

# **CHAPTER 2:**

# **LEGISLATION AND POLICY**

**FINAL REPORT**



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## CHAPTER 2. LEGISLATION AND POLICY

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### 2.1 INTRODUCTION

This Chapter deals with the legal requirements and responsibilities relating to the environmental aspects of marine mining.

The corporate responsibility is to have a comprehensive listing and understanding of all relevant legislation, ensuring that there are controls in place and to determine the relevance of this legislation to the operation. The interpreted understanding of the legislation provides the backdrop for management and mitigation of all environmental impacts.

The Environmental Management Act (Act 7 of 2007) requires due process to be followed, essentially that all project related regulatory requirements are identified, (the direct and indirect activities of the operation) scoped (public consultation), mitigated and complied with.

The following section provides a listing of relevant legislation and provides some detail of, or relevance to the project. The project legal requirements are evaluated in terms of:

- Namibian legislation, including guidelines and policy;
- International legislation, including guidelines and policy, and
- Company policy and standards of compliance.

### 2.2 THE NAMIBIAN CONSTITUTION

The particular articles of relevance are: Articles 91(c) 95(l):

91 (c) “the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia.”

95 (l) “maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.”

### 2.3 NAMIBIAN LEGISLATION

#### 2.3.1 *The Environmental Management Act (Act 7 of 2007) & Draft Regulations*

The Act is administered by the Ministry of Environment and Tourism (MET). MET is responsible for issuing the Environmental Contract against an approved Environmental Management Plan Report (EMPR). The contract may be countersigned by other line ministries.

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The Environmental Management Act (Act 7 of 2007) and the draft (3rd revision) environmental regulations, as well as the 2008 preliminary procedures and guidelines for environmental impact assessment and environmental management plans, establish the control of the environmental approval / review and management process. The regulations are currently in development, a third version has been circulated for comment. The current status of approval / acceptance / promulgation of the regulations is reported to be, “in progress”.

Presently the approval process of EIA / EMPRs is relatively simple: follow due process, submit appropriate documentation and await the issue of an environmental contract. The intended process (once the regulations have been promulgated), requires an integrated and cooperatively managed process between MET and the Proponent during the development of the EIA/EMPR.

It is understood that the Act and preliminary regulations will require upon promulgation that:

- Current approvals (EMPRs / EIAs, Environmental Contracts) are entirely re-processed through the new system and that this is to be completed in a 3-year period, and
- That every three years the issued Environmental Contract (environmental clearance certificate) expires and has to be reapplied for. (MET advised the Chamber of Mines, that the reissue is against compliance with the terms of the EC and which is demonstrated through annual compliance reporting and verification of MET).

The Act requires the establishment of a rehabilitation and decommissioning fund. There are presently no criteria for determining the financial quantum, as a result of this and other factors, MET has decided that the requirement will not be legislated when the environmental regulations are promulgated<sup>1</sup>.

**NOTE:** *The respective operations hold P&I (Protection and Indemnity) insurance. P&I is a standard insurance package, and typically all of the larger vessels (> 500 grt) have this in place as standard risk cover. The insurance covers all matters (this should be specifically verified) related to shipping incidents including environmental (pollution, wreckage, oil spill) incidents.*

Two key principles of management are set out in the act. These need to be appropriately incorporated in the environmental management and mitigations:

- *the Precautionary Principle* – lack of scientific certainty will not be used as a reason to postpone cost effective measures to prevent degradation where there are threats of serious or irreversible environmental damage; and
- *the Principle of Preventative Action* – there is an obligation to prevent damage to the environment or to limit and control activities that may cause such damage.

### **2.3.2 Minerals (Prospecting and Mining) Act, Act 33 of 1992**

The Act is currently under revision - there is no indicated time frame for completion of the process. It is not envisaged that these revisions will prescribe any additional environmental requirements, other than those already in place.

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<sup>1</sup> Personal communication Mr V Malango General Manager of the Chamber of Mines

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The Act is administered by the Ministry of Mines and Energy (MME). MME is the line ministry and as such any legal non-compliances pertaining to the environment that the licence holder does not attend to, are the responsibility and liability of MME. This is generally clearly stated in the Environmental Contract as issued by MET and counter-signed by MME and other relevant ministries.

The Act essentially requires the proponent to develop and maintain an approved EMPR and to comply with relevant legislation. This requirement is specifically communicated to the applicant in the conditions of the Mining Licence document issued by MME. The conditions of a Mining Licence can vary in content (specific requirements given the nature of the mining operation / location) but typically requires the proponent to obtain an approved EMPR and an EC issued by MET within a period of time from date of issue of the ML.

The licence holder is ultimately responsible for all actions of subcontractors and must ensure that all licence conditions are equally applied to subcontractors. Abandonment of a mining area stipulates the need to give written notice to the Mining Commissioner; to demolish accessory mining works (unless required by the landowner), and to "take all such steps" to "remedy to the reasonable satisfaction of the Minister" any damage caused by the mining or prospecting operation to the "surface of, and the environment on, the land in the area in question".

**2.3.3 The Marine Resources Act 27 of 2000**

The Act is administered by the Ministry of Fisheries and Marine Resources (MFMR). The ministry is the principal responsible controlling / regulatory authority for all activities below the high water mark that may affect the marine ecological environment.

Under section 61 the Minister of Fisheries and Marine Resources is empowered to make regulations on a broad number of topics including "regulating or prohibiting the discharge in the sea or discarding on the seashore and land of specified substances or materials, or substances or materials not complying with specified requirements or having specified properties"

This Act provides for the conservation of the marine ecosystem; for the responsible utilization, conservation, protection and promotion of marine resources on a sustainable basis. [The Act replaces the Sea Fisheries Act 29 of 1992, which dealt with: dumping at sea, discharge of wastes into marine reserves, disturbance of rock lobsters, marine invertebrates or aquatic plants, areas in which the catching / disturbing of fish or aquatic plants or disturbing / damaging the seabed are prohibited].

**2.3.4 The Diamond Act of 1991**

This Act came into effect on 1 April 2000. Section 52 deals with Restricted Areas, where approved persons must enter with the required permit. Restricted Areas are declared as such by the Minister in the Government Gazette, and include areas where on - or offshore mining or related activities take place. Since the mineralisation target locations of marine phosphates and diamonds differ, the Diamond Act is not applicable.

### **2.3.5 The Merchant Shipping Act 73 of 1991**

This Act regulates all shipping activities, with particular attention to matters of, but not limited to:

- The registering and licensing of ships;
- Certificates of competency and service;
- Safety of ships and life at sea;
- Safety of navigation, and
- Collisions, accidents at sea and limitation of liability.

### **2.3.6 Prevention and Combating of Pollution of Sea by Oil Amendment Act 24 of 1991**

The amendment regulates pollution from ships at sea (Prevention and Combating of Pollution of the Sea by Oil Act No 6 of 1981), with primary focus of increasing the fines that may be imposed in respect of offences. The Minister of Works Transport and Communication regulates the Act.

### **2.3.7 Water Act 54 of 1956.**

The abstraction from and discharge into the sea requires a permit under Sections 32 and 56 of the Water Resources Management Act (No. 24 of 2004), respectively. This Act is based on the National Water Policy (Ministry of Agriculture, Water and Rural Development 2000). A combined licence to abstract and use water and to discharge effluent is covered under Section 38 of the Act. Licences are provided by the Ministry of Agriculture, Water and Forestry (MAWF). The Act is applicable to activities happening on land.

### **2.3.8 National Monuments Act 28 of 1969.**

Controls the disturbance of shipwrecks, and archaeological deposits. It provides detail of the reporting requirements, as well as the actions to take if such is found. In essence the requirement is that operations are stopped and the relevant authorities advised.

### **2.3.9 Namibian Ports Authority Act 2 of 1994**

Gives Namport the responsibility of protecting the environment within harbour areas. Namport has implemented a pollution tariff applicable to soil, water and air pollution. The pollution tariff was implemented with effect from 2003.

### **2.3.10 Maritime Notice No. 4 of 1994**

Provides rules and procedures for collecting garbage from vessels in Namibian waters.

### **2.3.11 Petroleum Products and Energy Amendment Act of 2000**

Provides provision for the Minister to regulate the cleaning up of petroleum product spills, leaks and related incidents.

### **2.3.12 Hazardous Substance Ordinance 14 of 1974 as amended**

Relates to the control of hazardous substances, as well as their manufacture, sale, use, disposal, dumping, import and export.

### **2.3.13 The Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990**

The act defines Namibia's territorial sea, inland waters, contiguous zone, exclusive economic zone and continental shelf and related matters.

## **2.4 POLICIES AND PROTOCOLS OF RELEVANCE**

### **2.4.1 Namibian Vision 2030: NDP: 2006/7-2011/12**

The third National Development Plan (NDP 3) articulates Namibia's national development objectives, and the Strategies to achieve these objectives. Vision 2030 states; "The nation shall develop its natural capital for the benefit of its social, economic and ecological well being by adopting strategies that: promote the sustainable, equitable and efficient use of natural resources; maximize Namibia's competitive advantages."

Extract from the Foreword of the document "I (the President) implore our international development partners and private foreign investors to redouble their effort to help us move on to and continue on the higher growth trajectory."

### **2.4.2 General Biophysical Impacts**

- Namibia's 12 Point Plan for Integrated Sustainable Environmental management. This was established from Namibia's Green Plan (1992), which was tabled at the "Earth Summit" in Rio de Janeiro.
- Conservation and Biological Diversity and Habitat Protection Policy
- Policy Framework for Wildlife and Utilization Production in Support of Biodiversity
- Pollution control and Waste Management Bill 1999.

### **2.4.3 SADAC Protocol: Fishereis**

The Protocol on Fisheries for the Southern African Development Community (SADC) (the 'Fisheries Protocol') was signed in 2001. Namibia has ratified the protocol, the protocol is established on 31 Articles.

The goal of the sector is to promote responsible and sustainable use of the living aquatic resources and aquatic ecosystems in order to enhance food security and human health. The specific policy objectives are to promote effective management of fish stocks, protect and preserve fish resources, promote aquaculture and mariculture development and promote trade in fish. The strategies of the Sector include establishing a regional stock assessment and fisheries



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management system; promoting regional trade; and building capacity for better fisheries management.

**2.5 INTERNATIONAL CONVENTIONS****2.5.1 Convention for the Prevention of Pollution from Ships (MARPOL) – 73/78.**

MARPOL 73/78 is the International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocol of 1978. ("MARPOL" is short for marine pollution and 73/78 short for the years 1973 and 1978.) MARPOL 73/78 is one of the most important international marine environmental conventions. It was designed to minimize pollution of the seas, including dumping, oil and exhaust pollution. Its stated object is: to preserve the marine environment through the complete elimination of pollution by oil and other harmful substances and the minimization of accidental discharge of such substances.

The original MARPOL Convention was signed on 17 February 1973, but did not come into force. The current Convention is a combination of 1973 Convention and the 1978 Protocol. It entered into force on 2 October 1983. As of 31 December 2005, 136 countries, representing 98% of the world's shipping tonnage, are parties to the Convention.

All ships flagged under countries that are signatories to MARPOL are subject to its requirements, regardless of where they sail and member nations are responsible for vessels registered under their respective nationalities.

This Convention is relevant to the disposal of sewage, garbage, oil discharges, hazardous substances, and atmospheric emissions. Although Namibia is not a signatory of MARPOL, the guidelines provided by the Convention on the prevention of pollution from ships 1973/1978 (MARPOL) are relevant. More specifically, Annex I of MARPOL provides regulations for the prevention of pollution by oil, Annex IV deals with prevention of pollution by sewage from ships, and Annex V with prevention of pollution by garbage from ships. Annexures 1 (Oil pollution) and 5 (Garbage) are implemented in Namibia by means of Marine Circular 010 of 2003.

**2.5.2 United Nations Law of the Sea Convention (UNCLOS) 1982**

The UNCLOS presents a comprehensive international legal framework to govern the seas and oceans of the world. A central feature of the Convention is the descriptions of the various maritime zones, i.e. internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf, and high seas.

Part XII, titled "Protection and Preservation of the Marine Environment" deals more specifically with marine pollution. Article 192 states that: 'States have an obligation to protect and preserve the marine environment'. Article 194(2) requires States to take necessary measures to ensure that activities under their jurisdiction or control do not "cause damage by pollution to other States and their environment" and to take measures to minimise "the release of toxic, harmful or noxious substances, especially those that are persistent, from land based sources, from or through the atmosphere, or by dumping" (Article 194(3)(a)), as well as "pollution from vessels,

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installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil” and “pollution from other installations and devices operating in the marine environment” (Article 194(3)(b)).

Article 196 requires states to take necessary measures to “prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular area of the marine environment, which may cause significant and harmful changes thereto”.

**2.5.3 *Convention on the Control of Transboundary Movements of hazardous Wastes and their Disposal 1994 (Basel Convention)***

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, usually known simply as the Basel Convention, is an international treaty designed to reduce the movements of hazardous waste between nations, and specifically to prevent transfer of hazardous waste from developed to less developed countries. It does not, however, address the movement of radioactive waste. The Convention is also intended to minimize the amount and toxicity of wastes generated, to ensure their environmentally sound management as closely as possible to the source of generation, and to assist less developed countries in environmentally sound management of the hazardous and other wastes they generate.

The Convention was opened for signature on 22 March 1989, and entered into force on 5 May 1992

**2.5.4 *Convention of Biological Diversity Rio de Janeiro (1992)***

Namibia signed the Convention on Biological Diversity (CBD) on 12 June 1992 in Rio de Janeiro, at the United Nations Conference on Environment and Development, and ratified it on 18 March 1997. Namibia is accordingly obliged under international law to ensure that its domestic legislation conforms to the CBD’s objectives and obligations. Its Constitution explicitly refers to biodiversity, providing that in the interests of the welfare of the people, the State shall adopt policies aimed at maintaining ecosystems, ecological processes and biodiversity for the benefit of present and future generations (Article 95(l)).

Of relevance for the proposed activities are:

- Article 1 outlines the framework within which action must be taken, and demands that implementation and further development of the CBD conform to these objectives. In this way, it will help ensure that balanced decisions are taken, and that where interpretations diverge, conflicts are resolved amicably.
- Article 6 (a) requires the development of national strategies, plans or programmes for the conservation and sustainable use of biological diversity, or adapting existing strategies, plans or programmes for this purpose, while Article 6 (b) sets out the need for integration, as far as possible and as appropriate, of the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.
- Article 14 requires each contracting party to carry out EIAs for projects that are likely to adversely affect biological diversity. It further requires that the EIA be aimed at avoiding

or minimising such effects and, where appropriate, allow for public participation in the assessment.

- Article 14.1 (d) provides that, where there is imminent or grave danger or damage to biological diversity within areas under jurisdiction of other States or in areas beyond the limits of national jurisdiction, that such potentially affected States be notified immediately of such danger or damage, and action initiated to prevent or minimize such danger or damage.

### **2.5.5 United Nations Framework Convention on Climate Change (UNFCCC).**

The United Nations Framework Convention on Climate Change was concluded in Rio de Janeiro in June 1992. The objective of the Convention, and subsequent related legal instruments (such as the Kyoto Protocol), is “the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner” (United Nations, 1992).

### **2.5.6 The Stockholm Declaration on the Human Environment, Stockholm 1972.**

The United Nations Conference on the Human Environment, which led to the Stockholm Declaration on 16 June 1972, aimed to provide “a common outlook and common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment” (UNEP, 1972). Namibia adopted the Stockholm Declaration on the Human Environment on 28 August 1996, and the following principles are the most relevant:

- *Principle 21:* States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.
- *Principle 22:* States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction.

### **2.5.7 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention 1972)**

The convention controls and prevents marine pollution. Dumping is identified as “the deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man made structure”. In 1986 a set of guidelines was prepared and these have been revised as the Dredged Material Assessment Framework.

"Dumping" has been defined as the deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures, as well as the deliberate disposal of

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these vessels or platforms themselves. Wastes derived from the exploration and exploitation of seabed mineral resources are, however, excluded from the definition. The provisions also do not apply when the safety of human life or vessels are at stake.

Namibia is a signatory; however the agreement has not been ratified.

## **2.6 INTERNATIONAL FINANCING REQUIREMENTS**

### **2.6.1 *The Equator Principles***

The Equator Principles require that an Environmental Social Impact Assessment addresses key social and sustainable environmental requirements. The Equator Principles are incorporated by the International Finance Corporation and presented below.

### **2.6.2 *International Finance Corporation (IFC)***

The International Finance Corporation, a component of the World Bank Group, has developed operational policies (IFC 1998) that require that an impact assessment is undertaken within the country's overall policy framework and national legislation, as well as international treaties, and that natural and social aspects are to be considered in an integrated way.

Projects financed are developed in a manner that is socially responsible and reflect sound environmental management practices. Negative impacts on project-affected ecosystems and communities should be avoided where possible. If these impacts are unavoidable, they should be reduced, mitigated and/or compensated for appropriately."

The projects have the following elements:

- Social and Environmental Assessment;
- Applicable Social and Environmental Standards;
- Action Plan and Management System;
- Consultation and Disclosure;
- Grievance Mechanism;
- Independent Review;
- Covenants;
- Independent Monitoring and Reporting, and
- IFC Reporting requirements.

Loans are not provided to projects where the borrower will not or is unable to comply with our respective social and environmental policies and procedures that implement the Equator Principles."

## **2.7 MARINE MINING CODES OF PRACTICE**

### **2.7.1 Code for Environmental Management of Marine Mining**

The code for Environmental Management of Marine Mining is a voluntary code which industry, regulatory agencies, scientists and other stakeholders are encouraged to strive towards use. The International Minerals Society has developed the code. The code was revised, 16<sup>th</sup> September 2011.

The Code provides a framework and benchmarks for development and implementation of an environmental programme for a marine exploration or extraction site by marine mining companies and or stakeholder in Governments, non-governmental organizations and communities in evaluating actual and proposed applications of environmental programmes at marine mining sites.

The Code also assists in meeting the marine mining industry's requirement for regulatory predictability and risk minimization and in facilitating financial and operational planning..

## **2.8 COMPANY POLICY**

The Company places high value on the natural environment in which employees work, and similarly places a high value on the health and safety of the employees who work in that environment. The Company has established, separate Health & Safety and Environmental Policy Statements, which together encompass the Companies approach to ethical moral and practical corporate responsibility.

### **2.8.1 Environmental Policy Statement**

It is Namibia Marine Phosphate's aim to achieve a high standard of care for the environment in all of the activities in which we engage.

To achieve this objective we will:

- Conduct our operations in compliance with all relevant environmental regulations, licenses and legislation as a minimum condition;
- Identify, monitor and manage environmental risks arising from our operations;
- Seek continuous improvement in environmental performance, production processes, waste management and the use of resources;
- Set, endeavour to meet and periodically review objectives and targets related to environmental performance;
- Provide appropriate training and awareness for all employees on environmental issues;
- Communicate regularly with employees about our aim and about individual responsibilities and

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- Communicate with the authorities' shareholders and the community about our environmental performance and contribute to the development of laws and regulations, which may affect our business.

Namibian Marine Phosphate strives to operate in harmony with all other stakeholders who may be affected by the mining operations, as is manifested in the company's environmental management policy statement. Resolution of any conflict, should such occur, is of highest priority. The Company is committed to complying with all environmental legislation, maintaining communication with users and managers, fostering environmental responsibility among staff and contractors and establishing programs to minimise impact to the environment.

**2.8.2 Health and Safety Policy Statement**

Namibian Marine Phosphate aspires to zero harm to people. In this regard we will conduct our mining and exploration activities so as to protect the safety and health of employees, contractors, visitors and the communities in which we operate.

To achieve our goal, we will:

- Utilise a Safety Management System that follows a pro-active and consultative approach with all stakeholders to ensure that hazards are identified, assessed and adequately controlled in all activities;
- Provide and maintain a safe and healthy workplace by complying with, and exceeding where possible, all applicable safety and health laws, codes of practice, standards and guidelines;
- Provide leadership, accountability, support, resources and training to create an environment where all personnel have the ability and desire to achieve a safe, healthy and productive workplace;
- Provide support to the families of any person injured in the course of their employment at our operations, recognising that such injury has an impact beyond the individual injured;
- Strive to achieve leading industry practice in safety and health management;
- Develop, communicate, measure and review safety, health and other key business objectives and targets to ensure performance is continually improved;
- Employ only those staff and contractors who demonstrate high levels of performance and commitment to workplace health and safety management;
- Implement this policy through a systematic and ongoing planning process.

This Safety and Health Policy is the primary component of our overall operating philosophy. We are totally committed to this Policy and we accept primary responsibility for the achievement of all its aims.

**2.8.3 International Guidelines on Business Ethics**

Namibian Marine Phosphate (Pty) Ltd subscribes to the business ethics guidelines of the International Fertilizer Industry Association, these are:

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IFA members are expected to respect a strong sense of ethics and integrity to ensure a sound business environment within the fertilizer industry.

IFA members are expected to adhere to the highest standards of business conduct by honouring all business obligations and complying with the laws, rules and regulations in the countries and communities in which they operate.

Members are expected to conduct business in good faith, respect the sanctity of contracts and foster fair, ethical and legal trade practices.