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**DMR REFERENCE 9/2/4/3/21**  
**APPEAL AGAINST MINING RIGHT MP 30/5/1/2/2/505 MR**  
**BIRDLIFE SOUTH AFRICA'S RESPONSE TO WILLIAM PATRICK BOWER PTY LTD'S REPLYING**  
**SUBMISSION**

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1. This responding statement is made in terms of Regulation 74(8) of the Mineral and Petroleum Resources Development Regulations GNR 527 of 23 April 2004 (Regulations), and responds to the replying submission made by William Patrick Bower Pty Ltd (WPB) sent to the Centre for Environmental Rights (CER), the appellant's attorneys, by email on 3 February 2014 (replying submission). This responding statement addresses the following points:
  - 1.1. WPB's replying submission is significantly out of time, and no explanation is provided for this delay. In any event, the Regulations do not give the Minister of Mineral Resources discretion to condone late submission of a reply to an appeal, and the replying submission should therefore be disregarded. The replying submission furthermore does not address those matters that it is required to address in terms of regulation 74(7).
  - 1.2. WPB's replying submission introduces new information which was not before the decision maker when the mining right was granted, and which indicates that the information that was before the decision maker was deficient. The appeal should therefore be upheld.
  - 1.3. The replying submission makes claims which directly contradict the findings of WPB's own environmental consultants, and which are based on a fundamental misunderstanding of the grounds of the appellant's objections to the grant of the mining right.

**Replying submission out of time – no discretion to condone**

2. WPB's replying submission was submitted at least three months after the prescribed deadline for submission in Regulation 74(7). WPB provides no explanation for this delay. In any event, neither the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) nor the Regulations give the Minister of Mineral Resources (Minister) discretion to condone the late submission of a reply in terms of Regulation 74(7). The Minister is therefore obligated to disregard WPB's replying submission.

3. Regulation 74(7) provides (our emphasis):

*“A person contemplated in subregulation 5(b)(ii) must **within 21 days from receipt of the notice of appeal**, submit to the Director-General or the Minister, as the case may be, a replying submission indicating—*

*(a) the extent and nature of his or her rights;*

*(b) how the outcome of the appeal may affect his or her rights; and*

*(c) any other information pertaining to the grounds as set out in the notice of appeal.”*

4. The notice of appeal was submitted to the Minister and to the legal services department of the Department of Mineral Resources (DMR) on 30 July 2013. On 8 October 2013, Marthán Theart of the CER contacted Johan Nieman, director of legal services at the DMR, to request an update on the status of BirdLife South Africa’s appeal. Mr Nieman advised Mr Theart that a copy of the notice of appeal was dispatched to WPB “a long time ago” and that WPB had requested an extended timeframe within which to submit its replying submission. A copy of Mr Theart’s file note is attached hereto as **BLSA1**.

5. Although the exact date on which WPB received a copy of the notice of appeal is unknown to the appellant, it is clear from the CER’s communication with Mr Nieman that WPB had received a copy of the notice of appeal by 8 October 2013. The deadline for the submission of the replying submission was therefore, at the very latest, 29 October 2013. **The replying submission was therefore submitted at least 94 days, or more than three months, out of time.**

6. WPB has also not complied with the requirements of Regulation 74(7), as its replying submission does not indicate the extent and nature of its rights, nor how the outcome of the appeal might affect its rights, as is required by Regulation 74(7).

#### **New information attached to replying submission requires grant of mining right to be set aside**

7. For the reason described above, the Minister must disregard WPB’s replying submission. However, BirdLife South Africa (BirdLife or the appellant), erring on the side of caution, nevertheless replies in this responding statement to the substantive arguments made in the replying submission.

8. WPB’s replying submission contains new information not before the DMR when the mining right was granted, which requires the grant of the mining right to be set aside. The replying submission also contains a number of statements that directly contradict the findings of WPB’s own environmental consultants.

9. The replying submission claims that the appeal submitted by BirdLife against the grant of a mining right to WPB *“is based on outdated information and takes no account of the hydrogeochemical study of September 2013 by Geo Pollution Technologies (Pty) Ltd”*<sup>1</sup>, which study is attached to the replying submission<sup>2</sup>. This study was conducted after the mining right was granted, and after the appeal was noted, and did not form part of WPB’s application for a mining right to the DMR. It is therefore impossible for the appeal to “take account of” this “hydrogeochemical study”. Significantly, this study constitutes new information that was not before the decision maker when the mining right was granted.
10. The “hydrogeochemical study” appended to WPB’s replying submission was conducted by the same company that conducted WPB’s geohydrological report, which formed part of the environmental impact assessment and environmental management report (environmental report) submitted to the DMR as part of WPB’s mining right application. It appears from the replying submission that WPB was directed by the Inkomati Catchment Management Agency to conduct a further study, in connection with WPB’s application for a water use licence, on the basis that WPB had provided “no definite strategy for post-closure impacts on water quality”. WPB’s original geohydrological report, included in the environmental report, did not adequately address post-closure impacts on water quality. BirdLife raised this very point in its appeal (see paragraphs 77- 94 of the appeal, and especially paragraph 93).
11. The new “hydrogeochemical study”, which claims to address “AMD and decant management plan and strategy”<sup>3</sup> is based on a “new, revised layout plan”<sup>4</sup> of the mining area. This “new, revised layout plan” was not before the decision maker when WPB’s mining right was granted, and has therefore not been authorised by the DMR. Regulation 11(1)(b) requires that a mining work programme must contain “a plan contemplated in regulation 2(2), showing the land and mining area to which the application relates”. The mining right was granted on the basis of the “Opencast Layout 2011”, as it is described in the new “hydrogeochemical study”, not on the basis of the “Opencast Layout 2013”, which WPB now proposes implementing. If WPB commences mining operations based on this plan, it will be doing so in breach of the MPRDA. On WPB’s own version, the decision of the DMR to grant the mining right was based on “outdated” and deficient information, and therefore the grant of the mining right should be set aside.

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<sup>1</sup> Replying submission p. 2

<sup>2</sup> “Hydrogeochemical study for the groundwater impact and decant management of the WPB colliery near Belfast, Mpumalanga” compiled by Geo Pollution Technologies – Gauteng (Pty) Ltd for M2 Environmental Connections CC

<sup>3</sup> P 2

<sup>4</sup> P 3

12. Finally, the new “hydrogeochemical study”, to the extent that it is relevant at all, does not address the concerns that formed the basis of BirdLife’s grounds of appeal. The study deals with an “AMD and decant management plan and strategy”. It does not address the fact that the grant of the mining right infringes the constitutional and statutory imperative of cooperative governance and intergovernmental coordination. It does not address the fact that open-cast coal mining in this area would result in unacceptable pollution, ecological degradation and damage to the environment (which is not limited to impact on water resources). It does not address the fact that the grant of the mining right is in breach of the constitutional obligation of the DMR to prevent ecological degradation, promote conservation and secure ecologically sustainable development.
13. The new “hydrogeochemical study” therefore not only fails to address the grounds of appeal, but also constitutes new information that was not before the decision maker when the right was granted. It is therefore clear that the information submitted to the DMR by WPB in its application for a mining right was deficient, and should WPB commence mining operations, it will be on the basis of a mine layout that has not been authorised in terms of its mining right.

#### **Arguments in replying submission contradict findings of WPB’s environmental consultants**

14. WPB now alleges that the properties in relation to which the mining right has been granted constitute *“a completely fragmented habitat which bears no resemblance to any area that could reasonably be regarded as an area of unique and irreplaceable biodiversity”*<sup>5</sup>. This claim directly contradicts the conclusions in WPB’s own environmental report, which recognises that *“the proposed WPB colliery is situated in a sensitive environment”*<sup>6</sup>, that *“wetlands in the area are under constant threat due to mining activities”*<sup>7</sup>, and that the Steenkampsberg Important Bird Area (IBA) *“is of global importance as it hosts various Grassland bird species that are either globally or nationally threatened and have restricted ranges”*, and that *“[t]he impacts of the proposed mining activities ... can result in the loss of individuals of Red Data Species in this area.”*<sup>8</sup>
15. In addition to the concerning fact that WPB’s replying submission makes claims that contradict the findings of the expert reports in its own environmental report, WPB’s arguments relating to the current condition of the land are based on a fundamental misunderstanding of BirdLife’s

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<sup>5</sup> p 4

<sup>6</sup> Environmental report, p7-65

<sup>7</sup> Environmental report, p7-67

<sup>8</sup> Environmental report, Wheeler report, p 22

objection to the grant of the mining right. This objection is based on the cumulative impacts of coal mining on a region which contains irreplaceable biodiversity, and forms the habitat of threatened bird species. It is disingenuous of WPB to suggest that the environmental impact of mining will be limited to the properties on which the mining will take place. As recognised in WPB's environmental report, mining operations on this property will have knock-on effects on surrounding water resources, biodiversity and ecosystems. The preservation of important biodiversity and ecosystems is dependent on an assessment of the "cumulative impact" of development in a particular area, as is made clear in BirdLife's appeal.

16. WPB's replying submission relies on the fact that *"there has previously been coal mining on this very site with evidence of unrehabilitated surface and underground coal mining"*. The existence of these unrehabilitated coal mining sites does not constitute grounds for further mining to take place on the properties. If anything, these sites are evidence of the environmental degradation and water pollution that are the inevitable results of coal mining. Furthermore, section 28 of the National Environmental Management Act 107 of 1998 requires the owner of land on which such pollution or degradation has occurred to *"take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring"*. This duty of care applies regardless of whether the owner of the land caused the pollution or degradation to the environment.
17. Furthermore, these unrehabilitated coal mining sites on the property on which the mining is proposed to take place are already the source of water pollution caused by acid mine drainage<sup>9</sup>. Section 19 of the National Water Act 36 of 1998 (NWA) obliges the owner of land to prevent water pollution on that land. Failure to do so is a criminal offence in terms of section 151(1)(i) and (j) of the NWA.
18. WPB states in its replying submission that *"the area has not been listed as ... an Important Bird Area."* The designation of the proposed mining area as part of the Steenkampsberg Important

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<sup>9</sup> The objection to the grant of the mining right sent to the DMR on 30 August 2011 by Mike Brett, an engineer with expertise in mining geology, states that *"BH's BH3, BH4 and BH12 show signs of being affected by acid mine drainage. From my experience, early signs of contamination from acid mine drainage is reflected by elevated concentrations of heavy metals... It must be noted that affected water, particularly with elevated metal concentrations, is unpalatable for livestock"*.

In Mr Brett's objection of 7 October 2011, he states that *"water was tasted from the borehole, point 029 on Figure 7, from the old underground workings, Point 026 on Figure 7, and Point 032 on Figure 7 all of which had a metallic taste. Farmers reported that livestock will not drink water from the water course shown in red on Figure 7. This clearly indicates that water from the mine workings is polluted and is borne out by the reports submitted. The downstream users are currently affected by polluted mine water. In my opinion, insufficient background sampling and analysis was carried out to assess the current impact from old mine workings on water users."*

Bird Area was fully described in the appeal. Furthermore, WPB's own environmental report recognises the inclusion of the properties within the Steenkampsberg Important Bird Area (see paragraph 14 above).

19. WPB also claims that *"the area has not been listed as an endangered ecosystem"*. As was fully described in BirdLife's appeal, the ecosystem found in the mining area has been identified by the Mpumalanga Tourism and Parks Agency (MTPA) as an endangered ecosystem (the Dullstroom Plateau Grasslands ecosystem). The attached map (**BLSA2**) shows that the ecosystem occurring on the entirety of the proposed mining area is classified as endangered. The attached extract from the List of Ecosystems that are Endangered and in Need of Protection published in terms of the National Environmental Management: Biodiversity Act No. 10 of 2004 shows that the Dullstroom Plateau Grasslands ecosystem is listed as endangered (**BLSA3**). The ecological and hydrological importance of the proposed mining area is illustrated in the attached relevant segments of the terrestrial (**BLSA4**) and freshwater (**BLSA5**) assessment maps from the Mpumalanga Biodiversity Spatial Plan.
20. It is nowhere contended in the notice of appeal that the proposed mining area forms part of a protected environment as contemplated in the National Environmental Management: Protected Areas Act No. 57 of 2003 (NEMPAA).
21. BirdLife has never disputed the fact that parts of the properties on which the proposed mining would take place are degraded. WPB's reliance on the fact that the land in question is not "pristine" as a basis for arguing that coal mining is therefore an appropriate land use for the properties is misleading, and based on a fundamental misunderstanding of the cumulative impact of mining on biodiversity conservation. The endangered ecosystem occurring in the proposed mining area is already under pressure from land uses such as agriculture and forestry, and mining will significantly increase the pressure on this ecosystem, regardless of mitigation. The purpose of declaring a protected environment in respect of the Greater Lakenvlei area will be to ensure that current land practices are conducted sustainably and that degraded land in the area is rehabilitated where feasible.<sup>10</sup> Coal mining is not compatible with the conservation of

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<sup>10</sup> Section 29(2) of NEMPAA provides that a protected environment may be declared to "...

- (b) *to enable owners of land to take collective action to conserve biodiversity on their land and to seek legal recognition therefor;*
- (c) *to protect the area if the area is sensitive to development due to its –*
  - (i) *biological diversity;*
  - (ii) *natural characteristics...;*
  - (v) *provision of environmental goods and services...;*
- (e) *to ensure that the use of natural resources in the area is sustainable..."*

biodiversity and the inevitable damage to the environment caused by it will result in the irreparable destruction of irreplaceable ecosystems. The effects of coal mining are furthermore not confined to the mining area. Water, dust and noise pollution, for example, affect surrounding areas as well.

22. WPB's unprofessional, unfounded and defamatory statement in paragraph 11 that *"Dr Lötter's arguments are... based on nothing but emotive generalisations and speculative predictions with nothing factual in support thereof"* is briefly addressed here. Dr Lötter is the acting manager for biodiversity planning at the Mpumalanga Tourism and Parks Agency. The MTPA is an organ of the South African Government, tasked with providing *"for the management and promotion of responsible tourism and nature conservation in the province and to ensure sustainable utilisation of natural resources for the benefit of everyone in the province"*. The MTPA and the Department of Agriculture and Land Administration have jointly developed the Mpumalanga Biodiversity Conservation Plan (MBCP), on which Dr Lötter's arguments are based. The Mpumalanga Biodiversity Conservation Plan Handbook describes the MBCP as follows:

*"The project has been funded by the Development Bank of Southern Africa and widely supported from outside the Province by planners and scientists from the South African National Biodiversity Institute (SANBI), and from other provinces, universities and research institutes. The MBCP takes its mandate from the South African Constitution, the National Biodiversity Act (10 of 2004) and the MTPA Act 10 of 1998... The MBCP is founded on an extensive biodiversity database compiled over the last 21 years by the Province's conservation biologists. These detailed records, together with the latest mapping and remote sensing data on vegetation, land use and water resources, have been combined and subjected to sophisticated analyses. The science on which the MBCP is based is the best available and the data, despite having gaps and limitations, is also the best there is."*<sup>11</sup>

23. WPB's improper dismissal of Dr Lötter's submission to the DMR clearly stems from the fact that it is unable to refute Dr Lötter's arguments on any scientific grounds.

#### **WPB's contention that the appeal should be dismissed for being out of time**

24. WPB asserts that the appeal should be dismissed for being out of time. BirdLife's reasons for late submission of its appeal are fully explained in paragraphs 130 to 140 of its appeal. BirdLife was advised by the Regional Manager that the mining right had been granted to WPB by the

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<sup>11</sup> Mpumalanga Biodiversity Conservation Plan Handbook p vii

Minister. As no internal appeal lies against a decision of the Minister, it was incumbent on BirdLife to establish who the decision maker was, and the exchange of correspondence detailed in BirdLife's appeal was necessary. BirdLife furthermore properly made an application for condonation, on good cause, in its appeal.

#### **WPB's contention that the appellant has no locus standi**

25. WPB asserts that BirdLife has no *locus standi* to appeal the grant of the mining right. In terms of section 96(1) of the MPRDA, "*any person whose rights or legitimate expectations have been materially and adversely affected or is aggrieved by an administrative decision*" may lodge an appeal against that decision.
26. The Constitution of the Republic of South Africa affords every South African the right to an environment that is protected for the benefit of future and present generations. BirdLife's objectives include the conservation of the Steenkampsberg Important Bird Area, of which the properties over which the mining right has been granted form a part, and therefore BirdLife's rights have been adversely affected by the decision to grant a mining right to WPB.
27. It should further be noted that in registering BirdLife as an interested and affected party in the mining right application process, WPB clearly recognised BirdLife's rights and interests in this application.

#### **BIRDLIFE'S COMPLIANCE WITH THE REGULATIONS**

28. A copy of the replying submission was sent by WPB's attorneys, Van Zyl Le Roux Inc., to the appellant's attorneys, the CER, by email. The CER received a copy of the replying submission on 3 February 2014. The email to which the replying submission is attached is appended hereto, marked **BLSA6**.
29. Regulation 74(8) of the Regulations provides that the appellant must lodge a responding statement to the replying submission within 21 days of receiving the replying submission. i.e. by 24 February 2014. It is therefore respectfully submitted that the responding submission complies with the Regulations.

#### **CONCLUSION**

30. The failure of the appellant to respond to each and every allegation made in the replying submission must not be construed as an admission of the allegations not responded to. The

appellant reserves its right to respond to such allegations at a later stage should the appellant deem it necessary to do so.

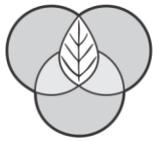
**Centre for Environmental Rights**  
Attorneys for the Appellant

per: 

**T Davies**  
**Attorney**  
Direct email: [tdavies@cer.org.za](mailto:tdavies@cer.org.za)

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**SIGNED** at **CAPE TOWN** on this the **24th** day of **February 2014** for and on behalf of Birdlife South Africa



## Centre *for* Environmental Rights

Advancing Environmental Rights in South Africa

### File Note

Case ref: CER 44.1 BirdLife

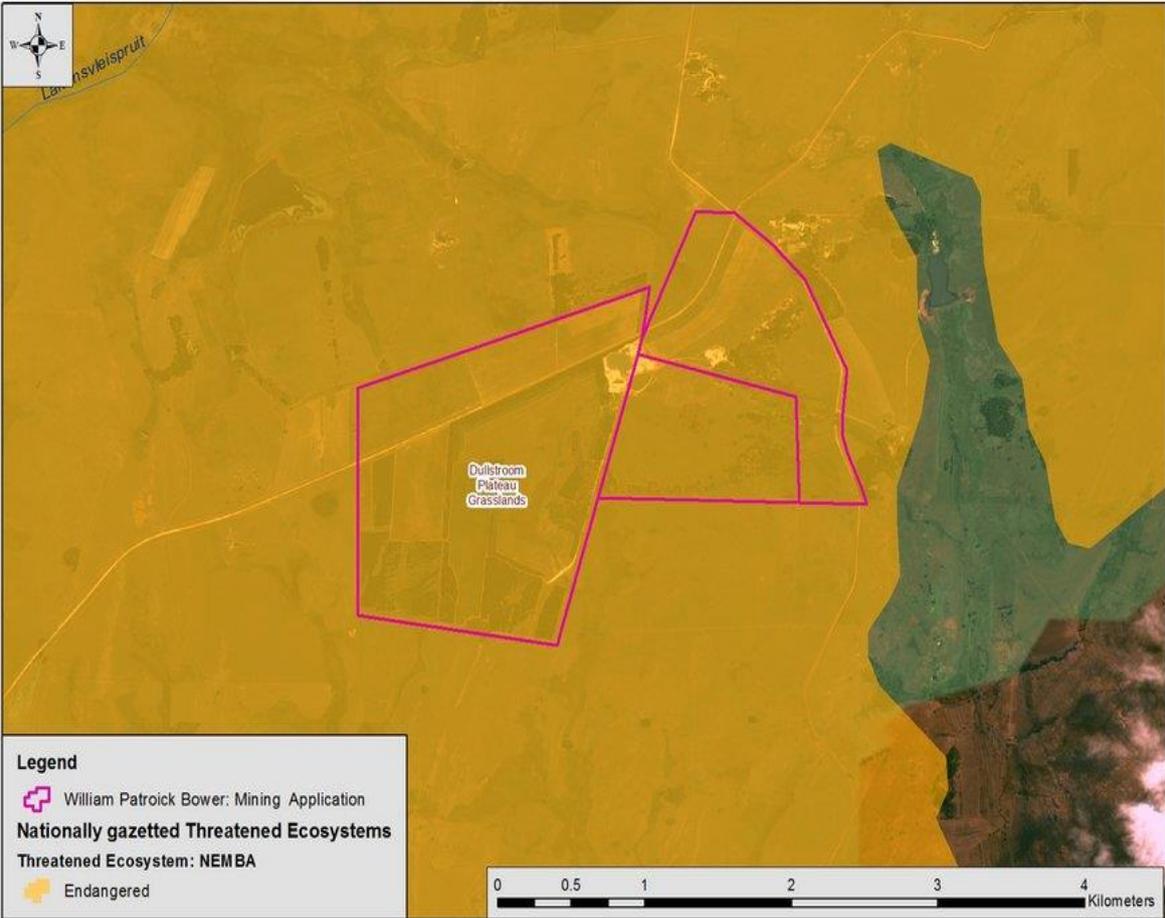
Note by: Marthán Theart

Date: 8 October 2013

#### **Phone call to Johan Nieman re: status of appeal**

1. Many appeals being dealt with simultaneously and they are therefore a bit overwhelmed.
2. Copies of this appeal were sent to the relevant parties “a long time ago.”
3. Region (Regional Manager) has not yet responded – he will follow up today
4. One of the “appellants” (he means parties), WPB, asked for extended time to reply

# BLSA2



# BLSA3

**GN 1002 of 9 December 2011: National list of ecosystems that are threatened and in need of protection**

**(Government Gazette No. 34809)**

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

I, Bomo Edith Edna Molewa, Minister of Water and Environmental Affairs, hereby publish, in terms of section 52 (1) (a) of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004), a national list of ecosystems that are threatened and in need of protection, in [the Schedule](#) hereto.

**(Signed)**

**BOMO EDITH EDNA MOLEWA**

**MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS**

**Table 3:**

**Summary of listed ecosystems, including reference numbers, divided into critically endangered, endangered and vulnerable ecosystems**

<i>No.</i>	<i>Ecosystem</i>	<i>Biome</i>	<i>Province</i>	<i>Criterion</i>
<b>Endangered (EN)</b>				
69	Dullstroom Plateau Grasslands (MP 4)	Grassland/Forest	Mpumalanga	F

## 69. Dullstroom Plateau Grasslands (MP 4)

Reference number	MP 4
Listed under Criterion	F
Biome	Grassland and Forest
Province	Mpumalanga
Municipalities	Highlands LM and Thaba Chweu LM
Original area of ecosystem	114 000 ha
Remaining natural area of ecosystem (%)	85%
Proportion of ecosystem protected	5% of original area
Known number of species of special concern	33 threatened or endemic plant and animal species including those listed below

### Geographical location

Grassland plateau occurring between Die Berg in the north and Belfast in the south (2530AA, 2530AC, 2530AD, and 2530CA). Ecosystem delineated by breeding and feeding habitat for cranes and Rudd's Lark. Ecosystem redefined using geology and landtypes.

### Description

Key biodiversity features include five mammal species for example Robust Golden Mole, Rough-haired Golden Mole, Cape Molerat, Oribi and Welwitch's Hairy Bat; eight bird species including Blue Crane, Wattle Crane, Grey Crowned Crane, Blue Korhaan, Southern Bald Ibis, White-winged Flufftail, Yellowbreasted Pipit and Rudd's Lark; one amphibian, *Bufo gariensis nubicolus*; twenty plant species for example *Eucomis vandermerwei*, *Gladiolus cataractarum* *Gladiolus malvinus*, *Nerine gracilis*, *Streptocarpus denticulatus* and *Watsonia occulta*; and two vegetation types including the Steenkampsberg Montane Grassland and Dry Afromontane Forest. The ecosystem forms part of the



# BLSA4



# BLSA5



## Marthán Theart

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**From:** Tracey Davies  
**Sent:** 03 February 2014 03:56 PM  
**To:** Marthán Theart; d.zoekop@lando.co.za  
**Subject:** FW: APPEAL - WILLIAM PATRICK BOWER (PTY) LTD / BIRDLIFE - RESPONSE FYA  
**Attachments:** 20140203132051790.pdf

-----Original Message-----

From: Julene Westraad [<mailto:julene@vzlr.co.za>]  
Sent: 03 February 2014 02:27 PM  
To: Tracey Davies  
Subject: APPEAL - WILLIAM PATRICK BOWER (PTY) LTD / BIRDLIFE - RESPONSE FYA

Julene Westraad  
Secretary to Braam van den Berg

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