



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

The Honourable Ms NP Mokonyane
Minister of Water and Sanitation
Sedibeng Building
185 Frances Baard Street, Pretoria

and

Mr P Loselo
Chief Director: Legal Services
Department of Water and Sanitation
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185 Francis Baard Street, Pretoria

By email: KhudugaM@dws.gov.za

Your ref: 1/11/1/2016/17MK
Our ref: AAV Appeal
2 March 2017

Dear Honourable Minister and Mr Loselo

APPEAL IN TERMS OF SECTION 148(1) OF THE NATIONAL WATER ACT, 1998 IN RESPECT OF THE WATER-USE LICENCE ISSUED TO ATHA-AFRICA VENTURES (PTY) LTD FOR ITS PROPOSED YZERMYN UNDERGROUND COAL MINE

Representations by the Endangered Wildlife Trust and the Federation for a Sustainable Environment in respect of the petition by Atha-Africa Ventures (Pty) Ltd for the upliftment of the suspension of the water-use licence

This document constitutes the representations of the Endangered Wildlife Trust (“EWT”) and the Federation for a Sustainable Environment (“FSE”) in response to the petition by Atha-Africa Ventures (Pty) Ltd (“Atha”) dated 9 January 2017 (“the petition”) to uplift the suspension of the water-use licence (“WUL”) pending the disposal of the appeal in terms of section 148(2)(b) of the National Water Act, 1998 (“the NWA”).

In these representations the EWT and FSE will address the following pertinent issues:

- A. The purpose of the suspension of WULs pending appeals to the Water Tribunal, and factors to be considered by the Honourable Minister in making her decision on the petition
- B. The Appellants’ reasonable prospects of success in the appeal to the Water Tribunal
- C. Risks to water resources should the Honourable Minister exercise her discretion to uplift the suspension

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D. Atha's submissions in its petition to lift the suspension are flawed

E. The Appellants' motivation for submitting their appeal to the Water Tribunal

A. PURPOSE OF THE SUSPENSION OF WULs PENDING APPEAL TO THE WATER TRIBUNAL, AND FACTORS TO BE CONSIDERED BY THE HONOURABLE MINISTER IN MAKING HER DECISION ON THE PETITION

1. In this section the EWT and FSE set out the purpose of the suspension provided for in section 148(2)(b) of the NWA, and provide reasons why the Honourable Minister should only depart from such suspension in exceptional circumstances.

The purpose of the NWA and the Honourable Minister's obligations thereunder

2. The primary purpose of the NWA is to ensure the protection and sustainable use of and equitable access to water resources.¹

3. The preamble to the NWA recognises that water is a *"scarce and unevenly distributed national resource"*; *"the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users"*; and *"the protection of the quality of water resources is necessary to ensure sustainability of the nation's water resources in the interests of all water users"*.

4. Section 2 of the NWA stipulates that the purpose of the Act is *"to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled"* in ways which take into account factors that include:

4.1. meeting the basic human needs of present and future generations;

4.2. promoting the efficient, sustainable and beneficial use of water in the public interest;

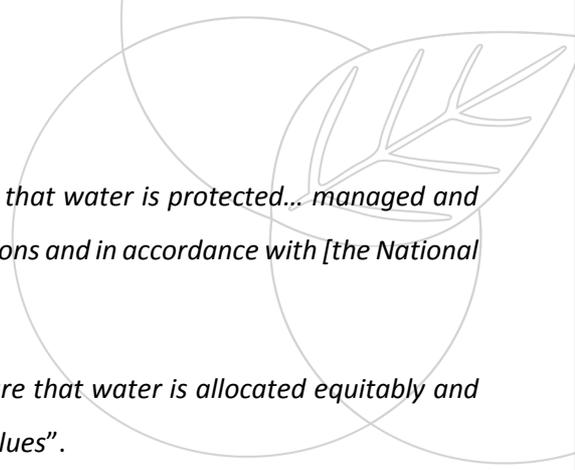
4.3. protecting aquatic and associated ecosystems and their biological diversity; and

4.4. preventing pollution and degradation of water resources.

5. As public trustee of the nation's water resources,² the Minister is charged with giving effect to the NWA.

¹ Section 2 of the NWA

² Section 3 of the NWA

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6. Section 3(1) of the NWA places an obligation on the Minister to “ensure that water is protected... managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with [the National Government’s] constitutional mandate”³.
 7. Section 3(2) provides that the Minister is “ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values”.
 8. These provisions must necessarily inform any decision by the Minister in terms of section 148(2)(b) of the NWA to uplift the suspension of a decision against which an appeal has been lodged in terms of the NWA, because the effect of such decision may have irreversible consequences for water resources and for those who depend on them.
 9. Importantly, the Minister must also have regard in the making of such decision, to all of the relevant environmental management principles of section 2 of the National Environmental Management Act, 1998 (“NEMA”)⁴. These include amongst others that:
 - 9.1. “a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions”⁵; and
 - 9.2. “sensitive, vulnerable, highly dynamic or stressed ecosystems, such as ... wetlands ... require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure”⁶.
 10. As we demonstrate below, both of these considerations are of pertinent application in this case.

The default suspension pending appeal in section 148(2) of the NWA

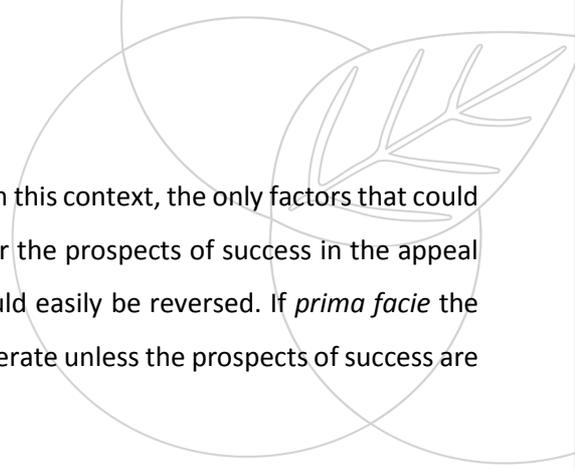
11. In terms of section 148(2) of the NWA, unless the Minister directs otherwise, the lodging of an appeal with the Water Tribunal has the effect of suspending all decisions under the NWA pending disposal of the appeal, save for certain directives aimed at preventing pollution or degradation of water resources or rectifying contraventions of the NWA.
12. The automatic suspension provision in section 148(2) of the NWA is the statutorily ordained default position. The legislature considered that the norm pending an appeal should be suspension. This means that the Minister should be convinced that exceptional circumstances exist to justify departure from the default position. Compelling

³ Including the right to have access to sufficient water in section 27 of the Constitution of the Republic of South Africa, 1996

⁴ In terms of section 2(1) of NEMA

⁵ Section 2(4)(a)(vii) of NEMA

⁶ Section 2(4)(r) of NEMA



reasons would have to exist for the automatic suspension to be uplifted. In this context, the only factors that could reasonably be considered in favour of uplifting a suspension are whether the prospects of success in the appeal are weak, and the potential harm to water resources is negligible or could easily be reversed. If *prima facie* the potential harm to water resources is significant, then suspension must operate unless the prospects of success are very weak.

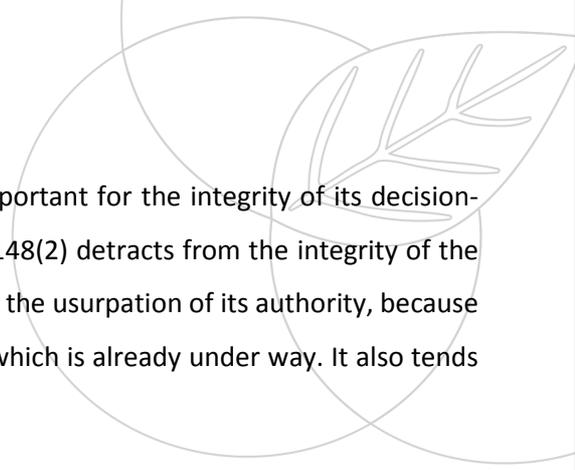
13. The rationale for the automatic suspension provision is similar to that of an interim interdict. Its effect is to ‘freeze’ the position until the appeal authority decides where the right lies. It is aimed at ensuring, as far as it is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief. If the holder of a WUL which is the subject of an appeal were to be allowed to act on the WUL before the appeal has been determined, the appellant’s right to appeal would be rendered nugatory, particularly if the authorised activity has the potential to harm water resources. In the case of the NWA, it is not only the right of the appellant which must be preserved, but the environment itself. The *status quo* must remain until the Water Tribunal has made a decision based on its specialist knowledge and expertise.
14. As set out in more detail below, the risks of harm to water resources should Atha be allowed to proceed despite the pending appeal are significant. The appeal is based on several detailed substantive and procedural grounds which cannot be dismissed out of hand, and the exceptional circumstances required to uplift the suspension of the appeal are therefore not present in this case.
15. Granting Atha’s petition would also set a questionable precedent for the implementation of the NWA in future. This is because such a decision would effectively allow Atha to mine within a Strategic Water Source Area⁷ and declared Protected Environment⁸ situated at the headwaters of the Pongola, the Vaal and the Thukela Rivers, at great risk to water resources. Such a precedent would place the Minister and the DWS in a very difficult position in similar petitions in the future.
16. The NWA establishes the Water Tribunal as an independent body that hears appeals against certain decisions made by various authorities under the Act.⁹ Appeals to the Water Tribunal take the form of a rehearing of the issues placed before the authority that made the decision which is the subject of the appeal.¹⁰ The Water Tribunal is made up of persons with relevant expertise and constitutes an important component of the decision-making processes provided for in the NWA. It is also a body which operates independently of the DWS. The legislature regarded that the Water Tribunal must ordinarily be allowed to make its decisions free of being confronted with

⁷ As determined by the South African National Biodiversity Institute and the World Wide Fund for Nature: South Africa as part of the DWA and DEA National Freshwater Ecosystem Project

⁸ The Mabola Protected Environment, which was declared as such on 22 January 2014 in terms of the National Environmental Management: Protected Areas Act, 2003

⁹ The preamble to Chapter 15 of the NWA

¹⁰ Item 6(3) of Schedule 6 to the NWA



a situation where the water-use activity is already underway. This is important for the integrity of its decision-making process. A departure from the automatic suspension in section 148(2) detracts from the integrity of the decision-making process of the Tribunal and has the potential to result in the usurpation of its authority, because the Tribunal is forced to accept as a *fait accompli* an existing water use which is already under way. It also tends to create an unfair advantage for the party opposing the appeal.

17. In the circumstances of this case, and for reasons set out in detail below, we respectfully submit that it would be wrong for the Minister to conclude either:

17.1. that the merits of the appeal are weak; or

17.2. that, should the appeal be successful, any damage that would have been caused to water resources by virtue of an upliftment of the suspension pending the disposal of the appeal would be negligible or could easily be reversed.

B. APPELLANTS' PROSPECTS OF SUCCESS IN THE APPEAL TO THE WATER TRIBUNAL

Introduction

18. The Appellants submitted a comprehensive appeal on 15 December 2016 against the WUL issued to Atha, based on six separate grounds of appeal. The grounds of appeal are briefly described below in order to enable the Honourable Minister to assess the prospects of success of the appeal in the Water Tribunal. It will become evident to the Minister that the grounds of appeal are substantiated by the available information, and that the prospects of success in the Water Tribunal are strong.

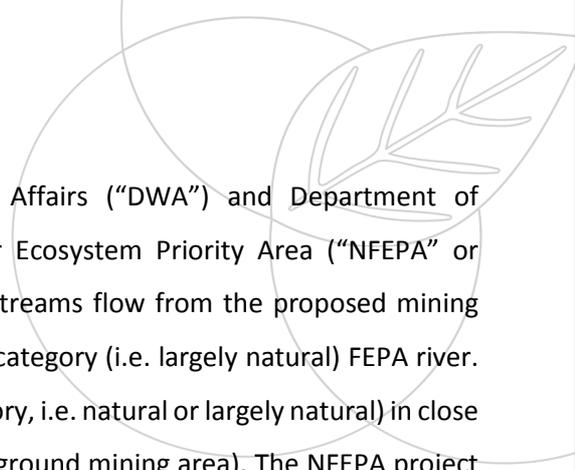
19. The grounds of appeal are also substantiated by three independent scientific reviews of the specialist environmental impact assessments commissioned by Atha in respect of the Yzermyn project, as well as Atha's Environmental Impact Assessment Report ("the EIAR"), environmental authorisation, WUL application and WUL. The most technical and detailed of these is the "*IWULA, IWUL and Specialist Investigation Review of the Yzermyn Colliery Mpumalanga*" dated 18 November 2016 by GCS Water and Environmental Consultants, which is attached marked "A" ("the GCS review"). The GCS review was commissioned by the Appellants in order to understand better the flaws in Atha's WUL application and WUL, and forms an integral part of the appeal.

20. We respectfully submit that because an appeal to the Water Tribunal takes the form of a rehearing, the GCS review and other relevant information which was not before the DG when she took her decision, fall to be considered by the Tribunal at the appeal. In order for the Minister to satisfy herself that the prospects of success on appeal are weak, she would need to dismiss the findings of the scientific reviews, including the GCS review. We respectfully

submit that the Minister is not well placed to do that without the kind of technical input which the Water Tribunal would give.

First ground of appeal

21. The first ground of appeal is that there was inadequate and inaccurate information in Atha's WUL application about the environmental sensitivity, vulnerability and importance of the proposed mining area and its surrounds, and accordingly the DG failed to consider, alternatively adequately consider, the efficient and beneficial use of water in the public interest as required in terms of section 27(1)(c) of the NWA.
22. The Appellants explain in the appeal that the footprint of the proposed mining area (surface infrastructure and underground operations) and the surrounding area are environmentally sensitive, vulnerable and important, from a regional and national perspective. The Appellants list various key features demonstrating the area's environmental sensitivity, vulnerability and importance drawn from, amongst others, the specialist ecological and wetland assessments commissioned by Atha's environmental impact practitioner ("EAP") as part of the environmental impact assessment of the proposed mine, including, amongst others, the following:
 - 22.1. the quality of the surface and groundwater in the area has been monitored and determined to be good (mostly potable quality) with very little anthropogenic impacts;
 - 22.2. the surface and underground areas of the proposed mine coincide with several wetlands;
 - 22.3. the wetlands in the proposed mining area (surface infrastructure and underground operations) are considered to have a Category A Present Ecological State, meaning that they are natural and unmodified. The existing impacts on the wetlands caused by, among other things, alien invasive species and cattle tracks are very limited and minor in extent;
 - 22.4. the wetlands in the proposed mining area (surface infrastructure and underground operations) have a "VERY HIGH" Ecological Importance and Sensitivity, meaning that the wetlands are considered to be ecologically important and sensitive on a national or even an international level;
 - 22.5. the biodiversity of these wetlands is likely to be very sensitive to flow and habitat modifications and the wetlands play a major role in moderating the quantity and quality of water of major rivers;
 - 22.6. the wetlands in the proposed mining area (surface infrastructure and underground operations) provide "HIGH" eco-services in respect of the maintenance of biodiversity, erosion control, groundwater discharges, surface flow attenuation, and tourism and recreation;

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- 22.7. the proposed mine is situated in a Department of Water Affairs (“DWA”) and Department of Environmental Affairs (“DEA”) designated National Freshwater Ecosystem Priority Area (“NFEPA” or “FEPA”) river catchment: numerous headwater and mountain streams flow from the proposed mining area into rivers that drain into the Assegaai river, a B ecological category (i.e. largely natural) FEPA river. Furthermore there are six wetland FEPAs (of A/B ecological category, i.e. natural or largely natural) in close proximity to the proposed mine (some within 1 km of the underground mining area). The NFEPA project resulted in several guidelines one of which is that mining of any form should not be permitted in wetland FEPAs or within 1 km of a wetland/riverine FEPA buffer;
- 22.8. the proposed mine is situated in the Enkangala Drakensberg Strategic Water Source Area, as determined by the South African National Biodiversity Institute and the World Wide Fund for Nature: South Africa (“WWF-SA”) as part of the DWA and DEA National Freshwater Ecosystem Project. The Strategic Water Source Areas are the 8% of South Africa’s land area that provide 50% of our surface water run-off. The following explanatory information by WWF-SA is provided in the appeal: *“water source areas (WSAs) provide a disproportionate amount of run-off to the rest of the catchment ... Downstream users and ecosystems are dependent on the healthy functioning of these areas to sustain good quality water supplies ... Disrupting water supply from these 16 strategic WSAs would effectively turn off the taps to our economy and seriously impact our food and water security”*. WWF-SA further explains that *“water is provided to us by healthy and functioning ecosystems”* and *“the health of our rivers and wetlands is measured by the diversity and health of the species [microbes, plants and animals] we share these resources with”*;
- 22.9. the proposed mining site is situated at the headwaters of the Pongola, the Vaal and the Thukela Rivers;
- 22.10. the underground area to be mined falls within the Mabola Protected Environment which was declared as such on 22 January 2014 in terms of the National Environmental Management: Protected Areas Act, 2003 (“NEMPAA”); and
- 22.11. the motivation for, and purpose of declaring the Mabola Protected Environment specifically included, amongst others, protecting this environmentally sensitive, unique area against coal mining.
23. The Appellants point out that one of the ecological assessments commissioned by Atha’s EAP (the NSS ecological assessment) found that the Yzermyn project:
- “is fatally flawed, and should be NO GO in terms of Biodiversity. This is largely because of the impact of the proposed underground mining on the supply of water to the surface water resources (due to the de-watering activities) and the potential groundwater contamination. These aspects will have a significant impact on aquatic and wetland ecosystem functioning and biodiversity in a far greater area than the underground mining area. These and other aspects of the mining project are in strong conflict with international, national and”*

provincial legislation, policies and guidelines". [own emphasis] We emphasise that this was an assessment commission by Atha's EAP, not by the Appellants.

24. As noted in paragraph 8 above, NEMA requires that *"sensitive, vulnerable, highly dynamic or stressed ecosystems, such as ... wetlands ... require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure"*.
25. The Appellants point out that the Integrated Water and Waste Management Plan ("the IWWMP") and the EIAR, both of which were before the DG when she decided to issue the WUL, contain inadequate – and in some cases blatantly inaccurate – information about the environmental sensitivity, vulnerability and importance of the proposed mining area. The gaps in information and inaccuracies are set out in detail in the appeal with reference to the specialist reports commissioned by Atha's EAP.
26. Accordingly, the Appellants' first ground of appeal is that the DG necessarily failed to adequately take into account the strategic importance of the water resource and its efficient and beneficial use in the public interest as required in terms of section 27(1)(c) of the NWA.

Second ground of appeal

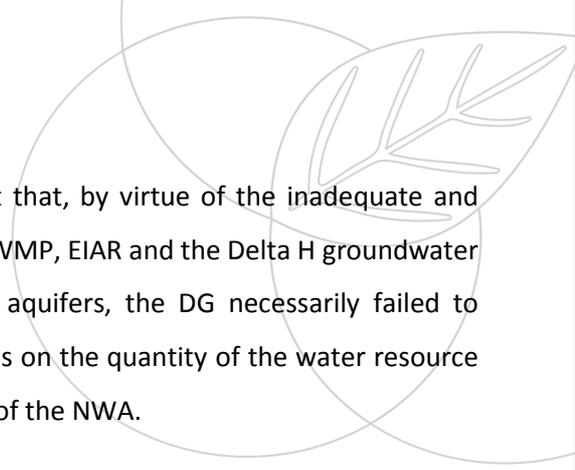
27. The second ground of appeal is that Atha's WUL application contained inadequate and inaccurate information about the risks and consequences posed by the proposed colliery pertaining to:
- 27.1. the dewatering of aquifers;
 - 27.2. the decant of contaminated groundwater and acid mine drainage ("AMD");
 - 27.3. cumulative impacts of the proposed colliery; and
 - 27.4. the impacts of the proposed colliery on downstream water users,
- and accordingly the DG failed to consider, alternatively, adequately consider, the likely effect of the proposed water uses to be authorised on the water resource and on other water users as required in terms of section 27(1)(f) of the NWA.

Dewatering of aquifers

28. The Appellants demonstrate that the primary groundwater (geohydrological) assessment commissioned by Atha's EAP and relied upon in Atha's IWWMP and EIAR (the Delta H groundwater assessment) cannot be relied upon as a basis for granting a WUL. The Delta H groundwater assessment itself recorded that its groundwater model was

of low confidence (see paragraph 38.3 of the appeal and the references there). The low confidence level of the model was confirmed in the GCS review.

29. Referring to the Australian groundwater modelling guidelines (Barnett et al, 2012), GCS explains that a low confidence model (also referred to as a “Class 1 model”) *“has relatively low confidence associated with any predictions and is therefore best suited for managing low-value resources (i.e. few groundwater users with few or low-value groundwater dependent ecosystems) for assessing impacts of low-risk developments or when the modelling objectives are relatively modest”*. The GCS review comments that based on the results of Atha’s specialist studies, as well as various statements in Atha’s IWWMP and EIAR, *“it is evident that the area of and surrounding the proposed mining activity is a moderate to high value groundwater-dependant ecosystem. In light of this, a Class 3 model with a high level of confidence is required before a decision may be taken which will affect the resource”*.
30. The Appellants explain that the low confidence of the findings of this crucial groundwater assessment means that Atha’s assertion in its IWWMP that *“the cone of water drawdown for the shallow aquifer is predicted to be about 8 m at its worst area of impact, due to mine dewatering and could potentially have a limited impact on the wetlands in the mine target area”* is poorly-substantiated and inaccurate. The Appellants also point out that this assertion was relied upon by the DG in her reasons for the decision to issue the WUL.
31. The appeal explains that this statement in Atha’s IWWMP is also at odds with the findings of the comprehensive ecological assessment commissioned by Atha’s EAP (the NSS ecological assessment). The NSS ecological assessment which utilised as modelling parameters, cones of the depression which were substantially similar to those predicted by Delta H, found that:
- 31.1. *“This lowering in groundwater level will have a negative impact on all wetlands fed by the shallow aquifer and the springs within the cone of depression”* (NSS pgs 243 to 246);
- 31.2. *“The loss or deterioration of the wetlands will extend beyond the study area [i.e. the “mine target area”] and will extend into the wetland FEPAs within the mine lease area and the wetland FEPAs and Wetland Clusters in the immediate surrounds ... These systems are also the start of the catchment that feeds the Assegaai River FEPA, and a decline in water input will, therefore, result in a decrease in flow of this river system”* (NSS pg 246); and
- 31.3. *“Due to the HIGH and long-term (if not irreversible) status of this impact in an area far exceeding the study area, the project should be a NO GO”* (NSS pg 253). (NSS recorded this impact as having a “HIGH” significance (NSS’s highest significance rating) both without mitigation and with mitigation (in other words, NSS regarded mitigation as being impossible)).



32. Accordingly, the Appellants' second ground of appeal includes the fact that, by virtue of the inadequate and inaccurate information in Atha's WUL application (particularly Atha's IWWMP, EIAR and the Delta H groundwater assessment) about the risks and consequences of the dewatering of aquifers, the DG necessarily failed to adequately take into account the likely effect of the proposed water uses on the quantity of the water resource and impacts on other water users within the meaning of section 27(1)(f) of the NWA.

The decant of contaminated groundwater and AMD

33. The Appellants highlight in the appeal the following assertion made in Atha's EIAR: *"the scientific evidence indicates no risk on the [water] quality during the 15 year life of mine with limited risk post closure that can effectively be mitigated"*.

34. The Appellants demonstrate with reference to the specialist reports commissioned by Atha's EAP that it is entirely inaccurate to describe the risks to water quality associated with mine closure as being limited. They also point out that the WUL application does not establish that they can be mitigated.

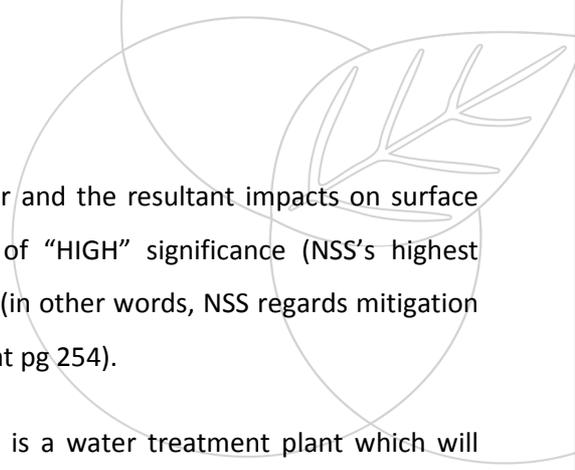
35. The Appellants point out that the risks to water quality after mine closure are described as follows in the various assessments commissioned by Atha's EAP:

35.1. *"...decant from the underground mine voids via the adit and/or unsealed exploration boreholes in the vicinity are [highly] likely to occur"* (Delta H pg 68);

35.2. *"The potential for post-closure decant of water from the underground mine void via the adit and/or unsealed exploration boreholes ... is of particular concern, as this will have a long term effect on surface water quality of not only ... the wetlands within the study area, but also on aquatic resources within the greater catchment with special mention of the Assegaai River"* (the SAS 2014 assessment pg vi);

35.3. *"The current groundwater and surface quality within the region of the study area is good ... Based on the predicted groundwater plume, and the surface water resources, the receiving environment for any surface or groundwater contamination is the Assegaai River"* (which is classified as a B ecological category FEPA river, meaning that water quality inputs must support keeping it in a good condition) (the NSS ecological assessment pg 260 read with the SAS 2014 assessment para 3.1.2 pg 41);

35.4. *"AMD represents the most severe impact of coal mining on water resources. ... The elevated location of the mine will lead to drainage of contaminated water away from the mine. Since the ... mine will be located in the headwaters of the Assegaai River ... it will threaten more than one water resource and thus users ... in the lower catchment"* (the NSS ecological assessment pg 255); and

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- 35.5. The anticipated impact of decant of contaminated groundwater and the resultant impacts on surface water quality, wetlands, aquatic ecology and biodiversity is of “HIGH” significance (NSS’s highest significance rating) both without mitigation and with mitigation (in other words, NSS regards mitigation of this impact as being impossible) (the NSS ecological assessment pg 254).
36. The Appellants explain that the mitigation measure proposed by Atha is a water treatment plant which will discharge treated water into the wetlands. The problem however is that this mitigation measure has not been assessed in any of the specialist reports. Accordingly, there is no way of knowing that it would be effective or what the possible adverse impacts may be.
37. The Appellants’ second ground of appeal accordingly includes the fact that, on account of inadequate and inaccurate information in Atha’s WUL application about the risks and consequences of the decant of contaminated groundwater and AMD, the DG failed adequately to take into account the likely effect of the proposed water uses on the quality of the water resource and impacts on other water users within the meaning of section 27(1)(f) of the NWA.
38. In support of this ground of appeal, the Appellants highlight various conditions in the WUL issued by the DG which demonstrate the DG’s failure to sufficiently consider the risks and consequences pertaining to the decant of contaminated groundwater and AMD. For example, the WUL includes the condition that, *“The Licensee must ensure that the wetlands must not be polluted or destroyed because of the activities occurring within the Yzermyn Underground Coal Mine site”*. As explained in the appeal, this condition is wholly out of touch with:
- 38.1. the findings referred to in paragraphs 35.1 to 35.5 above that the post-closure decant of contaminated water and AMD from the underground mine voids would have a long term negative effect on the surface water quality of the wetlands within the study area and aquatic resources within the greater catchment; and
- 38.2. the fact that there is no specialist assessment of the likely efficacy or impacts of the mitigation measure proposed by Atha, namely a water treatment plant.

Cumulative impacts of the proposed colliery

39. The Appellants also highlight an assertion in Atha’s IWWMP that *“the cumulative impact of the mine and other activities is not considered to be significant”*. The appeal demonstrates however that this broad statement is unsubstantiated and inaccurate. The Appellants explain for example that the IWWMP and EIAR failed to take the Loskop Coal Mine into consideration in assessing cumulative impacts, although this mine is 2km east of the proposed Yzermyn project and falls in the Mabola Protected Environment. According to Brownlie, *‘[t]his omission*

*is serious and negates any conclusions drawn about the severity of cumulative impacts on biodiversity and water resources’.*¹¹

40. The Appellants’ second ground of appeal accordingly includes the fact that the inadequate and inaccurate information in Atha’s WUL application about cumulative impacts means the DG necessarily failed to adequately take into account the likely effect of the proposed water uses on the water resource and impacts on other water users within the meaning of section 27(1)(f) of the NWA.

The impacts of the proposed colliery on downstream water users

41. This ground of appeal asserts that the DG could not have, and accordingly failed to, adequately consider the likely effects of the water uses to be authorised on other water users as required in terms of section 27(1)(f) of the NWA, because of a fundamental lack of information about the anticipated impacts of the proposed colliery on downstream water users. The assessment of downstream water use in Atha’s IWWMP is entirely based on a Downstream Water Usage report prepared by Atha’s EAP itself (despite lacking the necessary expertise and experience of a specialist in this area). Susie Brownlie, an Environmental Scientist and registered EAP, was commissioned by the CER, on behalf of the EWT and FSE, amongst others, to review the Downstream Water Usage report and found it to be inadequate for a number of reasons detailed in the appeal.

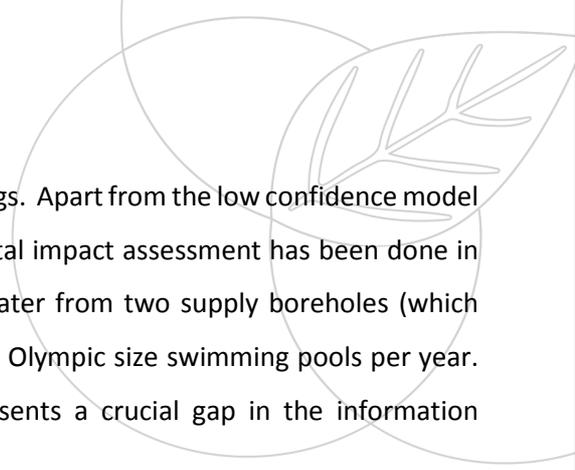
Third ground of appeal

42. The third ground of appeal is that the DG failed to consider, alternatively adequately consider, the “precautionary” environmental management principle in section 2(4)(a)(vii) of NEMA, as required in terms of section 2(1) of NEMA.

43. This ground of appeal deals with the low confidence of the Delta H groundwater assessment commissioned by Atha’s EAP and relied upon in Atha’s IWWMP and EIAR, referred to in paragraphs 28 and 29 above. As explained above, the groundwater assessment has been determined by the authors themselves, as well as by GCS Water and Environmental Consultants to be of a low confidence, meaning that it is inappropriate for assessing impacts and guiding the management of the moderate- to high-value groundwater dependent ecosystem in the mining area and surrounds. The appeal refers to the unequivocal finding of GCS that, due to the low confidence of the groundwater assessment, it “*should not be used in its current state for any decision-making*”.

44. The Appellants explain that an understanding of the groundwater impacts of the proposed colliery is the keystone of any meaningful assessment of the surface water, wetland and biodiversity-related impacts of the proposed colliery. That is because the most significant impacts of the proposed colliery are, and are related to, the dewatering of the groundwater aquifers below and in the vicinity of the proposed mining area and the decant of

¹¹ Brownlie review (Annexure E to the appeal) pg 9



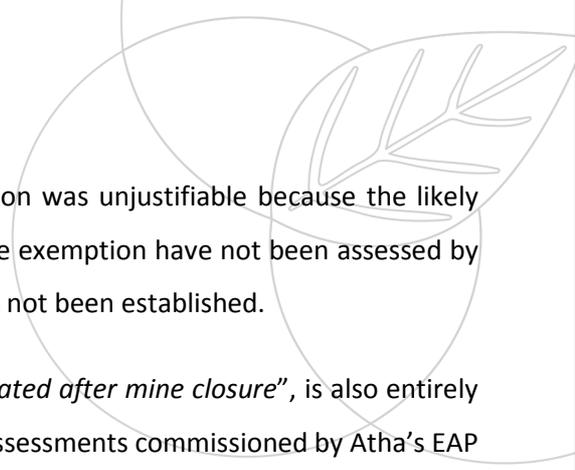
contaminated groundwater and AMD from the underground mine workings. Apart from the low confidence model developed by Delta H, there is the further problem that no environmental impact assessment has been done in relation to the proposed abstraction of up to 56 554 m³/a of groundwater from two supply boreholes (which abstraction has been authorised as part of the WUL). This equates to 22 Olympic size swimming pools per year. The absence of a sufficiently rigorous groundwater assessment represents a crucial gap in the information required to make a decision.

45. The Appellants also point out that the information that *is* contained in the specialist studies commissioned by Atha's EAP regarding the groundwater, surface water, wetland and biodiversity-related impacts of the proposed colliery – which is based on an incomplete understanding of the groundwater impacts of the proposed colliery – indicates a high likelihood that the proposed colliery would have significant environmental impacts on an environmentally sensitive, vulnerable and important area, well beyond the footprint of the proposed mining area.
46. The Appellants' third ground of appeal is accordingly that *“a risk-averse and cautious approach ... which takes into account the limits of current knowledge about the consequences of decisions and actions”*, within the meaning of the precautionary principle, undoubtedly requires that Atha be denied a WUL in respect of the proposed colliery. Accordingly, it is evident that the DG failed to adequately consider the precautionary principle in deciding to issue the WUL.

Fourth ground of appeal

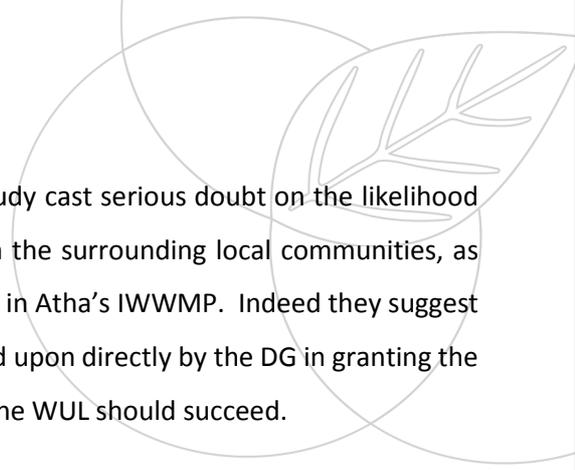
47. The fourth ground of appeal is that the DG's grant of exemption to Atha in terms of the *Regulations on use of Water for Mining and Related Activities aimed at the Protection of Water Resources*¹² (“the NWA Regulations”), was unjustifiable. As part of the WUL, the DG granted Atha exemption from the requirement in regulation 4(b) of the NWA Regulations that no person in control of a mine may carry on any underground mining within a horizontal distance of 100 metres from any watercourse or estuary, in order for Atha to conduct underground mining below various specified wetlands.
48. The Appellants explain that Atha's proposed mitigation measures in respect of the exemption (as stated in its IWWMP), are that *“any significant water ingress into the underground workings will be reduced by grouting”* and *“all impacted wetlands will be rehabilitated after mine closure. As a contingency, the mine will discharge treated (clean) mine water into effected wetlands, should the undermined wetlands experience reduced functionality due to proven mining impacts”*.

¹² Govt. Notice 704 in GG 20119, 4 June 1999

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49. The Appellants' ground of appeal is that the decision to grant exemption was unjustifiable because the likely impacts of the mitigation measures put up by Atha in order to obtain the exemption have not been assessed by any of the specialists commissioned by Atha's EAP, and their efficacy has not been established.
50. The bald statement by Atha that *"all impacted wetlands will be rehabilitated after mine closure"*, is also entirely unsubstantiated, and in fact contradicted by the environmental impact assessments commissioned by Atha's EAP which suggest that meaningful rehabilitation is likely not possible.
51. Accordingly, it is evident that the DG's grant of exemption to Atha was unjustifiable.

Fifth ground of appeal

52. The Appellants' fifth ground of appeal is that Atha's IWWMP and EIAR failed to report objectively, accurately and fully on the possible effects of the proposed colliery on people living in the area. Accordingly the DG was not in a position to, and did not, consider, alternatively adequately consider, the socio-economic impact of the water uses, if authorised, as required in terms of section 27(1)(d) of the NWA.
53. The Appellants explain that the socio-economic specialist study conducted as part of Atha's social and environmental impact assessment of the proposed mine did not form part of the WUL application and various relevant findings thereof were not incorporated into Atha's IWWMP and EIAR. For example, the socio-economic specialist study found that:
- 53.1. as regards employment in the construction phase, *"skilled labour is likely to be sourced from outside the [Area of Direct Influence], either regionally or nationally. In addition, management level staff are likely to be sourced in India (Atha's current mining operations), and brought into manage local operations and transfer skills to local employees/trainees on an on-going basis"*;
- 53.2. *"although there may be a small number of additional unskilled opportunities (e.g. security, community liaisons, general labourers and cleaners) that could arise, there is unlikely to be significant opportunities for the local population to be employed during the construction phase, and the opportunities are likely to be temporary"*; and
- 53.3. in respect of the operational phase of the mine, *"there are low skills levels within the [Area of Direct Influence] and therefore the local population may not meet the labour requirements of the mine ... A small number of opportunities may be sourced from the immediate area; however these are likely to be mainly unskilled, such as security and cleaning staff"*.
54. In contradistinction, the IWWMP says that the mine's *"employees are anticipated to be sourced from the surrounding local communities as far as practicable"*, which statement is repeated in the DG's reasons for issuing



the WUL. The above-quoted findings of the socio-economic specialist study cast serious doubt on the likelihood of any substantial number of the mine's employees being sourced from the surrounding local communities, as well as the reliability, accuracy and objectivity of the aforesaid statement in Atha's IWWMP. Indeed they suggest that the IWWMP contains a misleading statement that was, in turn, relied upon directly by the DG in granting the WUL. On this basis alone, the appeal against the DG's decision to grant the WUL should succeed.

55. The Appellants point out further that while the EIAR reports that eco-tourism and agriculture (subsistence and commercial) contribute materially to job-creation and livelihoods in the area, and that environmental impacts resulting from the proposed mine may result in a decline in eco-tourism and agriculture, the IWWMP and EIAR do not assess with any precision what the likelihood or extent of loss of livelihoods or income may be.
56. These failures of the IWWMP and the EIAR to report objectively, accurately and fully on the possible effects of the proposed colliery on people living in the area mean that the DG could not have adequately considered the socio-economic impact of the water uses, if authorised, as required in terms of section 27(1)(d) of the NWA.

Sixth ground of appeal

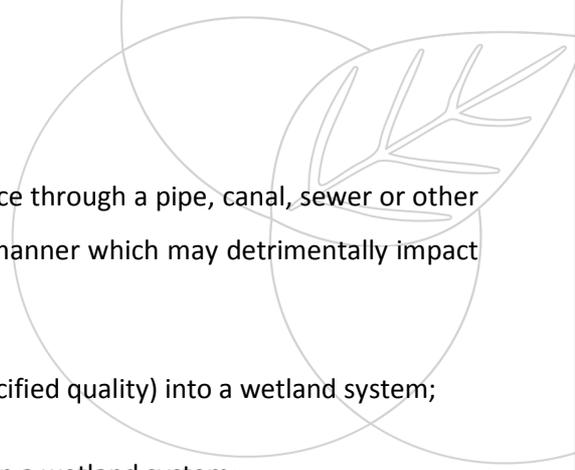
57. The sixth ground of appeal is that the public participation process for the WUL application conducted on behalf of Atha was inadequate and failed to give effect to the right to procedurally fair administrative action in terms of section 33 of the Constitution of the Republic of South Africa, 1996 and sections 3 and 4 of the Promotion of Administrative Justice Act, 2000 ("PAJA").
58. The Appellants explain that Atha failed to conduct a public participation process in respect of additional WUL application documents submitted to the DWS on 10 November 2015 (which had been requested from Atha by the DWS by virtue of being "*either incomplete or missing*" in the original WUL application). The failure to conduct a public participation process in respect of these additional WUL application documents denied interested and affected parties a reasonable opportunity to make representations in respect of the additional documents. Accordingly the WUL was issued without complying with the procedural fairness requirements of the Constitution and PAJA and on this basis alone the decision to issue the WUL amounts to unlawful administrative action.
59. The appeal points out that the additional WUL application documents included, amongst others, application forms for a new water use in terms of section 21(g) of the NWA (disposing of waste in a manner which may detrimentally impact on a water resource) in the form of using pollution control dam ("PCD")-processed water for dust suppression on roads in the mining footprint within 500 metres of various wetland systems on Yzermyn 96 HT: Portion 1. This water use was subsequently authorised by the DWS in the WUL, despite the fact that the environmental assessments which form part of the WUL application do not assess the environmental impacts of this use of the PCD-processed water on local and regional water quality, the wetlands or on biodiversity. This too was a fatal flaw in the process of issuing the WUL.

Conclusion

60. Having regard to the well-substantiated grounds of appeal against the issuing of the WUL, the appellants have a strong prospect of success on appeal.
61. The strong grounds of appeal are a compelling reason to preserve the *status quo* and not allow the water-use to commence before the appeal is considered. As we show below, legal principles and court decisions support this approach.

C. RISKS TO WATER RESOURCES SHOULD THE HONOURABLE MINISTER EXERCISE HER DISCRETION TO UPLIFT THE SUSPENSION AND THE APPEAL IS SUCCESSFUL

62. The risks to water resources of a decision to depart from the preservation of the *status quo* are significant.
63. The WUL authorises the following water uses in respect of the proposed Yzermyn underground coal mine among others:
- 63.1. impeding or diverting the flow of water in a watercourse (section 21(c) of the NWA) and altering the bed, banks, course or characteristics of a watercourse (section 21(i) of the NWA) pursuant to the construction and operation of the mine and associated infrastructure, including, amongst others:
 - 63.1.1. the construction and operation of underground mining activities and voids on various wetland systems;
 - 63.1.2. the partial destruction of a wetland system on Yzermyn 96 HT: Portion 1 pursuant to the construction and operation of a PCD system;
 - 63.1.3. the construction and operation of certain infrastructure within 500 metres of various wetland systems, including an adit; two coal stockpile slabs; and an office block and parking area;
 - 63.1.4. the construction and operation of various pipelines and clean- and dirty-water flo-drains (drainage systems) through and/or within 500 metres of various wetland systems;
 - 63.1.5. the construction and operation of various berms (artificial ridges or embankments) and canals through and within 500 metres of various wetland systems; and
 - 63.1.6. the construction and operation of two access roads through and within 500 metres of various wetland systems;

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- 63.2. discharging waste or water containing waste into a water resource through a pipe, canal, sewer or other conduit (section 21(f) of the NWA) and disposing of waste in a manner which may detrimentally impact on a water resource (section 21(g) of the NWA), including:
- 63.2.1. discharging water containing waste (treated to a specified quality) into a wetland system;
 - 63.2.2. disposing and storing contaminated water in a PCD on a wetland system;
 - 63.2.3. the construction and operation of a sewage treatment plant on a wetland system;
 - 63.2.4. the construction and operation of a wastewater treatment plant within 500 metres of various wetland systems; and
 - 63.2.5. the use of PCD-process water for dust suppression on roads within the mining area within 500 metres of various wetland systems; and
- 63.3. removing, discharging or disposing of water found underground (section 21(j) of the NWA), in particular pumping out groundwater flowing into the adit and underground workings situated on various wetland systems.

64. The appeal sets out extensive evidence that the footprint of the proposed mining area and the surrounding area are environmentally sensitive, vulnerable and important from a regional and national perspective, and that the proposed mining is highly likely to negatively impact water resources in the mining area and beyond. The findings of the comprehensive ecological assessment (the NSS ecological assessment) commissioned by Atha's EAP as part of the environmental impact assessment include the following:

- 64.1. *"Both the cone of depression [dewatering of aquifers] and the groundwater contamination plume extend to the wetland FEPA's in the near vicinity" of the proposed colliery;*
- 64.2. The anticipated impact of dewatering of the aquifers and the resultant impacts on wetlands, aquatic ecology and biodiversity is of "HIGH" significance (NSS's highest significance rating) both without mitigation and with mitigation (in other words, NSS regards mitigation of this impact as being impossible);
- 64.3. The anticipated impact of decant of contaminated groundwater and the resultant impacts on surface water quality, wetlands, aquatic ecology and biodiversity is of "HIGH" significance both without mitigation and with mitigation (in other words, NSS regards mitigation of this impact as being impossible);
- 64.4. *"The loss or deterioration of the wetlands will extend beyond the study area and will extend into the wetland FEPAs within the mine lease area and the wetland FEPAs and Wetland Clusters in the immediate*

surrounds ... These systems are also the start of the catchment that feeds the Assegaai River FEPA, and a decline in water input will, therefore, result in a decrease in flow of this river system”; and

64.5. *“AMD represents the most severe impact of coal mining on water resources. ... The elevated location of the mine will lead to drainage of contaminated water away from the mine. Since the ... mine will be located in the headwaters of the Assegaai River ... it will threaten more than one water resource and thus users ... in the lower catchment.”*

65. Lifting the suspension may well result in permanent damage to this environmentally sensitive, vulnerable and important area, without the Water Tribunal having had the opportunity to consider whether the WUL should have been refused on these grounds.

66. The proposed mining area is particularly significant in the context of the current drought conditions in South Africa, and South Africa’s status as a water scarce country. As already stated, the proposed mine is situated in the Enkangala Drakensberg Strategic Water Source Area, which, as is explained by WWF-SA, *“supplies water to South Africa’s economic hub, Gauteng, and it is also an important source for the agricultural sector in the KwaZulu-Natal and Free State provinces”*.

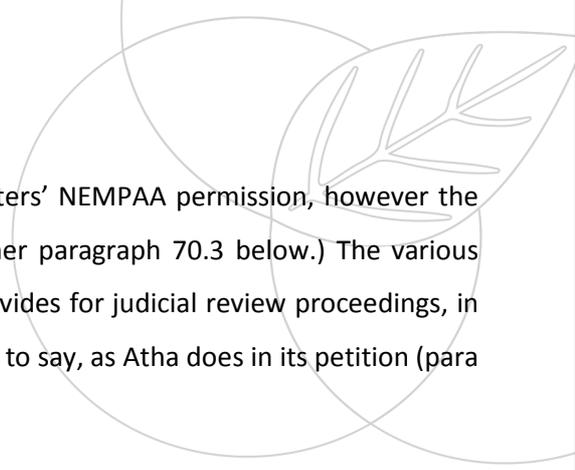
D. ATHA’S SUBMISSIONS IN ITS PETITION TO LIFT THE SUSPENSION ARE FLAWED

67. In its petition, Atha puts forward various considerations that it believes should persuade the Minister to depart from the automatic suspension provided for in section 148(2)(b) of the NWA. For the reasons set out below, these considerations are either irrelevant, or should carry little weight in the decision which Atha has asked the Minister to make.

Other authorisations

68. Atha suggests (in paras 1 to 5 and 12) that the authorisations it has received to date in respect of the proposed Yzermyn mine should persuade the Minister to lift the suspension of its WUL pending the decision of the Water Tribunal. However, it would be contrary to administrative law principles for the Minister to take these considerations, relevant to different statutes with different regulatory purposes, into account in a decision under section 148(2) of the NWA.

69. Moreover in detailing the authorisations it has received to date, Atha has omitted to mention that all but one of the authorisations are subject to internal appeal or judicial review by a coalition of community and civil society organisations comprising EarthLife Africa Johannesburg, BirdLife South Africa, the Mining and Environmental Justice Community Network of South Africa, the Bench Marks Foundation, the Association for Water and Rural Development (AWARD) and groundwork, as well as the EWT and the FSE (“the coalition”). (The one authorisation



that is not yet subject to internal appeal or judicial review is the Ministers' NEMPAA permission, however the coalition intends to take these decisions on judicial review – see further paragraph 70.3 below.) The various applicable statutes provide for internal appeal procedures and PAJA provides for judicial review proceedings, in order to give effect to just decision-making. It is accordingly quite wrong to say, as Atha does in its petition (para 12), that these authorisations have been “ultimately adjudicated”.

70. The circumstances are in fact the following:-

- 70.1. On 19 September 2014 the DG of the Department of Mineral Resources (“DMR”) granted a coal mining right to Atha in terms of the Mineral and Petroleum Resources Development Act, 2002 (“MPRDA”) in respect of the proposed mine. On 1 April 2015 the aforesaid coalition lodged an internal appeal to the Minister of Mineral Resources (“Minerals Minister”) in terms of section 96 of the MPRDA against the DG’s decision. On 14 April 2015 the Minerals Minister withdrew the DG’s grant of the mining right and issued a fresh mining right to Atha in terms of section 103(4)(b) of the MPRDA. On 10 September 2015 the coalition launched a judicial review application in the High Court in terms of PAJA against the granting of the mining right. The principal ground of review is that the Minerals Minister’s decision to grant the mining right was unlawful by virtue of noncompliance with section 23(1)(d) read with section 23(3) of the MPRDA, which requires that an application for a mining right be refused if the mining will result in unacceptable pollution, ecological degradation or damage to the environment. The judicial review is pending. It has not been ultimately adjudicated.
- 70.2. On 7 June 2016 the Chief Director of the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs granted environmental authorisation (“EA”) in terms of NEMA to Atha in respect of the proposed mine. On 19 August 2016 the coalition lodged an appeal in terms of section 43(2) of NEMA with the Member of the Executive Council: Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga against the granting of the EA. In terms of section 43(7) of NEMA the submission of the appeal has suspended the EA pending the determination of the appeal. The appeal is pending. If the appeal is decided against the coalition it will bring judicial review proceedings against both the grant of the EA and the appeal decision. This issue has also not been ultimately adjudicated.
- 70.3. On 20 August 2016 and 21 November 2016, respectively, the Minister of Environmental Affairs (“Environmental Minister”) and the Minerals Minister gave their permission in terms of section 48(1)(b) of NEMPAA for Atha to conduct commercial mining inside the Mabola Protected Environment. The coalition has instructed the CER to institute a judicial review proceedings in the High Court in terms of PAJA for the review and setting aside of the Ministers’ decisions to grant such permission, on the basis that such decisions are unlawful. The application papers are being prepared and the judicial review will be launched within the applicable time limits. This authorisation has also not been ultimately adjudicated.

71. It is incorrect to say, as Atha does (in para 5), that Atha is “*entitled to all the statutory rights as provided for under the ... MPRDA, ... NEMA, ... NWA and the NEMPAA, which includes the right to free and undisturbed access to [Atha’s] Mining Right Area to conduct mining activities in terms of the abovementioned authorisations...*”. It can only assert that it has these rights once they have been ultimately adjudicated.

Commencement of construction activity for the proposed Yzermyn mine, and financial and socioeconomic impacts of the continued suspension

72. Atha alleges in its petition (para 13) that “*the commencement of construction activity for the underground mine entails a very thorough, expensive and detailed project plan and the suspension would derail the entire project timelines and creates avoidable uncertainties with respect to the implementation phase of the project thus putting hundreds of millions of dollars of investments and proposed investments at risk as well as forego much needed jobs and community development projects*”.

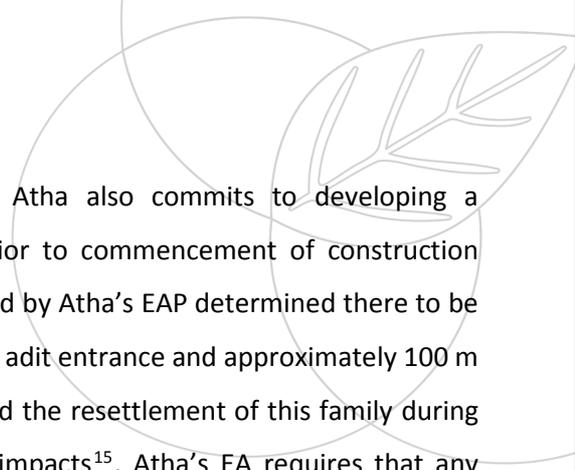
73. Atha fails to mention however that it cannot at this time lawfully commence construction or mining activities in respect of the proposed mine. Apart from the suspension of Atha’s WUL which forms the subject matter of these representations, the following authorisations and actions which are required for lawful commencement are currently outstanding or suspended:

73.1. Atha’s EA is suspended in terms of section 43(7) of NEMA pending the determination of the coalition’s appeal. The suspension of an EA in terms of section 43(7) of NEMA cannot be uplifted pending the disposal of the appeal;

73.2. The properties comprising the footprint of the proposed mining area (surface infrastructure and underground operations) are currently zoned for agriculture. While Atha has purported to bring an application for a change in land use in terms of the Spatial Planning and Land Use Management Act, 2013, the coalition is opposing that application on several grounds, including that there has not yet been any lawful public participation process. Any first-order decision in this regard will also be subject to an internal appeal;

73.3. Condition 3.57 of Atha’s EA requires that Atha obtain a permit from the Mpumalanga Tourism and Parks Agency for the removal or destruction of indigenous protected and endangered plant and animal species; and

73.4. Atha is required to develop a Resettlement Plan and resettle the family who reside within a 1 km radius of the location of the proposed surface infrastructure of the mine prior to commencement of construction activity. (In its environmental and social management programme (‘ESMP’), Atha commits to relocating households situated within a 1 km radius of the location of the proposed surface infrastructure of the



mine, prior to commencement of construction activities¹³. Atha also commits to developing a ‘Resettlement Action Plan’ or ‘Livelihood Restoration Plan’ prior to commencement of construction activities¹⁴. The socio-economic impact assessment commissioned by Atha’s EAP determined there to be one homestead located approximately 500 m from the proposed adit entrance and approximately 100 m from the main access road to the target area, and recommended the resettlement of this family during the preconstruction phase, so as to minimise potential social impacts¹⁵. Atha’s EA requires that any relocations of affected homesteads be addressed in accordance with the Resettlement Plan that is to be compiled as per Atha’s ESMP, which Plan must be informed by the recommendations of the socio-economic impact assessment¹⁶. Accordingly, Atha is required – prior to the commencement of construction activities – to develop a Resettlement Plan and attend to the resettlement of the aforesaid family residing within a 1 km radius of the location of the proposed surface infrastructure of the mine. There is no indication that this has been undertaken to date.)

74. In relation to Atha’s claim that there is a risk posed to *“hundreds of millions of dollars of investments and proposed investments”* by virtue of the derailing of *“a very thorough, expensive and detailed project plan”*, we submit that as a subsidiary of the Atha Group, which by its own account has operated for over 60 years in the mining and minerals industry¹⁷, it can safely be assumed that Atha has taken into account the possibility of delays and factored this into its financial and operational planning for the Yzermyn project.

75. In particular, the Appellants’ appeal and consequent suspension of the WUL could not have come as a surprise to Atha. The aforesaid coalition of community and civil society organisations has been actively asserting its constitutional rights in scrutinising the lawfulness and desirability of the proposed mine since April 2015. Furthermore, in a letter to Atha’s attorneys dated 28 November 2016, the CER informed Atha that, *“our clients have instructed us to lodge an appeal against the grant of the water use licence which we are in the process of compiling. The effect of such an appeal would be to suspend the water use licence pending the outcome of the appeal”* (attached marked **“B”**).

76. As regards Atha’s allegation that the continued suspension of the WUL will *“forego much needed jobs and community development projects”*, reference is made to paragraphs 52 to 55 above.

¹³ Mitigation ref. no. 13.11, pg 764

¹⁴ Mitigation ref. no. 13.14, pg 765

¹⁵ Par. 5.1.3, pg 28

¹⁶ Par. 3.61, pgs 18 and 19

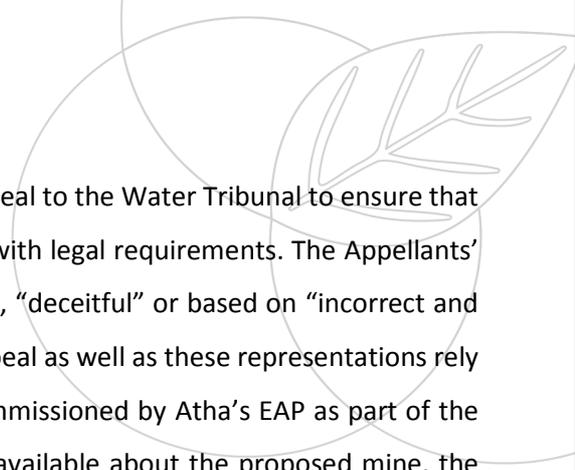
¹⁷ <http://www.athagroup.in/about-us/company-profile/>

Very detailed and comprehensive, scientifically based, assessment processes

77. Atha alleges (in para 11) that *“as a fact, very detailed and comprehensive, scientifically based, assessment processes were undertaken in respect of the Mining Right Application, Environmental Impact Assessment Application, Water Use Licence Application and the request submitted to the respective Ministers of Environment and Mineral Resources to grant permission to undertake mining activities in a Protected Environment”*.
78. We refer in this regard to paragraphs 43 and 44 above, where it is explained that the low confidence of the primary groundwater assessment commissioned by Atha’s EAP (the Delta H groundwater assessment) compromises any meaningful assessment of the impacts of the proposed mine on the groundwater, surface water, wetlands and biodiversity. This groundwater assessment was submitted as part of Atha’s mining right application, environmental impact assessment (EA) application and WUL application. (We do not at this time have the full record of decision in respect of the Ministers’ permission under NEMPAA and accordingly cannot comment on whether the groundwater assessment formed part of it). It can be stated with certainty however that the assessment processes undertaken in respect of Atha’s mining right application, environmental impact assessment (EA) application and WUL application were wholly insufficient and fundamentally flawed.

E. THE APPELLANTS’ MOTIVATION FOR SUBMITTING THEIR APPEAL TO THE WATER TRIBUNAL

79. Atha alleges (in paras 9 to 11), that the Appellants’ appeal is part of a *“blatant misrepresentation by the CER”* who is *“deliberately sensationalizing and disseminating incorrect and or ambiguous information and most importantly of all, employing deliberate delay tactics”*. Atha alleges further that any argument by the CER against the upliftment of the suspension of the WUL *“could be counter-argued as incorrect, deceitful and deliberately fabricated to cause confusion”*, and furthermore that *“the CER’s continuous exertion to assume the role of Interested & Affected Party, Specialist, Regulator and Adjudicator, not only in relation the Yzermyn Project but all proposed mining activities in Mpumalanga Province, is indicative of CER’s apparent indifference to the relevant competent authorities’ statutory mandate to accept, assess statutory required application criteria and to make an objective, fair and informed decision”*.
80. The CER acts on behalf of various communities and civil society organisations in South Africa with the aim of asserting and safeguarding the environmental rights contained in the Constitution. In the WUL appeal, the CER acts on behalf of the EWT and the FSE. The EWT and FSE are public interest, non-profit organisations who work towards achieving responsible management of environmental and water resources. They are not habitual appellants or litigants, nor had they planned and budgeted for the enormous volume of work that has gone into the various appeals (including the WUL appeal), and other legal proceedings relating to the proposed Yzermyn mine.



81. The Appellants are entitled to exercise their rights under the NWA to appeal to the Water Tribunal to ensure that decisions taken under the NWA are properly scrutinised and compliant with legal requirements. The Appellants' appeal, and these representations, are not "sensationalist", "fabricated", "deceitful" or based on "incorrect and or ambiguous information". Rather, as is evident from the above, the appeal as well as these representations rely on the scientific evidence contained in the various specialist studies commissioned by Atha's EAP as part of the environmental impact assessment. To further the scientific knowledge available about the proposed mine, the CER – on behalf of the coalition – commissioned various independent scientific reviews of the specialist studies, as well as Atha's EIAR, IWWMP, environmental authorisation and WUL, including the GCS review. These ought to contribute to the quality of decision-making in respect of the proposed mine.

82. The Appellants also act in the public interest. They seek to provide assistance to the Minister, who in this context acts not only as statutory adjudicator but also as one of the protectors of the environment for present and future generations in terms of section 24 of the Constitution, which reads:

"Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

83. Section 24 must in this context be read with section 7(2) of the Constitution, which requires the state (represented by the Minister in relation to water resources) to *"respect, protect, promote and fulfil the rights in the Bill of Rights"*.

84. The importance of the function of the Minister in protecting South Africa's water resources is highlighted by the recent crippling drought that has been faced in South Africa and continues to be experienced in several parts of it. The need to preserve the sanctity of South Africa's water resources has been made only too clear.

CONCLUSION

85. The EWT and FSE therefore respectfully request that the Honourable Minister dismiss Atha's petition and that the *status quo* be maintained until the matter has been decided by the Water Tribunal.

86. In the event that any form of oral hearing is afforded to Atha in relation to the Honourable Minister's decision on lifting the suspension, whether by way of a meeting with representatives of Atha or otherwise, we respectfully submit that the Appellants are entitled to a similar hearing and request that same be afforded to them before any

decision is taken. We are also willing to elaborate upon any aspect of the above representations that might require elaboration or clarification. If it is of a technical nature, we are happy to provide the assistance of any of the technical experts that have advised our clients.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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