

**NOTICE OF APPEAL IN TERMS OF SECTION 96(1) OF THE MINERAL AND  
PETROLEUM RESOURCES DEVELOPMENT ACT, 2002**

<b>EARTHLIFE AFRICA</b>	<b>FIRST APPELLANT</b>
<b>BIRDLIFE SOUTH AFRICA</b>	<b>SECOND APPELLANT</b>
<b>MINING AND ENVIRONMENTAL JUSTICE NETWORK OF SOUTH AFRICA</b>	<b>THIRD APPELLANT</b>
<b>ENDANGERED WILDLIFE TRUST</b>	<b>FOURTH APPELLANT</b>
<b>FEDERATION FOR A SUSTAINABLE ENVIRONMENT</b>	<b>FIFTH APPELLANT</b>
<b>GROUNDWORK</b>	<b>SIXTH APPELLANT</b>
<b>ASSOCIATION FOR WATER AND RURAL DEVELOPMENT</b>	<b>SEVENTH APPELLANT</b>
<b>BENCH MARKS FOUNDATION</b>	<b>EIGHT APPELLANT</b>
<b>IN RE:</b>	
<b>DIRECTOR-GENERAL: DEPARTMENT OF MINERAL REOURCES</b>	<b>DECISION-MAKER</b>
<b>ATHA-AFRICA VENTURES (PTY) LTD</b>	<b>RIGHT HOLDER</b>

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**NOTICE OF APPEAL AGAINST THE GRANT OF MINING RIGHT MP30/5/1/2/2/1/0069MR  
TO ATHA-AFRICA VENTURES (PTY) LTD IN RESPECT OF PROPERTIES IN THE  
MAGISTERIAL DISTRICT OF WAKKERSTROOM**

**AND**

**REQUEST FOR THE SUSPENSION OF THE GRANT OF THE AFORESAID MINING  
RIGHT PENDING THE OUTCOME OF THE APPEAL**

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## **INTRODUCTION**

1. On 22 January 2014 the Member of the Executive Council for the Department of Economic Development and Tourism, Mpumalanga, gave notice in terms of section 28(1)(a)(i) and (b) of the National Environmental Management: Protected Areas Act, 2003 (“*NEMPAA*”) of the declaration of a number of protected environments, including the Mabola Protected Environment near Wakkerstroom in Mpumalanga (“*the Mabola Protected Environment*”). One of the express motivations for the declaration of the Mabola Protected Environment was to protect this unique, irreplaceable and threatened grassland area from coal mining.
2. On 19 September 2014 the Director-General of the Department of Mineral Resources (“*DMR*”) granted a mining right to Atha-Africa Ventures (Pty) Ltd (“*AAV*”) in terms of section 23(1) of the Mineral and Petroleum Resources Development Act, 2002 (“*MPRDA*”) for the proposed Yzermyn underground coal mine over the properties Goedgevonden 95HT, Kromhoek 93HT, Yzermyn 96HT and Zoetfontein 94 HT (“*the mining right*”).
3. The properties fall within the Mabola Protected Environment and all but two of them fall within the Wakkerstroom Wetlands Area.
4. The mining right was granted notwithstanding:-
  - 4.1. that all available evidence, including a report submitted as part of AAV’s application for environmental authorisation , indicate that the mining will result in unacceptable pollution, ecological degradation or damage to the environment, contrary to the peremptory requirement of section 23(1)(d) of the MPRDA. The report by a consultant appointed by AAV recommended

that the area should be declared “no go” for mining, because of the impacts of mining on biodiversity and on the supply of water to the surface water resources;

4.2. that the mining right is in respect of properties that fall within the Mabola Protected Environment, but that the written permission of the Minister of Environmental Affairs and the Minister of Mineral Resources in terms of section 48(1)(b) of NEMPAA to conduct commercial mining in the Mabola Protected Environment had not been obtained, or sought (as far as the Appellants can establish);

4.3. that the mining right is in respect of properties that:

4.3.1. are classified as of “irreplaceable” biodiversity value in the terrestrial biodiversity assessment contained in the Mpumalanga Biodiversity Conservation Plan of 2006;<sup>1</sup>

4.3.2. form part of the Wakkerstroom/Luneburg Grasslands Threatened Ecosystem, listed as an endangered ecosystem in the National List of Ecosystems that are Threatened and in Need of Protection published in terms of the National Environmental Management: Biodiversity Act, No. 10 of 2004 (“*NEMBA*”);

4.3.3. fall within a National Freshwater Ecosystem Priority Area and a Strategic Water Source Area, determined by the South African National Biodiversity Institute (“*SANBI*”) as part of the National

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<sup>1</sup> Available at <http://bgis.sanbi.org/MBCP/biodiversityAssessment.asp#Wakkerstroom> (last viewed on 22 February 2015) .

Freshwater Ecosystem Project, funded by the Water Research Commission, the Council for Scientific and Industrial Research (“CSIR”), SANBI, the Department of Water Affairs (now the Department of Water and Sanitation) and DEA;

- 4.3.4. are identified in the National Protected Areas Expansion Strategy (2008) as an area that requires urgent legal protection;
- 4.4. that, in August 2011 , a comprehensive application was submitted by the Mpumalanga Tourism and Parks Agency (“MTPA”) to the DMR in terms of section 49 of the MPRDA to declare the Wakkerstroom Wet Grasslands area (“*the WWG area*”) as an area in which mining is prohibited (“*the section 49 application*”);
- 4.5. that the Regional Officer of the DMR visited the WWG area and acknowledged that the section 49 application has merit due to the hydrological and environmental sensitivity of the area;
- 4.6. that the Minister of Mineral Resources advised the National Council of Provinces in May 2012 that steps have been taken to prohibit mining in Wakkerstroom;
- 4.7. the express objection to the granting of the right by the Department of Water and Sanitation;
- 4.8. the express objection to the granting of the right by the MTPA;

- 4.9. the rejection by the Department of Environmental Affairs of AAV's final environmental impact assessment report (EIAR) in its first application for an environmental authorisation (AAV has since submitted a second application for an environmental authorisation to DEA); and
- 4.10. ongoing and repeated objections from civil society organisations, including members of the multi-stakeholder Grassland Programme such as WWF South Africa and BirdLife South Africa.
5. The mining right was granted subject to a number of conditions pertaining to the environment, which conditions are unlawful, vague and unenforceable.
6. Accordingly, the parties hereby appeal against the grant of the mining right in terms of section 96 of the MPRDA, read with Regulation 74 of the Regulations to the MPRDA.
7. The mining right should be set aside in its entirety and, given the extreme environmental sensitivity of the area, the mining right must be suspended pending the outcome of the appeal.

## **THE PARTIES**

8. There are eight appellants.
9. **EARTHLIFE AFRICA JOHANNESBURG** is a non-profit organisation with NPO number 004-159. EarthLife challenges environmental degradation and aims to promote a culture of environmental awareness and sustainable development. It also

seeks to improve the quality of life of vulnerable people in South Africa through assisting civil society to have greater impact on environmental governance by understanding and defending their constitutional rights, specifically those enshrined in section 24 of the Constitution. Its address is 5th Floor Hereengracht Building, 87 De Korte Street, Braamfontein, Johannesburg

10. **BIRDLIFE SOUTH AFRICA** is a non-profit and public benefit organisation registered in terms of the laws of the Republic of South Africa with NPO registration number 001-298 NPO and PBO exemption number 930 004 518, with its head office at 239 Barkston Drive, Blairgowrie, Johannesburg. It is an independent nature conservation organisation with the mission to promote the enjoyment, conservation, study and understanding of wild birds and their habitats. BirdLife South Africa has over 6000 members in 32 bird clubs throughout South Africa. BirdLife South Africa is a partner in the Grasslands Programme, which is a partnership between government, non-governmental organisations and the private sector to mainstream biodiversity into the Grasslands Biome, with the intention to balance biodiversity conservation and development of protected areas in a production landscape.
11. The **MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA (MEJCON-SA)** a non-profit voluntary organisation with its administrative address at c/o Centre for Environmental Rights, 2<sup>nd</sup> Floor, Springfield Studios, 1 Scott Street, Observatory, Cape Town. MEJCON-SA was constituted in October 2012 with the main objective of promoting and defending the environmental and human rights of communities that are both directly and indirectly affected by mining; and to ensure the sustainable use of mineral resources.
12. The **ENDANGERED WILDLIFE TRUST (EWT)** is a non-government non-profit organisation and a public benefit organisation with NPO Number 015-502 and PBO

number 930 001777, EWT has its physical address at Building K2, Ardeer Road, Pinelands Office Park, Modderfontein, Gauteng. EWT is a fully accredited member of the Union of Conservation of Nature and is dedicated to conserving threatened species and ecosystems in southern Africa.

13. **FEDERATION FOR A SUSTAINABLE ENVIRONMENT (FSE)** is a registered non-profit company with registration number 2007/033134/08 and NPO number 062986-NPO. FSE has its physical address at 8 Palladio, corner of Ryk Street and Roux Avenue, Beverley Gardens, Johannesburg. The FSE's main objective is promoting the ecological sustainability of development and the wise use of natural resources in South Africa.
14. **GROUNDWORK** is a non-profit environmental justice service and developmental organisation with NPO number 045-235-NPO. groundWork has its physical address at 6 Raven Street, Pietermaritzburg. groundWork seeks to improve the quality of life of vulnerable people in South Africa, and increasingly in Southern Africa, through assisting civil society to have a greater impact on environmental governance. groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices.
15. The **ASSOCIATION FOR WATER AND RURAL DEVELOPMENT (AWARD)** is a non-profit organisation with company registration Number 98/03011/08 and non-profit organisation registration Number 006 – 821. Its physical address: Number 14 Safari Junction, Hoedspruit, Limpopo. AWARD specialises in participatory, research-based project implementation aimed at addressing issues of sustainability, inequity, and poverty through building natural-resource management competence and sustainable water-based livelihoods. AWARD's vision is to contribute to a more sustainable world and in particular to a democratic South Africa where the principles of equity and

sustainability are upheld and strengthened through building active civil society participation in wise water and biodiversity stewardship, management and governance.

16. The **BENCH MARKS FOUNDATION** is a non-profit, faith-based organisation owned by the churches in South Africa, with its physical address at 6th Floor, Khotso House, 62 Marshall Street, Marshalltown, Johannesburg, South Africa, 2017. The Bench Marks Foundation is committed to providing leadership and advocacy on issues regarding benchmarking of good corporate governance, ethical and socially responsible investment as well as linking people and institutions committed to these ideals. The vision of the Bench Marks Foundation is to promote corporate social responsibility and socially responsible investment.
17. The Appellants are represented by the Centre for Environmental Rights (“*CER*”). CER is a law clinic accredited by the Law Society of the Cape of Good Hope, and operates from premises at Springtime Studios, 1 Scott Road, Observatory, Cape Town.
18. The **DMR** is the government department responsible for, *inter-alia*, processing mining right applications by mining companies. The Minister of Mineral Resources is authorised to grant or refuse mining right applications in terms of section 23(1) of the MPRDA. The Director-General of the DMR is the authorised delegatee of the Minister of Mineral Resources as described in the DMR’s delegation of powers dated 12 May 2004 in terms of section 103(1) and (2) of the MPRDA.
19. **ATHA-AFRICA VENTURES (PTY) LTD (AAV)** is a private company registered in terms of the laws of South Africa, with registration number 2004/020746/07 and with its registered address at 8<sup>th</sup> Floor, Sinosteel Plaza, 159 Rivonia Road, Sandton. The Companies and Intellectual Property Commission records of AAV is attached as “1.”



## **THE MABOLA PROTECTED ENVIRONMENT**

### **The declaration under NEMPAA**

20. The Mabola Protected Environment was declared under section 28 of NEMPAA on 22 January 2014. That Act prescribes the purposes for which a protected environment may be declared and a public consultation process to be followed before a protected environment is declared.
21. Notices of intention to declare the Mabola Protected Environment were published on 10 May 2013 and 9 August 2013 and, after public consultation, the declaration was made on 22 January 2014. A copy of the notice in the Government Gazette giving notice of this declaration is attached, marked “2”(*the Protected Environment notice*).
22. As appears from the Protected Environment notice, the purposes of the declaration, in accordance with the provisions of NEMPAA, are as follows:-
  - 22.1. to enable the owners of the land to take collective action to conserve biodiversity on their land and to seek legal recognition therefor;
  - 22.2. to protect the area if the area is sensitive to development due to its biological diversity, natural characteristics, scenic and landscape value and the provision of environmental goods and services;
  - 22.3. to protect a specific ecosystem and to ensure that the use of natural resources in the area is sustainable.

23. Factors and motivations supporting the declaration of the Mabola Protected Environment to give effect to those purposes are outlined below. Copies of the documents, or relevant extracts, referred to below will be made available upon request.
24. As part of the declaration process, the MTPA submitted a comprehensive motivation in support of the declaration of the Protected Environment dated January 2013. A copy is attached marked “3”. In this motivation, the MTPA summarised the ecological and hydrological importance of the area and argued in favour of land use in the area that is compatible with biodiversity conservation, such as ecotourism and livestock farming. It identified coal mining as a significant risk to the conservation of this critical biodiversity area.

**Wakkerstroom Area identified as requiring urgent and priority protection in government adopted protected area plans**

25. The South African government has a duty in terms of section 24(b)(ii) of the Constitution of the Republic of South Africa, 1996 to protect the environment for the benefit of present and future generations through reasonable legislative and other measures that promote conservation.
26. One such legislative measure was the enactment of NEMPAA. “Reasonable other measures” would include the declaration of protected areas in terms of NEMPAA in accordance with a strategy, or strategies.
27. The Wakkerstroom/Luneburg area is identified in the National Protected Areas Expansion Strategy (2008)(“*the Expansion Strategy*”) as an area that requires urgent legal protection. The Expansion Strategy was commissioned by Department of Environmental Affairs and Tourism (DEAT) (now Department of Environmental

Affairs (DEA)) and endorsed for implementation by statutory role-players including national conservation agency South African National Parks, and provincial conservation agencies such as MTPA.

28. The Expansion Strategy provides that “[t]he Mpumalanga Mesic Grasslands focus area... represents opportunities to conserve poorly protected grassland and bushveld vegetation types as well as whole river reaches and threatened river types. It was also identified as a national priority in the Grasslands systematic biodiversity plan.”<sup>2</sup>
29. It also requires the development and adoption of area specific protected area plans. In terms of that plan, the Mpumalanga Protected Areas Expansion Strategy (2009), the Wakkerstroom/Luneburg area is a “priority 1” area.<sup>3</sup>

**Irreplaceable biodiversity value of the Wakkerstroom area recognised in Mpumalanga government conservation plan**

30. The Mpumalanga Biodiversity Conservation Plan of 2006 (MBCP)<sup>4</sup> was developed by the MTPA and the Mpumalanga Department of Agriculture and Land Administration to guide conservation and land use decisions in support of sustainable development in Mpumalanga.
31. The MBCP is founded on an extensive biodiversity database compiled over the last 21 years by the Province’s conservation biologists.

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<sup>2</sup> Government of South Africa *National Protected Areas Expansion Strategy* (2008) pp.27-28.

<sup>3</sup> Mpumalanga Tourism and Parks Agency *Mpumalanga Protected Areas Expansion Strategy* (2009) pp.20-21.

<sup>4</sup> Available at <http://bgis.sanbi.org/MBCP/biodiversityAssessment.asp> (last viewed on 2 March 2015).

32. The Wakkerstroom area is classified in the MBCP's terrestrial biodiversity assessment<sup>5</sup> (terrestrial assessment) as of "irreplaceable" biodiversity value.

33. Irreplaceable ecosystems, comprising a mere 2.4% of Mpumalanga Province, are described in this plan as follows:

***"Irreplaceable:** Irreplaceable areas are those of highest biodiversity value outside the formal PA network. They support unique biodiversity features, such as endangered species or rare habitat patches that do not occur anywhere else in the province. These features have already been so reduced by loss of natural habitat, that 100% of what remains must be protected to achieve biodiversity targets. All land in this category must be managed for biodiversity conservation to meet the targets set. All development must be strictly controlled in line with biodiversity conservation objectives."* (own underlining).

34. The terrestrial assessment furthermore identifies this area as a "focus area," the importance of conserving which is described as follows:

***"Value:** important sub-catchment; grassland and forest vegetation types; important grassland patch; threatened plant species; golden mole; blue and wattled crane nest sites; endemic grassland birds. **These highveld grasslands are amongst the most threatened.***

***Pressures:** coal mining; timber plantations; agriculture; alien plant invasion"* (own emphasis).

35. The MBCP Aquatic assessment<sup>6</sup> (aquatic assessment) also suggests that the Wakkerstroom / Luneburg area is of irreplaceable biodiversity value.

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<sup>5</sup> Available at <http://bgis.sanbi.org/MBCP/biodiversityAssessment.asp#Wakkerstroom> (last viewed on 22 February 2015) .

<sup>6</sup> Available at <http://bgis.sanbi.org/MBCP/aquaticBiodiversity.asp> (last viewed on 22 February 2015).

**Collective multi-stakeholder action to conserve biodiversity and give legal protection to the Grassland Biome**

36. The multi-stakeholder Grasslands Programme was launched in 2008 as a partnership between government, non-governmental organisations and the private sector to mainstream biodiversity into the Grassland Biome, with the intention of balancing biodiversity conservation and development imperatives in a production landscape. The Programme was catalysed through an \$8.3 m investment from the Global Environment Facility, managed by the United Nations Development Programme and implemented by SANBI and approximately 26 partner organisations.
37. Following the launch of the Grasslands Programme in 2008, SANBI, the MTPA and other partner organisations, including the World Wide Fund for Nature South Africa (WWF), BirdLife South Africa and the Endangered Wildlife Trust, embarked on a process to attain legal protection for the most threatened Grassland Biomes in South Africa. The Wakkerstroom/Luneburg grasslands was identified by the various stakeholders as such a biome.
38. As most of the land comprising this biome is privately owned, it was decided that the declaration of a protected environment under NEMPAA in respect of this area would afford the best protection to that particular Biome.
39. The land owners were consulted about a proposed declaration of a protected environment in respect of their land in a process that lasted roughly five years. By 2013, all of the affected land owners had given their written consent for the declaration of the Mabola Protected Environment.

40. The declaration of the Mabola Protected Environment therefore gives effect to the purpose in section 28(2)(b) of NEMPAA to enable the owners of the land to take collective action to conserve biodiversity on their land and to seek legal recognition therefor.

### **National Freshwater Ecosystem Priority Area and Strategic Water Source Area**

41. The Wakkerstroom area has been classified as a National Freshwater Ecosystem Priority Area (NFEPA) by the South African National Biodiversity Institute (“SANBI”) as part of the National Freshwater Ecosystem Project, funded by the Water Research Commission, the Council for Scientific and Industrial Research (“CSIR”), SANBI, the Department of Water Affairs (now the Department of Water and Sanitation) and DEA.
42. The NFEPA Atlas<sup>7</sup> shows that the Wakkerstroom area is a priority wetland and river ecosystem. River Freshwater Ecosystem Priority Areas are rivers that are still in relatively good ecological condition occurring in healthy catchments and should remain in relatively good condition to contribute to national biodiversity goals and support sustainable use of water resources. The surrounding land and stream network need to be managed in a way that maintains the good condition of the river reach. Similarly, Freshwater Ecosystem Priority Wetlands and Wetland Clusters must be maintained if they are in good ecological condition and rehabilitated to the best attainable ecological condition if they are in a substandard ecological condition.<sup>8</sup>
43. More recently, the Wakkerstroom area has been classified as a “Strategic Water Source Area”<sup>9</sup> (SWSA), which was also determined by the National Freshwater

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<sup>7</sup> Nel, et al *Atlas of Freshwater Ecosystem Priority Areas in South Africa: Maps to Support Sustainable Development of Water Resources* (2011) (NFEPA Atlas) p.20.

<sup>8</sup> NFEPA Atlas p.14.

<sup>9</sup> Available at <http://bgis.sanbi.org/NFEPA/SWSAmap.asp> (last viewed on 22 February 2015) .

Ecosystem Priority Area Project by CSIR through co-funding from a Project for Ecosystem Services funded by the World Bank established Global Environmental Facility and WWF. SWSAs “... **are those areas that supply a disproportionate amount of mean annual runoff to a geographical region of interest. These areas are important because they have the potential to contribute significantly to overall water quality and supply, supporting growth and development needs that are often a far distance away.**” These areas make up 8% of the land area across South Africa, Lesotho and Swaziland, but provide 50% of the water in these countries.

44. Deterioration of water quality and quantity in these areas can have a disproportionately large negative effect on the functioning of downstream ecosystems and the overall sustainability of growth and development in the regions they support.
45. They therefore need to be appropriately managed, by, inter alia, “... *maintaining healthy functioning riparian zones and wetlands; ensuring good agricultural management leads to soil conservation that supports the water cycle; avoiding activities that reduce stream flow (e.g. irrigated agriculture and forestry plantations) and where this is not possible ensuring careful regulation of these activities; minimising ground water abstraction; clearing invasive alien plants; [and] restoring the hydrological functioning of degraded landscapes.*”

**Listed as endangered ecosystem on list published in terms of the National Environmental Management: Biodiversity Act**

46. The Wakkerstroom/Luneburg Grasslands Threatened Ecosystem<sup>10</sup> is listed as an “endangered ecosystem” in the National List of Ecosystems that are Threatened and in Need of Protection published by the Minister of Environmental Affairs in terms of NEMBA in Government Gazette No. 34809 as Notice 1002 on 9 December 2011 (Listed Ecosystems). Endangered ecosystems are “... **ecosystems that have undergone degradation of ecological structure, function or composition as a result of human intervention, although they are not critically endangered ecosystems.**”<sup>11</sup> The purposes of listing ecosystems are to “**conserve a representative sample of all components of biodiversity (genes, species, and ecosystems)... and to ensure the continuing functioning of ecological and evolutionary processes that allow biodiversity to persist over time.**”<sup>12</sup> According to these Regulations, only 2% of the original range of this ecosystem remains<sup>13</sup> and it is marked by “**very high irreplaceability.**”<sup>14</sup> This ecosystem hosts a myriad of threatened or protected species, three threatened vegetation types and important subcatchments, pans and wetlands.<sup>15</sup>

**Important status in local Integrated Development Plans**

**Gert Sibande District Municipality Integrated Development Plan**

47. The area in question falls within the Gert Sibande District Municipality. The Spatial Development Plan (SDP) for this municipality states that the “**sensitive upper**

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<sup>10</sup> National List of Ecosystems that are Threatened and in Need of Protection published in Government Gazette No. 34809 as Notice 1002 on 9 December 2011 (Listed Ecosystems Regulations) p.302.

<sup>11</sup> Ibid p.21.

<sup>12</sup> Ibid p.17.

<sup>13</sup> Ibid p.301.

<sup>14</sup> Ibid p.36

<sup>15</sup> Ibid p.302.



**catchments and wetlands in the Wakkerstroom area”<sup>16</sup> “... must be actively protected, managed and enhanced so as to ensure that they are not degraded by mining, forestry, agricultural and human settlement activities.”<sup>17</sup> According to the SDP, compatible economic activities, including forestry and tourism related activities, must be allowed to continue in these areas.<sup>18</sup>**

**Dr Pixley Ka Isaka Seme Local Municipality Integrated Development Plan – Environmental Management Framework**

48. The area in question also falls within the Dr Pixley Ka Isaka Seme Local Municipality (PKISLM). Under the heading, “Environmental Management Framework” in this municipality’s Integrated Development Plan (IDP),<sup>19</sup> it is stated that the municipal area is **“characterised by many wetlands and pan systems, and is an important water catchment area. Many endemic and threatened grass species occur in the area and of particular significance are the areas around Wakkerstroom and Luneburg... The PKISLM is also strategically important because it contains the sources of three river systems, including an important source of water for the Gauteng region.”<sup>20</sup>**

**CONFLICT WITH STATED NATIONAL GOVERNMENT POLICIES ON MINING IN MPUMALANGA**

49. The decision to grant the mining right is in conflict with stated national government policies on mining in Mpumalanga.

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<sup>16</sup> Available at [http://www.gsibande.gov.za/index.php?option=com\\_docman&Itemid=69](http://www.gsibande.gov.za/index.php?option=com_docman&Itemid=69) (last viewed on 16 March 2015) p.117.

<sup>17</sup> p. 118.

<sup>18</sup> p 118.

<sup>19</sup> Available at <http://cgta.mpg.gov.za/IDP/GertSibande2013-14/Seme2013-14.pdf> (last viewed on 16 March 2015) pp. 328-330.

<sup>20</sup> p.328.

50. In April 2010, the MPTA submitted an application to the DMR in terms of section 49 of the MPRDA to declare the Wakkerstroom Wet Grasslands area as an area in which mining is prohibited (*“the section 49 application”*);
51. On 31 August 2010, the Minister of Mineral Resources imposed a moratorium on the granting of all prospecting rights (GN R768 in GG33511 of 31 August 2010). That moratorium was extended on 28 February 2011 for one month until 15 April 2011, except for Mpumalanga where the moratorium was extended to 30 September 2011 (GN R160 in GG34057 of 28 February 2011 as amended by GN R287 in GG34171 of 31 March 2011).
52. At the time of the extension in February 2011,, Minister of Mineral Resources Susan Shabangu was quoted as telling a media briefing on 8 February 2011 that the reason for not lifting the moratorium in Mpumalanga was that the DMR had “challenges bigger than what we expected, so we will lift eight provinces, and Mpumalanga will continue... for two to three months before we lift the moratorium.” According to the Minister, the biggest challenge in Mpumalanga was environmental matters, “issues of ecology”. “You find sensitive areas where rights have been granted,” she was quoted as saying. “We intend to address that matter, hence we are not going to lift the moratorium, so as to make sure that we respond to the challenges of nature. Unfortunately rights were granted, but we'll have to address those issues.” She said her department was working closely with the department of environmental affairs.”<sup>21</sup>

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<sup>21</sup> <http://www.iol.co.za/business/news/mine-rights-moratorium-to-be-lifted-1.1023216>

53. In August 2011 the MTPA re-submitted the section 49 application. The first application was mislaid. The section 49 application contained a detailed analysis of the importance of the WWG including that: -
- 53.1. the area is critically important from a water production perspective;
  - 53.2. the area is largely classed as irreplaceable by the MBCP and thus crucial for the achievement of provincial and national conservation targets due to the biodiversity features located there;
  - 53.3. the area is located in an endangered ecosystem; and
  - 53.4. the area falls within provincial and national priority Protected Area expansion zones (as reflected on Map 1 of Annexure 11)
54. The DMR's Annual Report for 2011/12 states that "[t]he previous extension of the moratorium in Mpumalanga was due to the complex nature of environmental challenges in that province. It culminated in over 41 Rights that are located in Wakkerstroom and Chrissiesmeer being identified as those belonging to the category of environmentally sensitive areas and consequently action has been taken to prohibit mining within those areas."<sup>22</sup> (our underlining). A copy of the front page of the annual report and the relevant extract are annexed marked "4".
55. This same statement was also relayed by the Minister of Mineral Resources to the National Council of Provinces during her Budget Vote Speech for the DMR on 24 May 2012:<sup>23</sup> **"Honourable members would recall that we had extended the moratorium**

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<sup>22</sup> Department of Mineral Resources *Annual Report 2011/12* p.18

<sup>23</sup> Minister Susan Shabangu Budget Vote Speech 2012 p.3.

in Mpumalanga due to the complex nature of environmental challenges in that province. This culminated in over 41 Rights that are located in Wakkerstroom and Chrissiesmeer being identified as those belonging to the category of environmentally sensitive areas. Consequently we have taken action to prohibit mining within these areas.” A copy of the budget speech is annexed marked “5”.

56. The Regional Officer of the DMR has visited the WWG area and acknowledged that the section 49 application has merit due to the hydrological and environmental sensitivity of the area.

57. As at date hereof, to the Appellants’ knowledge, the Minister of Mineral Resources has not yet made the requested declaration under section 49 of the MPRDA.

#### **OBJECTIONS BY OTHER ORGANS OF STATE TO AAV’S MINING RIGHTS APPLICATION**

##### **Department of Environmental Affairs**

58. On 27 September 2012, AAV’s environmental assessment practitioner (EAP) submitted an application for environmental authorisation for various activities listed in the Listing Notices published under the National Environmental Management Act, 1998 (NEMA) that the mine intends to conduct.

59. On 16 May 2014, the DEA addressed a letter to AAV’s EAP in which it stated that it rejects AAV’s environmental impact assessment report (EIAR). Copies of this letter, attached marked “6,” were also sent to AAV, the Mpumalanga Department of Economic Development, Environment and Tourism **and the DMR.**

60. The most important reasons for the rejection of the EIAR for the purpose of this appeal are:

60.1. AAV failed to propose an alternative layout plan for the mine that would allow the mine to coexist with the sensitive environment; and

60.2. biodiversity concerns:

60.2.1. the EIAR did not consider the status of the ecosystem in terms of the Listed Ecosystems under NEMBA;

60.2.2. unless a ground-truthing study suggests that the proposed mining area is not a critical biodiversity site, as it is classified in terms of the MBCP, the EIAR is fatally flawed;

60.2.3. due to the sensitivity of the aquatic ecosystems, the hydrological importance of the area and the potential significant impact of the proposed mine on these ecosystems mainly through the dewatering of the wetlands and pans in the area, the EIAR “cannot be considered without the identification of downstream water areas, the water users dependent on the water, and a quantification of the dewatering effect on economic activities downstream, including increase in droughts and floods”;

60.2.4. the recommendation in the EIAR that additional ground and surface water studies be undertaken in order to adequately quantify the anticipated impacts of acid mine drainage from the proposed mine on the receiving environment is supported;

60.2.5. the proposed mining area falls within an Important Bird Area which hosts endangered and threatened endemic and other bird species; and

60.2.6. as the mining area borders on Protected Areas to the south and the east and some of the land parcels in the application are part of a declared protected environment, "... **a mining licence (sic) cannot be granted without the express permission of the Minister of Environmental Affairs**" (own emphasis).

61. As far as the appellants are aware, an amended final EIAR was submitted to the DEA in or about October 2014 (after the mining right had already been granted) and, at the time of the lodging of this appeal, AAV's application for environmental authorisation is still pending.

#### **Department of Water Affairs (now Department of Water and Sanitation)**

62. In terms of the former section 40 of the MPRDA, <sup>24</sup> the Minister is enjoined to consult with any State department which administers any law relating to matters affecting the environment when considering an environmental management programme submitted for approval.

63. After having been consulted by the DMR, the Department of Water Affairs (as it was then) (DWA) addressed a letter to the Mpumalanga Regional Manager of the DMR on

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<sup>24</sup> This section has been repealed by the Mineral and Petroleum Resources Development Amendment Act, 2008 (MPRDAA), but it is still applicable for the purposes of AAV's mining right application as the application was lodged prior to the commencement of the MPRDAA.

10 January 2014. The DWA expressly stated in the letter that it **did not support** the proposed mining development. A copy of this letter is attached as “7.”

64. The DWA’s concerns concerning the draft environmental management programme for the proposed Yzermyn Underground Coal Mine included the following:

64.1. the location of the proposed mine in known sensitive habitats and environments as well as adjacent to the KwaMandlangampisi Protected Environment, “[t]he [DWA] notes the site location with great concern”;

64.2. **the impact of the mine on critical biodiversity sites is alarming even after mitigation is considered** (own emphasis);

64.3. the projected impact of the dewatering of wetlands and pans through the abstraction of water from the identified boreholes is concerning;

64.4. the positioning of the adit and the discard dump in wetlands constitutes a “**a risk and a fatal flaw**”;

64.5. “... **no detailed wetland assessment was undertaken in the greater area to be impacted upon by the underground mining and associated cone of depression from the dewatering activities or groundwater contamination plume,**” meaning that the precise impacts on wetlands in the mining area and abutting the mining have not been predicted (this is particularly relevant because of the “conditions” imposed by the DMR when granting the mining right);

- 64.6. the proposed mine will lead to decline in water quality in the area, and is potentially prone to acid mine drainage decant after the closure of the mine;
- 64.7. at least 42% of the proposed mining area can be classified as “wetland;”
- 64.8. mining threatens the existing tourism sector in the area as well as potential growth in ecotourism in the regions;
- 64.9. although the mine will create job opportunities, the majority of these job opportunities will be reserved for skilled workers from outside of the surrounding areas;
- 64.10. “... **the greatest fatal flaw of this site is situated within the National Freshwater Ecosystem Priority Area...**” and that it is predicted that mining will lead to the dewatering of subsurface water resources and the pollution of both surface and subsurface water resources that will “**extend to wetland FEPAs in the near vicinity;**” and
- 64.11. “[a] number of threatened, endangered and vulnerable flora and fauna had proved to be solely dependent on the existence of the wetlands that seem to be threatened by the proposed mining activity” and that even the “... [s]lightest [of] changes in water quality and quantity are detrimental to the health of the aquatic biota.”

#### **Mpumalanga Tourism and Parks Agency**

65. The MTPA is established in terms of the Mpumalanga Tourism and Parks Agency Act of 2005, Act No. 5 of 2005. The entity came into existence on 1 April 2006 following



the merger of the now defunct Mpumalanga Parks Board and Mpumalanga Tourism Authority. Section 3 of the MTPA Act defines the Objective of the Agency as follows: **“To provide for the sustainable management and promotion of tourism and nature conservation in the Province and to ensure the sustainable utilisation of natural resources.”**

66. In pursuing its objects, the Agency shall –

66.1. provide for effective management and conservation of bio-diversity and eco-systems within the Province;

66.2. develop and ensure effective management of protected areas;

66.3. foster, promote and sustainably develop and market tourism;

66.4. promote and create socio-economic growth and transformation within the tourism and conservation industry, thereby creating economic and employment opportunities for previously disadvantaged individuals and local communities in the Province.

67. The MTPA objected to the granting of the mining right. Its letter dated 29 August 2012 is attached marked “8”.

68. The MTPA objected on the bases that:

68.1. the area in which AAV wants to mine is a proposed Protected Area under NEMPAA and that the final stage of the declaration was approaching,

- 68.2. the work of expanding the Protected Areas in Mpumalanga was part of the National Grassland Programme of 2008;
- 68.3. the area is classified as a sensitive area from a biodiversity conservation perspective, is identified as such in the MBCP and was endorsed by the Mpumalanga Provincial Cabinet in 2008;
- 68.4. the properties also form part of the area proposed for exclusion from mining in terms of section 49 of the MPRDA; and
- 68.5. the MTPA therefore objects to any mining activities within the Wakkerstroom Wet Grasslands Area.
69. The MTPA also objected to the granting of environmental authorisation in respect of the proposed Yzermyn mine. Its letter dated 27 October 2014 is attached, marked “9.”
70. In this letter, the MTPA objected on the bases that:
- 70.1. the amended site layout plan, accompanied by additional specialist studies pertaining to the status of the impacted ecosystem and the impact of the mine on wetlands and stream flow, is inadequate, vague and therefore fundamentally flawed;
- 70.2. it is unlawful to mine in a protected environment without the written consent of the Minister of Environmental Affairs and Minister of Mineral Resources;
- 70.3. it is undesirable for coal mining to be conducted in the Mabola Protected Environment;

- 70.4. the environmental impact assessment report (EIAR) accompanying the environmental authorisation application does not make adequate provision for the mitigation of future permanent modification and degradation of groundwater dependent ecosystems such as wetlands and springs in the proposed mining area;
- 70.5. it is not clear from the EIAR what effect subsidence will have on the topography, roads and underground water flows after mining;
- 70.6. the EIAR does not make provision for a sound rehabilitation plan for the forecasted post-mining acid mine drainage decant;
- 70.7. the alternative site layout plan for the discard dumpsite is inappropriate as it is situated in close proximity to a network of wetlands, seepage wetlands and partly within the “1km restricted zone” of a tributary of the Assegaai River, which river is classified as a Critical Biodiversity River in terms of the Mining and Biodiversity Guideline, 2013. (The development of the *Mining and Biodiversity Guideline: Mainstreaming Biodiversity Into The Mining Sector* was initiated by the Chamber of Mines and the South African Mining and Biodiversity Forum (SAMBF), in partnership with DEA and the DMR, and with technical input and coordination by the SANBI Grasslands Programme);
- 70.8. coal is an abundant resource in South Africa and can be mined in less ecologically sensitive areas; and
- 70.9. the impact of the mine, if not adequately mitigated, could have a devastating impact on affected vulnerable and endangered ecosystems.

71. On 3 March 2015, the MTPA submitted comments on the amended final environmental impact assessment report submitted by AAV in furtherance of its application for environmental authorisation to AAV's EAP. These comments are in the form of a letter and is attached marked "10."
72. In this letter the MTPA made the following submissions to DEA:
- 72.1. the declaration of the Mabola Protected Environment is an important step towards conserving an important biodiversity area and therefore for reaching biodiversity goals in Mpumalanga;
  - 72.2. coal mining is not a desired land use in the Mabola Protected Environment, and is not compatible with biodiversity conservation;
  - 72.3. the baseline environmental study is fundamentally flawed;
  - 72.4. the EIAR lacks a detailed cost analysis of the required post-mining water treatment, sourcing water for irrigation and wetland rehabilitation;
  - 72.5. AAV has already contravened the environmental legislative provisions by boring drill holes in wetlands during the prospecting phase; and
  - 72.6. there is no way in which agriculture, conservation, tourism and coal mining can co-exist in the Mabola Protected Environment.

**OBJECTIONS FROM NON-STATE PARTIES TO AAV'S APPLICATION FOR A MINING RIGHT AND ENVIRONMENTAL AUTHORISATION**

73. Strong written objections were raised during the course of the consultation process in respect of the mining right and environmental authorisations by WWF-SA.
74. On 27 September 2012, after receiving the Background Information Document for the proposed Yzermyn Underground Mine, WWF-SA wrote a letter of objection to AAV's EAP to the granting of its client's proposed mining right application in respect of properties that fall within what is now the Mabola Protected Environment. A copy of the letter is attached marked "11".
75. When the objection was lodged, a process was already underway to declare the Mabola Protected Environment.
76. The grounds of objection included:-
- 76.1. the area affected by the mining rights application falls within a key Protected Area expansion zone for WWF's work as the WWF-SA Enkangala Grassland project and SANBI grassland programme in partnership with MTPA;
- 76.2. portions of the area fall within national and provincial Protected Area expansion zones (as depicted on Map 1 of the letter) ;
- 76.3. all of the affected areas are located in an irreplaceable aquatic biodiversity area for Mpumalanga province;

- 76.4. should **any form of coal mining** (own emphasis) be pursued, it will have extremely negative impacts on this important water production area and any form of mining in such an area is considered inappropriate and of severe consequence to sustained ecosystem functioning;
- 76.5. , the MTPA submitted an application to the DMR for the Minister to prohibit mining in this area in the national interest in terms of section 49 of the MPRDA including because the area:
- 76.5.1. is critically important from a water production perspective;
- 76.5.2. is largely classed as irreplaceable by the MBCP and thus crucial for the achievement of provincial and national conservation targets due to the biodiversity features located there;
- 76.5.3. is located in endangered and vulnerable threatened ecosystems (in terms of the Biodiversity Act);
- 76.5.4. falls within provincial and national priority Protected Area expansion zones.
- 76.6. The mining application falls within areas classified as endangered and is classified as largely irreplaceable, highly significant and important and necessary by MTPA in the MBCP. The north western corridor of the mining application falls within an important ecological corridor.
77. On 27 October 2014, WWF-SA addressed a letter to AAV's EAP objecting to the granting of its client's environmental authorisation application under the National

Environmental Management Act, 1998 (NEMA). A copy of the letter is attached, marked “12.”

78. WWF-SA objected on the bases that:

78.1. In a specialist report submitted by Natural Scientific Solutions CC to AAV’s EAP for submission as part of the environmental impact assessment report to the Department of Environmental Affairs (NSS Report), the following is stated in the executive summary:

*“Although the proposed surface infrastructure layout plan will comprise a small portion of the target mining area, the combined Baseline and Impact Assessments (sic) indicate that the [ATHA Yzermyn Coal Project] (sic) is fatally flawed, **and should be NO GO in terms of Biodiversity**. [our emphasis] This is largely because the impact of the proposed underground mining on the supply of water to the surface water resources (due to de-watering activities) and the potential groundwater contamination. These aspects will have significant impact on aquatic and wetland ecosystem functioning and biodiversity in a far greater area than the underground mining area. This aspect of the mining project, alone, is in strong conflict with international, national and provincial legislation, policies and guidelines. A large number of CI [Conservation Important] species were detected, and most habitat in the proposed underground mining and surface infrastructure areas was assigned a Very High or High sensitivity. Most potential impacts of the mining operations had a HIGH overall significance rating, even with mitigation. Moreover, the cumulative impact of numerous mining applications in the study region are of serious concern...”*

- 78.2. the DEA justifiably rejected AAV's initial application for environmental authorisation;
- 78.3. the mitigation measures proposed by AAV's EAP in the revised EIR are inadequate to address the biodiversity issues raised in the NSS Report;
- 78.4. the proposed mine will "... prevent or hinder provincial and national Protected Area expansion targets from being achieved..." if it is allowed to go ahead;
- 78.5. the mining area is characterised by "serious aquatic and hydrological sensitivities that cannot be mitigated;"
- 78.6. the proposed mining project will impact on the Protected Environment as well as two other adjacent Protected Areas, i.e. the Kwamandlangampisi Protected Environment and the Tafelkop Nature Reserve;
- 78.7. the proposed mining area falls within the proposed Wakkerstroom Wet Grassland Section 49 Exclusion Zone;
- 78.8. the ecosystem is classed as "endangered" in the Listed Ecosystems Regulations;
- 78.9. the mining area is classified as irreplaceable in terms of the MBCP's terrestrial biodiversity assessment;
- 78.10. the north-western portion of the proposed mining area falls within an important ecological corridor and may well impact negatively on the functioning of this ecological corridor;



78.11. the granting of the mining right was in clear contravention of mining policy;  
and

78.12. the project is not “in the national interest” as suggested by AAV’s EAP – it is not in the national interest to sacrifice South Africa’s natural heritage, water security and food security for a relatively short-term economic gain.

### **THE GRANT OF THE MINING RIGHT**

79. Despite all the substantive objections from state and non-state bodies described above, the mining right was granted on 19 September 2014. A copy of the letter from the DMR advising AAV that it has been granted mining right is attached marked “13”. In an apparent attempt not to completely ignore environmental considerations in the face of the strong opposition to the granting of the right, a number of conditions were imposed:-

79.1. the granting shall exclude any areas that excludes wetlands;

79.2. surface mining or related activity, as well as erection/installation of surface infrastructure shall be prohibited from taking place in any area that constitute wetlands or is deemed to be a sensitive environment;

79.3. the applicant shall formulate proper mitigation measures relative to the area in consultation with other stakeholders/authorities that administer matters affecting the environment at National and Provincial (Mpumalanga) level;

79.4. a proper plan/map shall be submitted with a clear depiction of such exclusions;

80. Those conditions are fundamentally flawed for the following reasons:-
- 80.1. they are premised upon mitigation of environmental impacts of the proposed mine being possible in circumstances where all the evidence before the DMR was that mining should be prohibited in the area;
  - 80.2. the mining right and its conditions are not subject to the written consent of the Ministers of Environmental Affairs and Mineral Resources being obtained under NEMPAA for mining in the Mabola Protected Area;
  - 80.3. the conditions are irrational and not rationally connected to the purpose for which the right was apparently granted: practically the whole area is “sensitive” – that is precisely why it was declared a protected area under NEMPAA. The sensitivity includes that it is a strategic water resource;
  - 80.4. they are so vague as to be practically unenforceable.

### **LODGING OF THE APPEAL**

81. The CER became aware that a mining right may have been granted to AAV. It took numerous steps to find out whether a mining right had in fact been granted and to obtain further relevant information such as whether the environmental management programme has been approved. Copies of the letters which it sent are attached marked “14,” “15” and “16.”
82. On 23 February 2015, the CER sent a letter to the DEA enquiring whether or not AAV has requested or applied for written permission from the Minister of Environmental Affairs in terms of section 48(1)(b) of NEMPAA and whether or not AAV has been

granted environmental authorisation for the proposed Yzermyn Underground Coal Mine.

83. The response from the DEA, dated 25 February 2015, is attached marked “17”. According to that response, an environmental authorisation has not yet been obtained. It, however, remains unclear whether or not AAV has requested/applied for written permission from the Minister of Environmental Affairs in terms of section 48(1)(b) of NEMPAA.
84. On 3 March 2015, the CER received confirmation of the right granted in the form of a blank email from the DMR to which a copy of a letter from the DMR to AAV was attached. In that letter, the DMR notified AAV that its mining right had been granted subject to conditions (i.e. annexure 13). A copy of this email and letter is attached as “18.”
85. The Appellants all first became aware of the grant of the mining right, as confirmed by the DMR, after the DMR’s correspondence to the CER of 3 March 2015 (i.e. annexure 18).
86. The Appellants reserve their rights to supplement and/or vary this appeal if further relevant information is received.

### **GROUND OF APPEAL**

87. The evidence set out above supports the following grounds of appeal against the granting of a mining right to AAV in respect of the properties:

87.1. all available evidence, including a report submitted as part of AAV's application for environmental authorisation, indicate that the mining will result in unacceptable pollution, ecological degradation or damage to the environment, contrary to the peremptory requirement of section 23(1)(d) of the MPRDA. The report by a consultant appointed by AAV recommended that the area should be declared "no go" for mining, because of the impacts of mining on biodiversity and on the supply of water to the surface water resources;

87.2. that the mining right is in respect of properties that fall within the Mabola Protected Environment, but that the written permission of the Minister of Environmental Affairs and the Minister of Mineral Resources in terms of section 48(1)(b) of NEMPAA to conduct commercial mining in the Mabola Protected Environment had not been obtained, or sought (as far as the Appellants can establish);

87.3. that the mining right is in respect of properties that:

87.3.1. are classified as of "irreplaceable" biodiversity value in the MBCP's terrestrial biodiversity assessment (terrestrial assessment) in the Mpumalanga Biodiversity Conservation Plan of 2006;

87.3.2. form part of the Wakkerstroom/Luneburg Grasslands Threatened Ecosystem, listed as an endangered ecosystem in the National List of Ecosystems that are Threatened and in Need of Protection published in terms of the National Environmental Management: Biodiversity Act, No. 10 of 2004 ("NEMBA");

87.3.3. fall within a National Freshwater Ecosystem Priority Area and a Strategic Water Source Area, determined by the South African National Biodiversity Institute (“SANBI”) as part of the National Freshwater Ecosystem Project, funded by the Water Research Commission, the Council for Scientific and Industrial Research (“CSIR”), SANBI, the Department of Water Affairs (now the Department of Water and Sanitation) and DEA;

87.3.4. are identified in the National Protected Areas Expansion Strategy (2008) as an area that requires urgent legal protection;

87.3.5. that, in 2013, a comprehensive application was submitted by the Mpumalanga Tourism and Parks Agency (“MTPA”), at the invitation of the DMR’s Regional Manager for Mpumalanga, to the Minister of Mineral Resources in terms of section 49 of the MPRDA to declare the Wakkerstroom Wetland Area as an area in which mining is prohibited;

87.3.6. that the Minister of Mineral Resources advised the National Council of Provinces in May 2012 that steps have been taken to prohibit mining in Wakkerstroom;

87.3.7. the express objection to the granting of the right by the Department of Water and Sanitation;

87.3.8. the express objection to the granting of the right by the MTPA;

87.3.9. the rejection by the Department of Environmental Affairs of AAV’s final environmental impact assessment report (EIAR) in its first application

for an environmental authorisation (AAV has since submitted a second application for an environmental authorisation to DEA); and

87.3.10. ongoing and repeated objections from civil society organisations, including members of the multi-stakeholder Grassland Programme such as WWF South Africa and BirdLife South Africa.

88. The mining right was granted subject to a number of conditions pertaining to the environment, which conditions are unlawful, vague and unenforceable.

89. Furthermore, granting the mining right contravenes several National Environmental Management Principles (NEMPs) arising from section 2 of the National Environmental Management Act, 1998 (NEMA). In terms of section 2(b) of NEMA, NEMPs “serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of [NEMA] or any statutory provision concerning the protection of the environment.” The NEMPs could not have been considered by the DMR when it took its decision to grant a mining right to AAV. The following NEMPs are of particular importance to this decision:

89.1. Sustainable development requires the consideration of all relevant factors including the following:<sup>25</sup>

89.1.1. That the disturbance of ecosystem and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;<sup>26</sup>

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<sup>25</sup> Section 2(4)(a) of NEMA.

<sup>26</sup> Section 2(4)(a)(i) of NEMA.

- 89.1.2. That pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;<sup>27</sup> and
- 89.1.3. that a risk-averse and cautious approach is applied, which takes into account the current knowledge about the consequences of decisions and actions;<sup>28</sup>
- 89.2. the social, economic and environmental impacts of the activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment;<sup>29</sup>
- 89.3. decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law;<sup>30</sup>
- 89.4. there must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment;<sup>31</sup>
- 89.5. global and international responsibilities relating to the environment must be discharged in the national interest;<sup>32</sup>

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<sup>27</sup> Section 2(4)(a)(ii) of NEMA.

<sup>28</sup> Section 2(4)(a)(vii) of NEMA.

<sup>29</sup> Section 2(4)(i) of NEMA.

<sup>30</sup> Section 2(4)(k) of NEMA.

<sup>31</sup> Section 2(4)(l) of NEMA.

<sup>32</sup> Section 2(4)(n) of NEMA.

- 89.6. the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage;<sup>33</sup> and
- 89.7. sensitive, vulnerable, highly dynamic or stressed ecosystems such as coastal shores, estuaries, wetlands, and similar systems require attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.<sup>34</sup>
90. It is also in conflict with NEMPAA and the Constitutional duty to promote conservation through reasonable legislative and other measures in a number of respects:-
- 90.1. the grant of the mining right completely undermines the declaration of the Mabola Protected Environment in terms of NEMPAA. The purposes of the declaration of the Mabola Protected Environment will not be able to be achieved if coal mining takes place in the Mabola Protected Environment;
- 90.2. the written permission of the Minister of Environmental Affairs and Mineral Resources have not been obtained in terms of NEMPAA for the grant of the mining right; and
- 90.3. it will result in protected area expansion targets not being met.
91. The grant of the mining right is also in conflict with stated national policy in relation to mining in Mpumalanga. The Minister of Mineral Resources and the DMR have stated

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<sup>33</sup> Section 2(4)(o) of NEMA.

<sup>34</sup> Section 2(4)(r) of NEMA.



publicly (as outlined in paragraphs 52, 54 and 55 above) that steps have been taken to prohibit mining in the highly environmentally sensitive area of Mpumalanga.

92. On the available information placed before the DMR, the requirement in section 23(1)(d) of the MPRDA that a mining right will only be granted if the mining will not result in unacceptable pollution, ecological degradation or damage to the environment could not possibly have been met.
93. In the light of all the applicable environmental legislative provisions, government policies and adopted plans in respect of the Mabola Protected Environment, mining policy with regard to this area, and the environmental factors outlined above, the grant of the mining right is unlawful, irrational and unreasonable and relevant considerations were clearly not taken into account.

#### **APPLICATION FOR THE SUSPENSION OF THE MINING RIGHT**

94. An appeal in terms of section 96(1) of the MPRDA does not suspend the decision being appealed against.
95. Section 96(2) of the MPRDA vests the power in the appeal authority to suspend such a decision pending the outcome of the appeal.
96. The Appellants hereby formally lodge an application for the suspension of AAV's mining right pending the outcome of the appeal.
97. To the extent necessary, the contents of the appeal (together with the annexures) are expressly incorporated into this application for the suspension of AAV's mining right.

98. The evidence which was before the DMR when it granted AAV's mining right overwhelmingly establishes that the properties over which the mining right has been granted are extremely environmentally sensitive and irreplaceable. The properties fall within the Mabola Protected Environment declared as such under NEMPAA and all but two of them fall within the Wakkerstroom Wet Grasslands Area which is the subject of a pending application in terms of section 49 of the MPRDA to prohibit mining in that area.
99. When the mining right was granted to AAV, a number of conditions were imposed which reflect that the DMR acknowledges that the area is environmentally sensitive (as reflected in annexure "13").
100. There will be no irreparable harm to AAV if the mining right is suspended pending the outcome of the appeal. Any harm which it may suffer would be purely financial.
101. In contrast, if AAV commences mining in this extremely environmentally sensitive area pending the outcome of the appeal, there will be irreparable harm and damage. The area is truly unique, irreplaceable and threatened.

## **CONCLUSION**

102. In the circumstances, the grant of the mining right should be set aside in its entirety and suspended pending the outcome of the appeal.

**SIGNED** at **CAPE TOWN** on this the **30<sup>TH</sup>** day of **MARCH 2015** for and on behalf of the appellants

**CENTRE FOR ENVIRONMENTAL RIGHTS**

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**Attention: Messrs Pieter Alberts and Johan Nieman**

Legal services  
Department of Mineral Resources

By courier

**AND TO: DIRECTOR-GENERAL**

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**Reference: Dr Thibedi Ramontja**

By courier

**AND TO: ATHA-AFRICA VENTURES (PTY) LTD**

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By courier