clarity the Draft Policy should identify the extent of the powers of this unit which should include the power to investigate crimes, enforce applicable laws and make arrests. Furthermore, the Draft Policy is silent on how the already capacity constrained South African Police Service will adequately capacitate this new unit.

18.3 Given that it is unlikely that ASM operators will have the financial capability to hire private security companies to ensure security over their ASM permit areas (which in all likelihood will constitute areas on which illegal miners had previously mined and/or will be easier targets for illegal miners), in order to curb the violence which could ensue in such situations, the aforementioned dedicated unit should also assist with the security in respect of ASM permit areas.

18.4 More particularly it is important for the Draft Policy to take security considerations for ASM operators into account for the following reasons:

- (1) LSMs are currently committing a significant amount of money and resources to security at their mines in order to ensure the safety of their employees and to prevent illegal miners from entering the mining area (who are generally armed with firearms and explosive devices);
- (2) It is likely that ASM permits will be granted, at least initially, over areas where illegal mining is being conducted. The illegal miners will not vacate these areas easily;
- (3) Strict security measures are also important in the context of health and safety obligations under the MHSA; and
- (4) Turf wars between armed illegal mining gangs are extremely violent and common and often result in casualties.

18.5 In addition to the focus on precious metals, reference should also in paragraph 11, second paragraph (b), be made to diamonds and to the DA, and perhaps even to emeralds (which are neither precious metals or diamonds) and to chrome.

18.6 Stringent enforcement action should be taken against illegal miners to send a strong message to others to discontinue their illegal actions or to discourage others to commence with such activities.

## 19 **Public participation and appeal/objection procedures**

19.1 In line with the prescripts of procedural fairness and *audi alteram partem* applications for and the grant of ASM permits should be subject to a public participation procedure in terms of which any existing right holders and/or any pending applicants for a right within a 10 (ten) km radius of the permit area must be identified and consulted with. This is particularly important in the context of surface right permits, servitudes and old order dumps or new order residue stockpiles (despite ASM permits not being capable of being issued over such dumps and stockpiles) to avoid a situation

where existing LSM operators become aware that an ASM permit was issued over properties on which existing infrastructure belonging to LSM operators is situated.

- 19.2 Such existing right holders should also have the right to object to an ASM permit application as provided for in section 10 of the MPRDA and the right to appeal the grant of an ASM permit as provided for in section 96 of the MPRDA. Relevant amendments should be made to the legislation and corresponding regulations to provide for this.

## 20 **Local community development and housing**

- 20.1 The Draft Policy refers rather obliquely in paragraph 7(m) to incentives and off-sets to encourage LSM operators to co-exist with ASM operators. This is reminiscent of the set-offs provided for in the initial Mining Charter, 2004. However, these should be more clearly set out in the Draft Policy so as to inform the legislature, for example, how support and contributions by LSM operators for ASM operations can be recognised for purposes of LSM commitments in the Mining Charter and/or other social obligations encapsulated in the MPRDA such as in the Social and Labour Plan.

- 20.2 The Draft Policy is silent (for example in paragraph 7(c)) on the benefit which ASM operations must have on local communities. Local community involvement in ASM operations is imperative as well as the obtaining of the elusive 'Social Licence to Operate'. There must be sufficient consultation processes to ensure that ASM operations are not met with community unrest which could affect the relationship with LSM operators in certain areas.

- 20.3 Further to paragraph 7(o) of the Draft Policy, the establishment of residential areas adjacent to or related to ASM operations must be formal and organised. ASM activities cannot result in the illegal occupation of land and non-compliance with this should result in non-compliance with the relevant ASM permit. In situations where ASM operators illegally occupy land there should be legislative amendments discussed further below, to ensure that private landowners and LSM operators are in a position effectively and swiftly to evict such illegal occupants flowing from ASM activities.

- 20.4 Furthermore, in instances where ASM permit holders are permitted temporarily to reside on a property for the duration of an ASM permit, the Draft Policy should clearly set out who would be responsible for and to fund the basic infrastructure required such as housing, water, power and sewerage. It should furthermore be set out whether such housing structures will be excluded from the National Building Regulations and Building Standards Act, 1977.

## 21 **Access to Land**

- 21.1 Paragraph 7(g) of the Draft Policy does not provide sufficient information regarding access to land for ASM operators so that the Minerals Council assumes that similar rights of access to those encapsulated in section 5 of the MPRDA will also apply to ASM permit holders.

21.2 The rights of access to land and the ability for ASM operators temporarily to reside on land should be encapsulated in the Draft Policy to prevent the potential abuse by ASM operators to the detriment of private landowners or LSM operators. For example, ASM permits could be used by large co-operatives in an attempt to 'legitimise' unlawful land invasions or result in ASM operators attempting to create a permanent residence on the land and remain in occupation once the ASM permit has lapsed and operations have ceased. This also is linked with the length of time for which the ASM permit is granted and the fact that much of the land on which ASM operations will be conducted will constitute agricultural land.

21.3 The current regulatory regime governing interdicts and evictions of unlawful occupiers including the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 and the Extension of Security of Tenure Act, 1997 will need to be suitably amended to ensure that private landowners and LSM operators are in a position to make use of these instruments in a cost effective and swift manner in the instances of ASM operators.

## 22 Mining of tailings dumps and historic residue deposits and stockpiles

22.1 Paragraph 7(n) of the Draft Policy provides that "*A framework for ASM to have access to the mining of tailings dumps and historic residue deposits and stockpiles should be developed in line with existing jurisprudence as outlined by judicial decision on the matter. Owners of these tailings and dumps should be encouraged to work with artisanal and small-scale miners considering the applicable environmental management and water related legal instruments.*". The Minerals Council supports the position that access to the mining of tailings dumps and historic residue deposits and stockpiles should be developed in line with existing jurisprudence. However, for the avoidance of doubt this position should be clearly set out namely the following.

- (1) The MPRDA seeks to regulate mine dumps that fall within the definitions of "*residue stockpile*" and "*residue deposit*" in section 1 of the MPRDA. Those definitions relate only to residues produced by virtue of rights or permits granted in terms of the MPRDA or (after the commencement on 7 June 2013 of the first Amendment Act), produced by virtue of old order rights.
- (2) Mine dumps not so produced therefore do not fall within those definitions, and the processing of such dumps is not regulated in terms of the MPRDA.
- (3) The reference to residues produced by old order rights must be interpreted to mean residues produced under old order right from 1 May 2004 when the MPRDA commenced operation.<sup>4</sup>

22.2 Historic mine residues and new residue stockpiles created under an existing mining right fall to be dealt with at common law, and modes of acquisition and loss of ownership therein such as by way

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<sup>4</sup> See *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd* [2011] 1 All SA 364 (SCA).



of transfer of ownership by delivery, abandonment, *occupatio*, and acquisitive prescription, will apply to them.<sup>5</sup>

- 22.3 Given the aforementioned position, ASM permit applicants will not be able to apply for ASM permits over historic mine residues and new residue stockpiles created under an existing mining right and may only process such dumps with the written consent of the common law owner. Such consent would confer a contractual and not a statutory right.

## 23 Processing and Refining Facilities

- 23.1 In paragraph 7(m) of the Draft Policy reference is made to exploring the potential for tribute and buy-back arrangements, technical support, equipment leasing schemes, and opportunities for ASM to process and refine their ores.

- 23.2 It should further be provided in paragraph 7(m) that any material received to the processing or refining facilities from ASM operators will be subject to due diligence on the ASM operations to obtain assurance that they conform to the applicable ethical and responsible mining and responsible sourcing standards as well as any further requirements imposed on LSM operators listed on stock exchanges.

- 23.3 Any access to processing and refining facilities will need to be negotiated between the relevant LSM operators and the ASM operators and must be entirely voluntary by LSM operators.

## 24 Licensing regime, criteria and procedure

- 24.1 Paragraph 7(c) of the Draft Policy provides criteria for the issuance of an ASM permit. However, such criteria bear no relation to section 23 or 27 of the MPRDA. At a minimum the Minerals Council submits that the criteria set out in section 27 should be encapsulated into the criterion for an ASM permit such as for example that:

- (1) the mineral can be mined optimally;
- (2) no other person holds or has applied for a prospecting right, mining right, mining permit or retention permit for the any mineral on the same or adjacent land;
- (3) an environmental authorisation has been be obtained,

and possibly also additionally the criteria in sections 23(1)(f) and (g), namely that the applicant has the ability to comply with the relevant provisions of the MHSA, and that the applicant is not in contravention of any provision of the applicable legislation including the MPRDA and NEMA.

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<sup>5</sup> These submissions are taken from Dale *et al*, *op cit*, paragraph 131 (Service Issue 29) where all of the relevant case law is discussed.

- 24.2 Whilst the Minerals Council wishes to promote the formalisation of the ASM industry, this should not lead to a situation where ASM operators are outside of the mining regulatory framework and do not need to satisfy relevant criteria for the obtaining of such a permit.
- 24.3 Notwithstanding the environmental legislative requirements outlined above, there is a need for the development of more “fit for purpose” simplified requirements and processes for environmental and water use authorisations which are tailor made for ASM.
- 24.4 Furthermore such criteria speak of the “*graduation of operations to medium and large-scale mining operations.*” This rather ambiguous statement should be clarified to state explicitly that there is no exclusivity in such graduation as envisaged in section 19(1) of the MPRDA in relation to prospecting rights. Should ASM operators have the exclusive right to apply for a mining permit or a mining right in terms of the MPRDA, this could create a situation where the intention of the DMRE is subverted and various ASM co-operatives apply for less stringent ASM permits in order to obtain a mining permit or mining right ‘through the back door’.
- 24.5 The criteria are silent on whether ASM permit applicants will be able to apply for multiple ASM permits if the grant of such applications would result in a monopoly or exclude others from obtaining rights over which they previously conducted operations. Furthermore, a similar prohibition to that in section 27(3)(c) of the MPRDA should be included in the Draft Policy to provide that the granting of an ASM permit should not result in the applicant being granted more than one ASM permit on the same or adjacent land. Paragraph 7(b) of the Draft Policy provides that “*A dual licensing process is proposed. The current first come first served application process will be retained as a default licensing method. However, Government will be empowered to invite applications for artisanal mining or small-scale mining in designated areas. This invitation system will be adopted with the support of the Council for Geoscience (CGS).*”.
- (1) The Minerals Council respectfully submits that the Draft Policy should clearly set out that the first come first served application process will relate to all types of rights and permits and to all types of minerals and that the designated areas cannot pertain to areas which are currently the subject of *any* application for, or *any* granted, right or permit for, *any* mineral or petroleum in terms of the MPRDA, irrespective of the type of mineral which is the subject of the invitation. The inclusion of the invitation system ought to be reconsidered in the light of similar provisions having been put forward in the now withdrawn and 2013 Amendment Bill. However should this “dual system” be encapsulated into legislation, we would draw the Honourable Minister’s attention to clauses 5 and 37 of the 2013 Amendment Bill which provided as follows:

*“5. The following section is hereby substituted for section 9 of the principal Act:  
Invitation for applications*

*9. (1) The Minister must by notice in the Gazette, invite applications (including in respect of land relinquished or abandoned or which was previously subject to any right, permit or*

permission in terms of this Act, which has been cancelled or relinquished or which has been abandoned, or which has lapsed) for reconnaissance permissions, reconnaissance permit, prospecting rights, exploration rights, mining rights, technical co-operation permit, production rights and mining permits, in respect of any area of land, block or blocks, and may prescribe in such notice the period within which any application may be lodged with the Regional Manager and the procedures which must apply in respect of such lodgment.

(2) Any person may, after identifying an area of land, block or blocks and the type of mineral, mineral product or form of petroleum in or on such area or land, request the Minister to invite applications in such area of land, block or blocks in terms of subsection (1).

(3) Applications received in terms of subsection (1) must be processed in accordance with the provisions of the Act, including the terms and conditions upon which applications may be accepted, rejected, granted or refused.

(4) Any invitation referred to in subsection (1) must not include any mineral, mineral product or form of petroleum and land in respect of which another person holds a right or permit (excluding a reconnaissance permit or reconnaissance permission and an application made in terms of section 11 (2A)), or an application for a right or permit which has already been lodged prior to such invitation, and which remains to be granted or refused.

(5) The Minister shall, when processing applications, give preference to an application lodged by a person referred to in subsection (2).” (our underlining); and

“37. Section 49 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

...

(b) by the substitution for subsection (4) of the following subsection:

“(4) Subject to subsection (2)(b), the Minister may by notice in the Gazette invite applications for a reconnaissance permission, reconnaissance permit, technical co-operation permit, exploration right, production right, prospecting right, mining right or mining permit in respect of any mineral or land, and may specify in such notice the period within which any application may be lodged and terms and conditions subject to which such rights or permit may be granted; and”;

(c) by the addition after subsection (4) of the following subsection:

*“(5) Applications referred to in subsection (4) may be granted if the application complies with the requirements of sections 14, 17, 23, 26 or 27 of this Act, as the case may be.”*  
(our underlining).

- (2) Importantly, as set out in the 2013 Amendment Bill any such invitation scheme should:
- (a) exclude areas on which any another person holds a right or permit, or on which there exists an application for a right or permit (or for the extension or amendment of such right or permit) which has already been lodged prior to such invitation, and which remains to be granted or refused;
  - (b) give preference to those persons who, after identifying an area of land, request the Minister to invite applications.

24.6 Paragraph 7(e) of the Draft Policy which relates to extent of an ASM permit area is vague and sets out factors which should be considered when deciding the extent of an ASM permit. The Minerals Council respectfully submits that for clarity the extent and duration of ASM permits should be set out and should not exceed the current duration and extent of a mining permit provided for in section 27 of the MPRDA namely, an extent of no more than 5 hectares and a duration of no more than 2 years with an option for renewal of three periods each, which renewal period may not exceed one year.

24.7 The Minerals Council submits that governance of ASM and any legislation which flows from the Draft Policy should be encapsulated by way of amendments to existing legislation such as an amendment to section 27 of the MPRDA rather than a repeal of section 27 of the MPRDA and the enactment of a wholly separate Act. This would avoid any conflicting legislation.

24.8 However, notwithstanding our paragraph 23.7 above, should section 27 of the MPRDA be repealed suitable transitional arrangements will need to be provided for as set out in our paragraph 9.4(2) above.

24.9 As set out in our paragraph 10 above, currently, it is not possible to subdivide existing mining rights and to transfer subdivided portions of mining rights to other persons. This issue should be addressed and resolved to enable holders of mining rights to subdivide and transfer subdivided rights to small-scale miners where they have applied for such rights.

24.10 As set out in our paragraph 9.4 above, suitable transitional arrangements should be encapsulated in the Draft Policy which should include provisions where existing right holders under the MPRDA are given a window period to apply for other minerals on the land concerned in addition to minerals already held under an existing right. We would also refer the Honourable Minister to Clause 75(c) in the 2013 Amendment Bill which provided that:

*“75. Section 102 of the Principal Act is hereby amended –*

...

(c) by the addition of subsection (3) of the following subsections:

*“any right holder mining any mineral under a mining right may, while mining such mineral, also mine and dispose of any other mineral in respect of which such holder is not the right holder, but which must of necessity be mined with first-mentioned mineral, provided that the right holder declares such associated mineral or any other mineral discovered in the mining process.*

*(4) the right holder contemplated in subsection (3) must within 60 days from the date of making the declaration apply for an amendment of its right to include the minerals so declared failing which a third party may apply in terms of section 16, 22 or 27 as the case may be for such associated mineral.”*

In clause 1 of the 2013 Amendment Bill it was also proposed to amend section 1 of the MPRDA by the insertion of the following new definition namely

*“ ‘associated mineral’ means any mineral which occurs in mineralogical association with, and in the same core(sic: ore) deposit as the primary mineral being mined in terms of a mining right, where it is physically impossible to mine the primary mineral without also mining the mineral associated therewith;”*

The Minerals Council does however not wish to restrict such transitional provisions to only associated minerals but rather that it should apply to *any* minerals on the relevant land.

## 25 **Fiscal regime: Payment of Royalties and Taxes**

- 25.1 Chapter VI of the Draft Policy relates to the payment of royalties and taxes. The Minerals Council respectfully submits that these issues cannot be dealt with by the Minister and could only be formalised and legitimised through a Money Bill, which power is vested in the Minister of Finance. The Minister has no power to make or even introduce Money Bills or to develop a policy which relates to a Money Bill. That power is in terms of section 77 of the Constitution of the Republic of South Africa, 1996, reposed in the Minister of Finance.
- 25.2 In relation to paragraph 9(a) of the Draft Policy we would point out that section 7 of the MPRRA already contains a small business exemption.
- 25.3 The definition of “Royalties” on page 10 of the Gazette which currently is *“any royalty payable to the State in terms of an Act of Parliament”* should be amended to make reference to the MPRRA and any required amendments to the MPRRA would have to be tabled by the Minister of Finance as a Money Bill.
- 25.4 We would in passing mention that the year of the ITA is 1962 and not 1967 as mentioned in the Draft Policy.

## **CONCLUSION**

The Minerals Council respectfully requests that the Draft Policy be amended in accordance with the Minerals Council's representations above, and should be grateful to motivate these written representations by way of oral submissions to the Minister.