

Executive Summary of the first Independent Audit on the Implementation of the Biodiversity Offset Agreement between Black Mountain Mining (Pty) Ltd and the Department of Environment and Nature Conservation (DENC), Northern Cape Province

Background

Black Mountain Mining (Pty) Ltd (BMM) is located at Aggeneys in South Africa's Northern Cape Province, within an international biodiversity hotspot. BMM has developed the Gamsberg Zinc Mine, for which BMM received an Environmental Authorization (EA) from the Northern Cape Department of Environment and Nature Conservation (DENC) on 12 August 2013. Conditions 50 to 60 of the EA (Amendment 2) required that BMM should secure in perpetuity, through one or more of the following mechanisms provided for in Section 20 or 23 of the National Environmental Management Protected Areas Act, 2003 (Act No. 57 of 2003, as Amended) (NEM:PAA, 2003) areas and/or portions of which individually or collectively comprise at least the following areas of sustainably intact habitat that house the following vegetation types:

- a. At least 3 700ha of land comprising Aggeneys Gravel Vygieveld, including those component habitats supporting quartz gravel communities and those that are range restricted or which support localized and endemic plant species;
- b. At least 3 200ha of Bushmanland Inselberg Shrubland, including those habitat units supporting large succulent plants on the south facing aspects;
- c. At least 4 000ha of Bushmanland Arid Grassland, including those component habitats supporting calcrete gravel communities;
- d. At least 2 000ha of Azonal vegetation types comprising Bushmanland ephemeral river courses and outwash plains; and
- e. The land required to be secured by BMM shall be set aside and declared as a nature reserve and/or a protected environment in terms of sections 23 or 28 of the NEMPAA, respectively.

As a result, and in compliance with the EA (Amendment 2), a legal Agreement, namely the Biodiversity Offset Agreement (BOA) was signed between DENC and BMM (the implementing parties, IP) on 16 October 2014. In terms of the BOA (Clause 14.7), an independent review of the implementation of the BOA by an independent auditor or team of independent auditors should be undertaken every five years with the first review to be undertaken upon the expiry of the five years period calculated from the date of signature of the agreement). The first independent audit (IA), was undertaken from August 2019 to November 2019. The Initial IA report, submitted in December 2019, identified various

implementation challenges and interpretation issues to be addressed by the IP. It was therefore agreed by the IP to conduct a follow-up (Close-out) IA in March 2020 to revisit work in progress regarding the closure of partially compliant and non-compliant findings of the IA conducted by Amaryllis Biodiversity Consulting (Pty) Ltd (Amaryllis) and the implementation of recommendations made by the Independent Reviewer (IR). The Close-out audit report was finalised in May 2020.

This summary report outlines the key findings of the first IA, incorporating results from both the Initial (Independent audit report: Dec 2019) and Close-out (Close-out Independent audit report: May 2020) audits. The report aims to inform external stakeholders about performance in key compliance areas

and also outline agreement between the parties to improve future compliance performance. The full audit reports are included as links should any Interested and Affected Party want to review both audit reports in full (Independent audit report: Dec 2019 and Close-out audit report: May 2020)

Key findings

Highlighted below are key findings and outstanding compliance issues related to specific clauses of the BOA, along with agreed (by the IP) methods for moving these clauses towards full compliance in an efficient and timely manner.

Overall

Overall, 47 clauses of the BOA were assessed during the IR, 53 were not assessed as either they did not contain compliance obligations for either of the parties or they were not yet applicable at the time of the audit (due to the fact that timeframes had not yet been reached and work was still in progress to ensure completion within the specified timeframe). Out of the 47 clauses, the IR confirmed the IP were in full compliance (C) with 18 clauses. For 8 clauses, the IR confirmed completed but late (C-L), as actions were completed but not in accordance with the timing requirements of the BOA. For 14 clauses, the IP were assessed as being only partially compliant (PC), confirming that further actions were required from them to achieve full compliance. The IP were assessed as not compliant (N-C) with 7 clauses. Please refer to Table 2 of the “Close-out Audit Report”, 12 May 2020 for the summary of the compliance assessment and rationale for assessment categorization and a full explanation about the compliance assessment for each clause.

Overall, the IR observed commendable progress by the IP, in the steps they took to achieve compliance on a number of the BOA provisions. Furthermore, IR noted the IP had made a concerted effort to close non-compliances in the period between the submission of the Initial IA Report and the Close-out IA Report. The parties had devised a Work Plan to address non-compliances. IR acknowledged the requirements for a number of the clauses were in the process of being met. IR was convinced that many of the non-compliance gaps could easily be closed in the short to medium-term through ongoing effective, transparent, communication and cooperation between BMM and DENC.

Clause 3

In respect to Clause 3 (General duties of the parties), the parties were assessed as being largely C-L and P-C for most of the related obligations. Specifically, for clause 3.1, requiring the IP to cooperate in good faith regarding the implementation and execution of the BOA, the IP recognised the need for improvement as identified in the IR reports. Subsequent to the Initial IA Report the IP had developed new internal guidance and protocols to support more open, transparent, pro-active and effective communication amongst themselves, addressing the audit findings and with the aim to improve their compliance in this regard in the future.

Clause 5

The IR confirmed the status for Clause 5 (Protection of BMM properties) was mainly N-C. BMM had not demonstrated sufficient protection of the biodiversity and ecological functioning of the surface areas of the BMM properties (four set-aside areas) through appropriate provisions, restrictions and monitoring mechanisms as contained and/or to be contained in the EMP and/or BMP (Clause 5.1) delineated in the diagram attached as Annex “C” (Clause 5.2) of the BOA and managed and implemented through the EMP and/or BMP (Clause 5.3). This conclusion was based on:

- a. Lack of appropriate documentation to guide protection on set-aside properties;
- b. Absence of monitoring on set-aside areas; and
- c. Exploration on set-aside areas, including DMR’s requirement for the BOA to be amended and/or a new offset agreement to be developed to compensate for the impacts of the exploration activities. BMM set-asides still had exploration activities taking place on Gamsberg South & East and Big Syncline.

Clause 6

In terms of Clause 6 (Declaration of additional land as protected environment and/or nature reserve) the IR confirmed the IP were mainly C-L and P-C. BMM secured three (3) of the Annex B1 Nearby Properties and one (1) of the Annex B2 Nearby Properties between 2015 and 2017 (so only 3 out of 4 of the properties were B1 properties as required by the BOA and in addition the properties were secured late compared to the envisaged BOA timeframes). The IR confirmed BMM had used its best efforts to purchase properties but was unable to convince some farmers to sell their properties. Although BMM had not secured all the required B1 properties, the IR acknowledged considerable portions of sensitive habitat had been secured. In 2017, BMM secured in excess of 12900 Ha. The IP agreed to extend the Second Time Period to 1 April 2024 for BMM to buy the three (3) remaining properties, to secure the remaining portions of sensitive habitats where these existed. At the time of conducting the First IA, BMM was in the process of trying to secure an additional B1 property, which had recently become available for purchase.

Clause 7

In terms of Clause 7, the IR confirmed all properties were formally presented to DENC together, via a letter on 4 October 2017, more than 6 months after two (2) of these properties had been secured (C-L). The properties were declared as the Gamsberg Nature Reserve in terms of section 23 of NEM:PAA (2003) on 5 August 2019 (Provincial Notice 80 in Provincial Gazette 2287 of 5 August 2019), it was done but not as soon as reasonably possible, so it was assessed as C-L. At the time of the First IA, the properties had not yet been transferred to the Northern Cape Department of Roads and Public Works (DRPW). However, the IR concluded BMM had taken all reasonable measures to enable the transfer of the land to the relevant government department to date. The properties had not yet been fenced by BMM, therefore this was recognised as N-C.

Clause 8

Clause 8 (Management Authority) was not assessed as it did not contain compliance obligations for the parties, it was only confirming that DENC would be the Management Authority (MA). Under NEM:PAA (2003), a nature reserve was only one that has been declared as such by notice in the Government Gazette. This occurred on 5 August 2019. Under section 38(2) of NEMPAA, the MEC must assign the management of a nature reserve in writing. The Gazette Notice records that the “Management Authority appointed in terms of section 38(2) – [is the] Northern Cape Department of Environment and Nature Conservation”. Given that assignment of the MA could only take place once the nature reserve was declared, the assignment took place concurrently with the declaration.

Clause 9

Clause 9 (Management Plan) was not assessed, as it was not yet applicable. DENC had an additional 12 months to prepare and submit the Management Plan since the declaration of the nature reserve on 5 August 2019.

Clause 10

In terms of Clause 10 (Financial Provisions), the Gamsberg Nature Reserve Trust was registered, with letters of authority issued on 6 March 2020 in terms of Section 6 (1) of the Trust Property Control Act, 1988 (Act No. 57 of 1988). This was in compliance with the requirement to establish mechanisms to ensure the use of all funds received were “ring-fenced” and traceable to the implementation objective for which they were utilised. The Trust bank account was opened on 20 March 2020. An amount of R 12 050 000.00, as required by Clause 10 of the BOA, was transferred into the Gamsberg Nature Reserve Trust Standard Bank account on 3 April 2020 (it was done as required by BOA but late, so C-L). Such amount did not include two years of vehicle servicing (since the vehicles were not yet in existence) and the provisions and operational costs for accommodation and offices (as there were no staff from DENC needing/using them during the period prior to the Close-out audit). Following the

Initial IA Report, an Action Plan was compiled by the IP regarding payment requirements and timeframes as per Clause 10 of the BOA to ensure any future payments required for additional farms that need to be purchased until 1 April 2024 would be done within the relevant timeframes.

Clause 11

In terms of Clause 11 (Suretyship), despite significant delay in providing the required suretyship, it was eventually provided in a form acceptable to DENC on 6 September 2019 (C).

Clause 12 and 13

Clauses 12 and 13 (Establishment of steering and liaison committee), both committees were established. However, the IR confirmed they did not operate as effectively as envisaged in the BOA (P-C). The IP took into consideration recommendations made by IR in its initial IA report (December 2019) and developed new procedural rules, prior to the Close-out audit, to improve the efficiency of both committees in the future.

Way forward to improve compliance with BOA

The IP recognised key performance areas they needed to focus their efforts for 2020/2021, including addressing the recommendations of the IR, included:

- a. For both parties to improve performance in terms of clause 3, to improve the implementation efficiency of the BOA;
- b. For both IP to resolve the non-compliance challenges in terms of Clause 5 (Management of protected areas);
- c. For BMM to carry on working towards full compliance with Clause 6 (Declaration of additional land as protected environment and/or nature reserve, buying 3 more properties and related obligations in terms of Clause 7 and 10);
- d. For BMM to ensure the fencing of the properties (Clause 7) to be fully implemented and executed;
- e. For DENC to ensure the transfer of properties as soon as reasonably possible (Clause 7);
- f. For DENC to ensure the sound management of the protected area, by effectively developing and implementing the Management Plan (Clause 9).
- g. For both parties to address the financial requirements in terms of Clause 10, regarding the costs for the vehicles' maintenance, the need for offices and accommodation when they become necessary;
- h. For both parties to ensure effective operation of the Gamsberg Nature Reserve Trust; and
- i. For both parties to work on the required amendments of the BOA and EA when and where required, especially based on the recommendations of the IR.
- j. Both IP reiterated their commitment to continuous improvement to ensure compliance with the BOA.

In this respect and to enable the stakeholders to follow progress in terms of compliance with the BOA, both IP have agreed to review the 5-year timeframes for independent audits, which had to be decided by the steering committee.

Both IP reiterated their commitment to continuous improvement to ensure compliance with the BOA.

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Both reports are available on BMM website.