

**The Minister of Mineral Resources
of the Republic of South Africa
Department of Mineral Resources
Travenna Campus
Building 2C
Corner Meintjies Street and Francis Baard Streets
Sunnyside
Pretoria**

For attention: Director: Legal Services

30 July 2013

Dear Minister

NOTICE OF APPEAL AGAINST THE GRANT OF MINING RIGHT MP 30/5/1/2/2/505 MR TO WILLIAM PATRICK BOWER (PTY) LTD IN RESPECT OF PORTIONS 6 & 23 OF THE FARM GROENVLEI 353JT AND PORTION 12 OF THE FARM LAKENVLEI 355JT IN THE MAGISTERIAL DISTRICT OF BELFAST, MPUMALANGA PROVINCE.

REQUEST FOR SUSPENSION OF THE AFORESAID MINING RIGHT PENDING THE OUTCOME OF THIS APPEAL

INTRODUCTION

1. This document constitutes a notice of appeal in terms of section 96 of the Mineral and Petroleum Resources Development Act 28 of 2002 (“the MPRDA”) read with regulation 74 of the regulations to the MPRDA.
2. The appeal is directed against the decision of the Director-General of the Department of Mineral Resources (“the Director-General”) to grant a mining right over portions 6 and 23 of the farm Groenvlei 353 JT and portion 12 of the farm Lakenvlei 355JT in the magisterial district of Belfast, Mpumalanga Province (“the properties”) to William Patrick Bower (Pty) Ltd.

3. The appellant, BirdLife South Africa, seeks to have the Director-General's decision set aside by the Minister and for it to be suspended pending the finalisation of this appeal.

4. It is respectfully submitted that the Director-General erred in granting a mining right to William Patrick Bower (Pty) Ltd:

4.1. firstly, because the proposed mining on the properties infringes the constitutional and statutory imperative to ensure co-operative governance and intergovernmental co-ordination and harmonisation of policies, legislation and actions related to the environment, in that it will significantly undermine national, provincial and local initiatives to protect the unique and irreplaceable biodiversity of the area in which the properties are located;

4.2. secondly, because the proposed mining on the properties will result in unacceptable pollution, ecological degradation and damage to the area's unique and irreplaceable biodiversity and the grant of a mining right in these circumstances was accordingly precluded by section 23(1)(d) of the MPRDA; and

4.3. thirdly, because the grant of a mining right in these circumstances undermines the constitutional rights of BirdLife South Africa and the public in general to have the environment protected, for the benefit of present and future generations, through reasonable measures that prevent pollution and ecological degradation, promote conservation and secure ecologically

sustainable development and use of natural resources while promoting justifiable economic and social development.

5. Due to the fact that the commencement of mining operations on the properties will result in the very harm this appeal seeks to avoid, the Minister is respectfully requested to suspend the Director-General's decision to grant the mining right pending the finalisation of this appeal in terms of section 96(2) of the MPRDA.
6. This document also contains an application for condonation for the late noting of this appeal as contemplated in regulation 74(4) of the regulations to the MPRDA.

THE PARTIES

7. The appellant is BirdLife South Africa (BirdLife), a registered public-benefit non-profit organisation and the only dedicated bird conservation non-governmental organisation in South Africa.
8. BirdLife's aims are to:
 - 8.1. Prevent the extinction of any bird species;
 - 8.2. Maintain and where possible improve the conservation status of all bird species;

- 8.3. Conserve and where appropriate improve and enlarge sites and habitats that are important to birds;
 - 8.4. Help, through birds, to conserve biodiversity and to improve the quality of people's lives; and
 - 8.5. Integrate bird conservation into sustaining people's livelihoods.
9. BirdLife's interest in this mining right application arises because the Steenkampsberg area, in which the properties are situated, is one of critical biodiversity and conservation importance. Furthermore, the Steenkampsberg area is recognised, both nationally and globally, as an Important Bird Area because it provides critical grassland and wetland habitat for threatened and endemic bird species.
10. The mining right forming the subject of this appeal, MP 30/5/1/2/2/505 MR, is held by William Patrick Bower (Pty) Ltd (WPB), a private company with registration number 2010/019087/07 and registered address at Oak Tree Farm, Belfast, Mpumalanga.

THE OTHER INTERESTED AND AFFECTED PARTIES AND OTHER PENDING APPEALS

11. BirdLife was one of 143 registered interested and affected parties in the application by WPB for a mining right over the properties and many of these parties lodged written objections against the grant of the mining right.¹

¹ P. 6 par. 2.3 *Public Participation Report: WPB Colliery Project.*

12. To BirdLife's knowledge two appeals against the grant of the mining right to WPB have already been noted:

12.1. The first is by the Escarpment Environment Protection Group, the Dullstroom Trout Farm, the Federation of Southern African Fly Fishers and Mr John Mansfield, an owner of a farm situated directly adjacent to the mining properties ("the EEPOG appeal"); and

12.2. The second is by HHD Plase (Pty) Ltd which also owns a farm immediately adjoining the mining properties ("the HHD Plase appeal").

13. Both appeals are currently pending.

THE BIODIVERSITY AND CONSERVATION IMPORTANCE OF THE REGION

14. Before dealing with the grounds of appeal, it is necessary to describe the biodiversity and conservation importance of the region in which the properties are located.

15. The properties are located in the Belfast district within the eMakhazeni Local Municipality and are situated approximately 15km north-east of Belfast and approximately 21km south of Dullstroom in Mpumalanga Province.

16. The properties are located on a watershed with runoff from the site draining in a north-easterly direction into the Lakenvlei wetland system, in an easterly direction into the

Elandsfonteinspruit catchment and to the south-west of the site into wetlands which also ultimately feed into the Elandsfonteinspruit.²

17. The properties have been extensively transformed. There is evidence of historical unrehabilitated surface and underground coal mining and there is an operational sand quarry located on their northern boundary.³ The major current land uses of the properties are grazing (70%), cultivation (7.5%), afforestation (9%) and sand mining (2.6%).⁴

18. Although claims are made in the Environmental Impact Assessment and Environmental Management Report prepared by M² Environmental Connections CC in support of WPB's application for the mining right ("the Environmental Report") that the aim of the mining project is to "rehabilitate the abandoned mining area" and to mine the remaining coal resources on the property,⁵ it is evident from the maps included in the Environmental Report that the old unrehabilitated mining areas do not form part of the proposed new opencast mining area,⁶ and they will therefore not be rehabilitated as part of the concurrent rehabilitation of the opencast mining area.⁷ Furthermore, no additional specialised rehabilitation plan nor any financial provision for rehabilitation of these

² p. 10 of the "Supplementary avifaunal assessment for the proposed coal mining activities on portions 6 & 23 of the farm Groenvlei 353JT and portion 12 of the farm Lakenvalei 353JT" prepared by Geoff Lockwood for WPB and submitted as part of WPB's replying submission to the EEPOG appeal ("the Lockwood Report"). The Lockwood Report is attached to this appeal as annexure "BL5".

³ p. iii Lockwood Report

⁴ par. 10 reply to EEPOG appeal

⁵ See p. 1 Public Participation Report (appendix 4 to the Environmental Report) and p.7-58, par. 7.12.3 of the Environmental Report.

⁶ See the maps on pages 8, 21 and 29 of the Soil Report (Appendix 14 to the EMPR)

⁷ See the maps on pages 8, 21 and 29 of the Soil Report (Appendix 14 to the EMPR)

areas (which include old opencast areas and abandoned coal adits) is made in the Environmental Report.⁸

19. The properties do not fall within any as yet statutorily protected area. However, in order to understand the biodiversity and conservation importance of the properties it is important not to view the properties in isolation but rather to view them in their local and regional context and in particular in conjunction with the area immediately adjacent to the properties which contains habitat classified in the Mpumalanga Terrestrial Biodiversity Assessment as either “Important” and “Sensitive Areas”; areas of “High Significance” or areas considered to be “Irreplaceable”.⁹

20. The area between Dullstroom and Belfast is described in a letter from Dr Mervyn Lötter of the Mpumalanga Tourism and Parks Agency (MTPA) to the Mpumalanga Regional Manager of the Department of Mineral Resources (“the Mpumalanga Regional Manager”) as an area of *“of exceptional biodiversity value and because of the recent threats to the biodiversity and future tourism value of this area, it has been proposed for proclamation in terms of Section 49 of the MPRDA (decision pending) and it has recently been gazetted as an Endangered Threatened Ecosystem in terms of the National Environmental Management: Biodiversity Act”*.

⁸ See for example the “Calculation of the quantum required for rehabilitation” at p. 10-5 of the Rehabilitation Plan in the Environmental Report.

⁹ p. 3 Lockwood Report

21. According to Dr Lötter, *“the biodiversity sensitivity of this area is truly exceptional and irreplaceable, and this sensitivity has been objectively established by means of a multitude of planning and sensitivity products that are aimed at ensuring sustainable development”*. Dr Lötter concludes his letter by urging the Department of Mineral Resources (DMR) to respect the concerns of the MTPA and broader biodiversity community *“as any proposed mining activity within this area would certainly have a very negative long-term impact on the environment, the current and future tourism industry and water resources for the province”*.

A copy of Dr. Lötter’s letter, dated 19 March 2013, is attached hereto marked “**BL1**”.

22. Owing to its unique and threatened biodiversity, the area has been the focus of several national, provincial and local conservation initiatives as described more fully below.

Motivation to prohibit the grant of new mining or mining related rights in the area in terms of section 49 of the MPRDA

23. The MTPA has submitted a proposal for the protection of the area between Dullstroom and Belfast in terms of section 49 of the MPRDA to the Minister of Mineral Resources (“the Minister”).
24. This application, to which Dr Lötter refers in the abovementioned letter, is in respect of an area known as the Steenkampsberg Wet Grasslands.

25. The properties forming the subject matter of the mining right in question in this appeal form part of the Steenkampsberg Wet Grasslands.
26. The motivation for the protection of this area had been submitted to the DMR and was under consideration at the time the Director-General made his decision to grant the mining right in respect of the properties.
27. If the MTPA's application is approved, the grant of any new mining or mining related rights in the area will be prohibited.

The listing of the area as an endangered ecosystem in terms of the National Environmental Management: Biodiversity Act

28. As further mentioned by Dr Lötter in the aforesaid letter, the Dullstroom Plateau Grasslands ecosystem, which forms part of the Steenkampsberg Wet Grasslands, and within which the properties are situated, is irreplaceable and threatened. As a result it has recently been listed as an endangered ecosystem on the national list of ecosystems that are threatened and in need of protection as contemplated in the National Environmental Management: Biodiversity Act, 2004.¹⁰ The identification of threatened ecosystems aims to facilitate proactive conservation and management of these ecosystems. This includes consolidating and expanding the protected areas network or laying the basis for integrated management aimed at the conservation of critical biodiversity areas outside the protected areas network in order to address the historical lack of the protection of ecosystems in South Africa outside formally protected areas.

¹⁰ GN 1002 of 9 December 2011 in Government Gazette No. 34809, published in terms of section 52(1)(a) of the National Environmental Management: Biodiversity Act 10 of 2004

The identification of the area as an “Important Bird Area”

29. As mentioned above the properties over which the mining right has been granted fall within the boundaries of the Steenkampsberg Important Bird Area – IBA SA016. The Important Bird Area (IBA) programme was established to identify areas critical for the conservation of South Africa’s Red Data and endemic bird species.
30. The Steenkampsberg IBA is ranked as the eighth most important IBA nationally and the second most important IBA in Mpumalanga. It provides critical grassland and wetland habitat for 13 Red Data bird species, five of which - including the Critically Endangered Wattled Crane and White-Winged Flufftail - are specifically associated with the Lakenvlei wetland system situated to the north of the properties on which the proposed mining is to take place.
31. As explained below, mining is considered to be a serious threat to bird life in this IBA due to the potential it has to lead to the pollution and/or drainage of this important wetland system.

Initiative to declare the area as a protected area in terms of the National Environmental Management: Protected Areas Act, 2003

32. The MTPA, BirdLife, the Endangered Wildlife Trust and certain landowners are presently collaborating in an initiative aimed at having the Middelpunt-Lakenvlei area declared a protected environment under section 28 of the National Environmental Management: Protected Areas Act, 2003. Landowners surrounding the properties on which the mining

right has been granted have all consented in writing to participate in this proposed Protected Environment, to be known as the Greater Lakenvlei Protected Environment. These consenting landowners have formed an association and elected a committee, of which Mr John Mansfield is the Chairperson. This initiative spans portions of 13 farms in the area surrounding the Middelpunt-Lakenvlei wetland system. William Patrick Bower was contacted via email in July 2012, inviting him to attend a meeting and to participate in this conservation initiative, but he did not respond to this invitation. The MTPA, with assistance from BirdLife, is currently finalising the motivation for intention to declare this Protected Environment, and this will shortly be submitted to the Member of Executive Council: Department of Economic Development Environment and Tourism in Mpumalanga (Mrs Y. N. Phosa) for approval.

33. Should the area be so declared, the opportunity for mining to be undertaken in the area would be severely restricted as the written permission of the Minister of Water and Environmental Affairs would be required before mining activities may be conducted.

The identification of the area as a National Freshwater Ecosystem Priority Area

34. To support the implementation of the National Water Act, the National Environmental Management: Biodiversity Act and the National Environmental Management: Protected Areas Act, a multitude of stakeholders led by the South African Biodiversity Institute and the Council for Scientific and Industrial Research have identified, categorised and described South Africa's freshwater ecosystems. The results of this research were published as the National Freshwater Ecosystems Priority Areas (NFEPA) project.

35. The properties over which the mining right has been granted lie within 100m of a wetland which feeds clean water into two major rivers, the Crocodile River, which becomes the Inkomati River and the Steelpoort River which feeds the Olifants River system.
36. The catchment areas of both the Olifants River and the Inkomati River in the area between Belfast and Dullstroom contain two NFEPA wetland clusters and many NFEPA wetlands. The Crocodile River, which is regarded as a flagship free flowing river, originates in the wetland cluster in this area.¹¹
37. The NFEPA also classifies the Belfast - Dullstroom area as a high water yield area as it contributes significantly to the overall water supply of the country. The NFEPA emphasises the importance of protecting these areas by reducing activities such as mining that reduce stream flow and water quality.¹²
38. Owing to its high water yield, this area is also a high groundwater recharge area in which subsurface water resources are replenished and from where they move underground to other regions. Recharge in this area is believed to sustain coastal aquifers over 100km away. These aquifers in turn support high value crops.¹³

¹¹ Nel, et al *Atlas of Freshwater Ecosystem Priority Areas in South Africa: Maps to Support Sustainable Development of Water Resources* (2011) (NFEPA Atlas) <http://www.bgis.sanbi.org/nfepa/project.asp>

¹² NFEPA Atlas at 44

¹³ NFEPA Atlas at 45

Mpumalanga Biodiversity Conservation Plan

39. The Mpumalanga Biodiversity Conservation Plan comprises a series of GIS maps that show the spatial distribution of ecosystems in Mpumalanga. These maps identify and describe biodiversity priority areas in which unique biodiversity must be conserved by means of legal protection or proactive biodiversity management in order to meet biodiversity targets or thresholds.
40. The area between Belfast and Dullstroom is identified as one of these biodiversity priority areas with biodiversity values much higher than other parts of the province.¹⁴
41. As described above, the area hosts an important sub-catchment, unique grassland, threatened and endemic plant species as well as a variety of endangered fauna and avifauna. The sub-catchment includes a very important wetland cluster that is connected with both the Inkomati River and the Olifants River systems. The grasslands in this area play an important role in the conservation and provision of water, and also constitute important habitat for endemic plant and animal life.
42. Thus, although individual properties in this area, such as the properties in respect of which the WPB mining right has been granted, may no longer be covered with natural vegetation, they nevertheless remain important ecological corridors for animal and plant life in the broader area and form a contiguous part of the broader sensitive ecosystem.

¹⁴ South African Biodiversity Institute *Mpumalanga Biodiversity Conservation Plan* (2007), available at <http://bgis.sanbi.org/MBCP/biodiversityAssessment.asp> (last viewed on 7 July 2013)

Mpumalanga Provincial Protected Area Expansion Strategy

43. In 2008 the then National Department of Environmental Affairs and Tourism published the National Protected Area Expansion Strategy for South Africa in recognition of the fact that the current national and provincial protected area system does not adequately conserve a representative sample of South Africa's biodiversity nor is it adequate to maintain key ecological processes across the country.¹⁵
44. In accordance with the national strategy, the Mpumalanga Protected Area Expansion Strategy (MPAES), published in July 2009, identifies certain priority areas for protected area expansion in Mpumalanga based on several biodiversity data sources. One of the most important priority areas identified for protection was the province's grasslands, which presently have extremely low protection levels.¹⁶
45. Accordingly, the MPAES identifies the Steenkampsberg, located south of Dullstroom, as a "priority 1" level area for protected area expansion.¹⁷ This area includes the properties in respect of which the mining right in issue in this appeal has been granted.
46. This area and the area between Belfast and Dullstroom generally is identified as a priority area for protected area expansion¹⁸ on account of its richness in endemic plants,

¹⁵ p. iv National Protected Area Expansion Strategy for South Africa 2008

¹⁶ p. iii MPAES 2009 – 2028

¹⁷ p. 20 MPAES

¹⁸ p. 19 MPAES

large untransformed areas, critical breeding and foraging areas for threatened bird and mammal species as well as the critical sub-catchment areas.¹⁹

eMakhazeni Local Municipality Environmental Management Framework

47. In accordance with section 24(3) of the National Environmental Management Act, 1998, the eMakhazeni Local Municipality compiled an Environmental Management Framework (EMF) for its area of jurisdiction which includes Belfast, Dullstroom and surrounds.
48. An EMF is a decision support tool that describes the environmental attributes of an area, assesses the attributes relative to sensitivity to development and ultimately guides development planning and environmental decision-making.²⁰ The EMF is supported by a Strategic Environmental Management Plan, which is a set of practical guidelines for land use management and informed decision-making by the municipality.
49. The EMF identifies the area between Belfast and Dullstroom as appropriate for conservation, tourism and to a smaller extent agricultural use.²¹ Mining is not considered an appropriate land use in this area.

¹⁹ p. 20 MPAES

²⁰ p. 1 eMakhazeni Local Municipality Environmental Management Framework (2009) published as notice number 316 in Government Gazette 1724 of 30 September 2009 (EMF).

²¹ p. 10 EMF

THE GROUNDS OF APPEAL

FIRST GROUND OF APPEAL: THE GRANT OF THE MINING RIGHT INFRINGES THE CONSTITUTIONAL AND STATUTORY IMPERATIVE OF CO-OPERATIVE GOVERNANCE AND INTERGOVERNMENTAL CO-ORDINATION

50. Chapter 3 of the Constitution of the Republic of South Africa, Act 108 of 1996 (“the Constitution”)²² sets out a set of principles concerning co-operative governance which all spheres of government and organs of state are obliged to observe in their dealings with one another.

51. Section 40(2) of the Constitution provides that all spheres of government must observe and adhere to the principles set forward in Chapter 3 and must conduct their activities within the parameters that the Chapter provides.

52. The relevant principles and parameters are set forward in section 41 of the Constitution. Section 41 provides, inter alia, that:

“All spheres of government and all organs of state within each sphere must:

(a)

(b) ...

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d)

²² Chapter 3 of the Constitution comprises sections 40-41.

- (e) *respect the constitutional status, institutions, powers and functions of government in the other spheres;*
- (f) *...*
- (g) *exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and*
- (h) *co-operate with one another in mutual trust and good faith by-*
 - (i) *...*
 - (ii) *assisting and supporting one another;*
 - (iii) *informing one another of, and consulting one another on, matters of common interest;*
 - (iv) *co-ordinating their actions and legislation with one another..."*

53. All spheres of government and organs of state are accordingly constitutionally obliged when carrying out their functions to co-operate with and assist other spheres and organs of government and to co-ordinate their actions with the actions of these other spheres and organs of government. This applies in general to the exercise by the Minister or her delegate, the Director-General, of their functions under the MPRDA and also in particular to the exercise by the Minister or Director-General of their discretion to grant or refuse applications for mining rights.

54. Furthermore section 37(1) of the MPRDA²³ required the Director-General when considering WPB's application for a mining right to have regard to the principles set out in section 2 of the National Environmental Management Act, 1998 (NEMA). One of these

²³ As it was at the time of the Director's General's decision.

principles is that there must be intergovernmental co-ordination and harmonisation of policies, legislation and actions related to the environment.²⁴

55. The principle clearly has its origin in the section 40-41 constitutional obligations of co-operative governance.
56. Section 3(3) of the MPRDA moreover requires the Minister, while promoting economic and social development, to ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards.
57. Accordingly, when deciding WPB's application for a mining right in respect of the properties, the Director-General was required to take into account all the relevant and applicable national, provincial and local policies, norms and standards relating to the environment, and to ensure that his decision was consistent therewith and did not undermine or conflict with any such policies, norms or standards.
58. It is clear from what is set out above, that there are numerous national, provincial and local environmental initiatives underway proactively to protect the area between Belfast and Dullstroom as it contains unique, threatened and irreplaceable biodiversity.
59. While none of these initiatives have yet resulted in a prohibition of new mining activities commencing in the area, it is nevertheless clear that the authorization of such mining operations is contrary to the norms and standards set forward in these initiatives and

²⁴ NEMA section 2(4)(l)

thus is in breach of the constitutional imperative of co-operative governance, as well as the statutory obligations imposed on the Director-General in terms of sections 3(3) and 37(1) of the MPRDA (read with section 2 of NEMA) to comply with all relevant environmental legislation, norms and policies.

60. Furthermore, as mentioned above, the MTPA (a statutory body established, amongst others, to manage and protect Mpumalanga's biodiversity) has submitted a motivation to the Minister for the protection of the Steenkampsberg Wet Grasslands in terms of section 49 of the MPRDA. This area includes the WPB properties and the section 49 motivation had been submitted to the Minister and was under consideration at the time the Director-General made his decision to grant the mining right to WPB.
61. Should this motivation prompt the Minister to act in terms of section 49, the grant of any new mining or mining related rights in the area will be prohibited or restricted.
62. For the Director-General to have granted a mining right to WPB while this section 49 motivation was under consideration demonstrates a patent disregard for the initiatives of the MTPA and is inconsistent with the Director-General's obligations, described above, to promote co-operative governance and to ensure intergovernmental co-ordination and harmonisation of policies, legislation and actions related to the environment.
63. In addition and as also mentioned above, an initiative is currently underway to obtain protected environment status for the Middelpunt-Lakenvlei area surrounding the WPB properties, under section 28 of the National Environmental Management: Protected

Areas Act, 2003. Should the area be so declared, the opportunity for mining to be undertaken in the area would be severely restricted as the written permission of the Minister of Water and Environmental Affairs would be required before mining activities may be conducted.

64. For the Director-General to have granted WPB a mining right authorising the commencement of new mining activities in an area proposed for declaration as a protected environment is, once again, contrary to the Director-General's obligations as described above.

65. The Director-General's decision to grant a mining right to WPB in an area which is the focus of numerous national, provincial and local government initiatives aimed at the conservation and preservation of the area's unique and irreplaceable biodiversity is furthermore both irrational and unreasonable. For all the above reasons, it is accordingly unconstitutional and / or unlawful.

SECOND GROUND OF APPEAL: THE GRANT OF THE MINING RIGHT WAS PRECLUDED BY SECTION 23(1)(D) READ WITH SECTION 23(3) OF THE MPRDA

66. Section 23(1)(d) of the MPRDA provides, in relevant part, that “... *the Minister must grant a mining right if the mining will not result in unacceptable pollution, ecological degradation or damage to the environment*”. Section 23(3) of the MPRDA provides in turn that “*the Minister must refuse to grant a mining right if the application does not meet all the requirements referred to in subsection (1)*”.

67. Accordingly, if when considering an application for a mining right, information is put before the Minister (or her delegate, the Director-General in this instance) which shows that the proposed mining activities will result in unacceptable pollution, ecological degradation or damage to the environment, the Director-General must refuse to grant the mining right.

68. It is BirdLife's submission that the information provided to the Director-General and the DMR in the Environmental Report and the objections submitted by the numerous interested and affected parties to the application for the mining right makes it clear that the proposed mining on the properties poses significant negative risk to the water quality, seasonal flow patterns or volumes of water in the wetland system located to the north of the properties. This wetland system is home to 13 Red Data bird species, five of which (including the Critically Endangered Wattled Crane and White-Winged Flufftail) are specifically associated with the aforesaid wetland system. Accordingly any risk to that wetland system poses a risk to the endangered bird species which are dependent on it.

69. It is BirdLife's submission that this risk together with the endangered status of the bird species affected by this risk constitute unacceptable ecological degradation or damage to the environment and ought to have precluded the grant of the mining right to WPB.

70. On the basis of the information already provided to the Director-General together with the additional information provided in this document, the Minister is accordingly respectfully requested to set aside the Director-General's decision to grant a mining right to WPB.

The information contained in the Environmental Report and the objections raised by interested and affected parties

71. In BirdLife's "Analysis of Bird Species with Regard to the Proposed Coal Mining Operation on the Farms Groenvlei 353 JT and Lakenvlei 355JT, Mpumalanga", submitted as part of BirdLife's objections to WPB's mining right application ("BirdLife's Analysis"), it was pointed out that at least 14 endangered species have been recorded in the broader area in which the proposed mining is to take place and a further 17 species are endemic or near-endemic to South Africa²⁵. BirdLife stated that "*Any unsustainable development (including prospecting and mining activities) will have a negative effect on these species either through habitat loss or disturbance*"²⁶. A copy of BirdLife's Analysis is attached marked "**BL2**".

72. In "The Endangered Wildlife Trust's Comments on the Environmental Impact Assessment and Environmental Management Report for the Proposed Coal Mining Operation for William Patrick Bower (Pty) Ltd on the Farms Groenvlei 353JT and Lakenvlei 353JT" ("the EWT comments"), the Endangered Wildlife Trust (EWT) also emphasised the vulnerability of the bird species of the area. In particular the EWT pointed out that:

"The Steenkampsberg Plateau and the Lakenvlei wetland complex and its catchment in particular are home to all three of South Africa's crane species, namely the vulnerable Blue Anthropoides paradiseus and the Grey Crowned Balearice regulorum Cranes and the Critically Endangered Wattled Crane Bugeranus carunculatus. All three species breed within the Lakenvlei wetland and catchment. Lakenvlei currently holds one of only two

²⁵ p. 8 BirdLife's Analysis

²⁶ p. 9 BirdLife's Analysis

regular breeding pairs of Wattled Cranes remaining in Mpumalanga , and its catchment one of only two wintering flocks of Grey Crowned Cranes on the Steenkampsberg.”

and that

“The grasslands of ... the Steenkampsberg in particular form the catchment for four of South Africa’s large rivers, the Olifants, Sabie, Elands and Crocodile Rivers (which) all originate from this high altitude plateau and rely on the integrity of this region to continue to provide multiple ecosystem services to the local area and the far ranging reaches of these rivers’ lengths. The region is home to two vulnerable and endemic grassland birds, the Yellow-breasted Pipit Anthus Chloris and the Rudds Lark Heteromiraфра ruddi and a vulnerable and endemic mammal, the Rough-haired Golden Mole Chrysolplaax.”²⁷

A copy of EWT’s comments are attached marked “**BL3**”.

73. The Environmental Report itself identifies the enormous biodiversity and conservation significance of the Lakenvlei wetland system:

“The well-known Lakenvlei is described as an incredible wetland system lying between Dullstroom and Belfast in Mpumalanga. It is regarded as one of the most unique peat lands in the country and one of the peat lands on the Steenkampsberg Plateau that make up one of South Africa’s most important peat eco-regions in the country. It is a stable and complex peat land having been around for 12,000 years with a number of artesian springs feeding into it ...

These wetlands are considered extremely important bird areas and are home to all three of South Africa’s cranes species (Blue, Wattled and Grey Crowned Crane) as well as the elusive White-winged Fluff tail. The Cranes are extremely dependent on these wetlands. The wetland areas have also been classified as an irreplaceable area for biodiversity and the ecosystem service it offers in the Conservation Plan developed by the Mpumalanga Tourism and Parks Association, and has been zoned as a Tourism and Conservation Area

²⁷ p. 2 EWT Comments

in the Emakhazeni Environmental Management Framework. The wetlands in the area form the headwaters of many river systems ...

*Subsequently, the major concern in these three areas is the loss of wetlands (and associated crane habitat) as well as the degradation of freshwater systems as a result of increased mining operations”.*²⁸

74. The following statement about loss of wetland biodiversity is made in the Environmental Report:

*“Wetlands in the area are under constant threat due to mining activities. Sources of pollution stemming from mining activities include water quality degradation, altering of drainage pathways and loss of biodiversity. Several indigenous bird species are reliant on wetland conditions for their survival. The wetlands also provide satisfactory breeding habitat for fish, amphibians and reptile species. This is especially important given the potential for degradation of wetlands in the surrounding area, which in turn have severe impacts on bird, fish and amphibian populations.”*²⁹

75. From the information contained in the Environmental Report and the comments and objections raised by interested and affected parties there can be no doubt that the Director-General and the DMR were fully aware of the substantial risks that mining would pose to an extremely vulnerable and threatened ecosystem with critical biodiversity significance.

76. The specific risks are highlighted below.

²⁸ p.3-41 – 3-42 Environmental Report

²⁹ p. 7-67 Environmental Report – EIA

Impact on water resources

77. The “footprint” of the open-cast coal mine proposed by WPB lies directly adjacent to a wetland. According to the Environmental Report “*approximately 6.51% (15.39 ha) of the study area consists of imperfectly to poorly drained, grey sandy and black organic rich soils of which the land capability were classified as wetlands*”³⁰ and “*the area is situated adjacent to the extensions of the Lakenvlei Spruit Wetland System, as well as the Groenvlei Wetland*”³¹. The Environmental Report states that “*it is envisaged to mine up to 100 meters of the perimeter from the delineated wetland areas*”³² and that the “*100m wetland buffer zone intersects the proposed opencast area at 3 small sections.*”³³
78. The South African National Biodiversity Institute (SANBI) is a public entity that falls under the Department of Environmental Affairs. Established in 2004 in terms of the National Environmental Management: Biodiversity Act (Act 10 of 2004), SANBI leads and co-ordinates research, and monitors and reports on the state of South Africa’s biodiversity. *Life: the State of South Africa’s Biodiversity 2012* is a summary of the National Biodiversity Assessment 2011, which was led by SANBI in partnership with the Department of Environmental Affairs, CSIR, South African National Parks and a range of other organisations.³⁴ The following extracts from *Life: the State of South Africa’s Biodiversity 2012*, describe the importance of wetlands, and explain why their current precarious and endangered state is so problematic:

³⁰ p. ii Environmental Report – Executive Summary

³¹ p. xiv Environmental Report – Executive Summary

³² p. 3-45 Environmental Report – EIA

³³ p. 3-57 Environmental Report – EIA

³⁴ See http://bgis.sanbi.org/NBA/LIFESateBiodiversity2012_lowres.pdf

“Wetlands are irreplaceable. Wetlands support agriculture, filter pollution from water, trickle-feed water into rivers even during the dry season, slow flooding, combat desertification and help us absorb the environmental shocks that come with droughts. Wetlands are also warehouses of a diverse range of life. ... We can’t rely solely on complex and expensive engineering solutions to provide drinking water and to clean waste water. Our natural water infrastructure, in the form of wetlands, streams, rivers, lakes, aquifers and estuaries, complements and protects our dams, pipelines and water treatment plants. The extreme bouts of flooding and drought we expect to come with climate change mean our wetlands will become even more critical for water management. All this from only 2.4% of our country’s surface area. So when wetlands are damaged, the consequences ripple out across a system that reaches far beyond that little marsh or vlei.”³⁵

“[Wetlands] underpin the health and wellbeing of many rural communities. It’s the poor and vulnerable who benefit from healthy wetlands most directly, and who suffer most if wetlands are damaged. This is just one reason there’s a direct link between the return on environmental investment, and the welfare and survival of the poor.”³⁶

79. 48% of South Africa’s wetlands are classified as “critically endangered”:³⁷

“Of the wetlands that remain today, many of them have been heavily modified because we have dammed, drained, mined or bulldozed them. So far, we’ve often put other economic pursuits first, without thinking of the benefits of keeping wetlands intact. But we’re already seeing how this kind of decision making can be to our own detriment, leaving us battling with problems of water quality and flood damage, for example. Every choice we make now, regarding our threatened wetlands, is a choice we will have to live with for generations.”³⁸

“What happens in the catchment area around a wetland can also cause the wetland itself to become degraded. Disrupting the timing and the way water flows into the

³⁵ p. 15 Life: The State of South Africa’s Biodiversity 2012

³⁶ p. 16 Life: The State of South Africa’s Biodiversity 2012

³⁷ p. 18 Life: The State of South Africa’s Biodiversity 2012

³⁸ *Ibid.*

wetland through activities like building a dam or over-extracting water upstream of the wetland or extracting too much groundwater can cause damage. Pollution in rivers feeding into a wetland can cause harm.”³⁹

“Our wetlands are severely under-protected. Very few wetland ecosystem types (just over 10% in all) are adequately represented within South Africa’s formally protected areas, such as National Parks and Nature Reserves; meanwhile 70% are unprotected.”⁴⁰

80. WPB’s Environmental Report recognizes that the Director-General was required to assess the merits of the proposed project in the light of the especially sensitive and important surrounding areas:

“For the reason that the proposed WPB colliery is situated in a sensitive environment it is of the utmost importance that an impact that would ordinarily be assigned a low significance, be treated far more circumspectly in the context of its proximity to or potential impact on a sensitive environment.”⁴¹

81. The Environmental Report also makes it clear that the mine will have serious negative impacts on water resources in the area, as is evident from the extracts quoted below:

“Wetlands in the area are under constant threat due to mining activities. Sources of pollution stemming from mining activities include water quality degradation, altering of drainage pathways and loss of biodiversity. Several indigenous bird species are reliant on wetland conditions for their survival. The wetlands also provide satisfactory breeding habitat for fish, amphibians and reptile species. This is especially important given the potential for degradation of wetlands in the surrounding areas, which in turn have severe impacts on bird, fish and amphibian populations.”⁴²

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ p. 7-65 Environmental Report – EIA

⁴² p. 7-67 Environmental Report – EIA

“Some lithologies found in the mining area are potentially acid forming and therefore AMD is likely to occur when conditions are favourable.”⁴³

“The aquifer is reasonably sensitive to contamination and care should be taken with any activities that could generate pollutants.”⁴⁴

“The potential groundwater receptors outside the mining area are the Lakenvleispruit Elandsfonteinspruit and BH5. It is important that these streams be included in the monitoring network as it is considered as sensitive receptors. ... The spruits are believed to drain the aquifer that will be affected by mining activities.”⁴⁵

82. There are two viable coal seams available to be mined on the properties, the No. 1 seam and the No. 2 seam. According to the Environmental Report, *“if mined the No. 2 seam could produce an Eskom type of product. However, WPB Colliery only plans to mine the No. 1 seam.”⁴⁶* Section 5 of the Environmental Report, *“Need and desirability of the project (motivation)”* explains that *mining only the No. 1 seam will leave some of the extractable coal behind. To get to the No. 1 seam one will have to mine through the No. 2 seam. Disadvantages are ... If this No. 2 seam has an acid generation potential, it is left behind and can create an acid generation potential in the future with long-term residual impacts.”⁴⁷*

83. The Environmental Report further describes the impact of mining on various water resources during the different phases of the proposed operation:

“During the construction phase, soil exposure and concomitant runoff as well as dust may result in increased siltation of surface streams and wetlands. In addition, the

⁴³ p. v Environmental Report – Executive Summary

⁴⁴ *Ibid.*

⁴⁵ p. 3-47 Environmental Report – EIA

⁴⁶ p. 2-1 Environmental Report – Detailed Description of the Proposed Activity

⁴⁷ p. 5-9 Environmental Report

increase of traffic, as well as the additional logistics (especially the storage of petroleum products) may result in hydrocarbon spillages. Hydrocarbon spillages will also emanate from the washing bay and the diesel storage tanks.

The exposure of waste material during the initial boxcut on the discard dumps to atmospheric conditions will accelerate the generation of Acid Mine Drainage. Although the coal waste material has a lower sulphur content and potential to generate AMD, uncontrolled run-off will cause alleviated levels in TDS, SO₄, Na, Cl and EC with decrease in pH levels. Metal concentrations in the water resource will also increase.

In addition the water contained in the abandoned coal pit as well as water seeping from the adit can spill during the construction of water pollution containment facilities in areas where possible intersection can occur. Boxcut activities could also lead to increased inflow into the pit area with concomitant increase in ground water flow. The flow from the adit might increase and poor quality water will decant towards the lower lying wetland system. The inhabitants of a dwelling in close proximity to the seep zone are dependent on this water resource. Degradation of water quality will render the use unfit for human consumption.”⁴⁸

84. The “Impact Description: With Mitigation” of the above impacts states that *“contaminated water will be contained within designated PCD (pollution control dam) facilities. Water quality degradation will only stem from diffuse sources of pollution that is difficult to mitigate.”*⁴⁹

85. During the operational phase of the mine, the following potential impacts on water quality are described in the Environmental Report:

“Opencast mining will increase the surface water pollution threat, while the opencast mining may impact on the groundwater quality. ...

⁴⁸ p. 7-60 Environmental Report – EIA

⁴⁹ p. 7-61 Environmental Report – EIA

Material spilled on the roads is being crushed to dust which blows from the site. The coal dust could accumulate in drainage pathways causing an increase of salinity in the receiving environment. Pipelines carrying contaminated water can burst, or may discharge contaminated water during maintenance activities. Depending on the management measures in place, these impacts can be significant, albeit short term. The dewatering system from the pit could short circuit discharge to PCD (pollution control dams) and pump directly to the abandoned pit area. As this pit is not lined water quality degradation could arise in the long term.”⁵⁰

86. In the “Impact Description: With Mitigation”, the following statement is made: *“Diffuse pollution is still a possibility that might cause degradation to the environment.”⁵¹*

Furthermore, the assessment describes that *“water run-off as well as seepage from the discard dump sites are highly contaminated, and must be managed.”⁵²* However, even with mitigation, *“AMD generation is still possible, even if backfilled into pit.”⁵³* The *“operational phase impacts”* will involve *“inevitable”* effects on the groundwater regime, including the *“de-watering of the surrounding aquifer”* and a consequent *“lowering in the groundwater table, in and adjacent to the mine.”⁵⁴*

87. With regard to the closure phase of the mine, the Environmental Report states that *“the potential of AMD occurring had been verified by the geohydrological report.”⁵⁵* It also states that *“based on the groundwater investigation there is potential for groundwater to be acidified. ... There are several springs in the area that is interconnected with the*

⁵⁰ p. 7-62 Environmental Report – EIA

⁵¹ p. 7-63 Environmental Report – EIA

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ p. 7-76 Environmental Report – EIA

⁵⁵ p. 7-65 Environmental Report – EIA

groundwater aquifer. Contamination of groundwater will therefore ultimately contaminate surface water resources.”⁵⁶

88. Following closure of the mine:

“Groundwater within the mined areas is expected to deteriorate due to chemical interactions between the sulphide containing rocks and the groundwater. The resulting groundwater pollution plume will commence with downstream movement.”⁵⁷

“Once the normal groundwater flow conditions have been re-instated, polluted water can migrate away from the rehabilitated areas. Groundwater will flow away from the pit towards the streams. As some coal and discards will remain in the mine, this outflow will be contaminated as a result of acid or neutral mine drainage.”⁵⁸

89. The conclusion of the impact assessment on the *“cumulative effects on ground water quantity and quality”* is that:

“The impact is of major importance. Impact is significant, mitigation is critical to reduce impact or risk. Resulting impact could influence the decision depending on the possible mitigation. ... Notwithstanding the successful implementation of the mitigation measures, to reduce the negative impacts to acceptable levels, the negative impact will remain of significance. However, taken within the overall context of the project, the persistent impact does not constitute a fatal flaw.”⁵⁹

90. Notwithstanding the above findings, the Environmental Report concludes that:

⁵⁶ p. 7-66 Environmental Report – EIA

⁵⁷ p. 7-79 Environmental Report – EIA

⁵⁸ p. 7-80 Environmental Report – EIA

⁵⁹ p. 7-85 Environmental Report – EIA

*“The abovementioned Specialist Studies clearly indicate that without any mitigatory measures there will be a moderate to high impact on the environment, especially the surface water and the wetland systems. However, with the recommended mitigations these impacts can be managed to acceptable levels (moderate to medium-high).”*⁶⁰

91. That the proposed mining operations on the WPB properties have the potential to cause significant harm to the wetland surrounding the properties is not in question. What is in question is whether the measures proposed in the environmental report are adequate to mitigate this risk to acceptable levels.

92. In considering this question the Director-General was required, by virtue of section 37(1) of the MPRDA as mentioned above, to have regard to the precautionary principle set out in section 2 of NEMA. This principle requires that *“a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions”*.⁶¹ A further principle which ought to have guided the Director-General in making his decision whether to grant or refuse WPB’s mining right application is 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”*.⁶²

93. It was thus incumbent on the Director-General to approach WPB’s application for a mining right cautiously and to ensure that extra-ordinary measures were in place to protect the highly sensitive wetlands located to the north of the proposed mining area.

⁶⁰ p. iv-v Environmental Report – Executive Summary

⁶¹ NEMA section 2(4)(a)(vii)

⁶² NEMA section 2(4)(r)

Having regard to the mitigation measures proposed in the Environmental Report, it is evident that no such measures are described. Even assuming the successful implementation of the remediation measures proposed in the Environmental Report, given the fact that the wetlands surrounding the proposed mining area constitute an extremely vulnerable and threatened ecosystem with critical biodiversity significance, reducing the impacts of the proposed mine to “*moderate to medium-high*” (as suggested in the Environmental Report) does not render the impacts “*acceptable*” in the circumstances.

94. In the circumstances the Director-General was required to refuse to grant the mining right to WPB.

Impact on bird life

95. The Environmental Report contained several specialist studies, one of which was an Avifauna Study compiled by Dr. Mariette Wheeler (“the Wheeler report”).⁶³ One of the major limitations of the study (recognized in the report itself) was that the site visit on which it was based was conducted in the dry winter months when most of the migratory species had already left the area.⁶⁴
96. Nevertheless the Wheeler report recognized that the proposed mining area falls within the Steenkampsberg Important Bird Area (IBA) which “*is of global importance as it hosts various Grassland bird species that are either globally or nationally threatened and have restricted ranges*”. The study lists a total of 209 species that have been recorded in the

⁶³ The Wheeler report is Appendix 11 to the Environmental Report.

⁶⁴ p. 13 Wheeler report

area of which two are Critically Endangered, eight are Vulnerable and four are Near-Threatened species.⁶⁵

97. The Wheeler report recognizes that the various phases of the proposed mining project will have negative impacts of potentially high significance on bird species in the area with habitat loss and disturbance due to increased human activity and vehicles having the highest impact.

98. The Wheeler report recognizes that habitat loss, through the removal of vegetation, may result in the loss of endemic species and species of conservation importance. This habitat loss, the report states *“may result in species moving to other areas that may be less suitable for foraging and breeding. This will especially impact on species with restricted ranges as habitat loss will result in a reduction of the area available to them. The cumulative effects of habitat loss in the IBA due to current and future developments will affect the effectiveness of the IBA in protecting the long-term viability of bird species of conservation importance”*.⁶⁶ To mitigate this impact the report proposes simply that natural areas on the properties must be maintained to act as habitat for such species and the footprint of the mine must be kept as small as possible.⁶⁷

99. The Wheeler report notes that human disturbance may result in changes in bird behaviour, *“probably resulting in reduced survival and breeding success”*.⁶⁸ The report notes that *“human disturbance will especially have a high impact on species only*

⁶⁵ p. iii Wheeler report

⁶⁶ p. 19-20 Wheeler report

⁶⁷ pp. 17, 19 Wheeler report

⁶⁸ p. 20 Wheeler report

*dependent on Grassland as they might not be able to move to other areas”.*⁶⁹ To mitigate this impact the report proposes that mining activities should be restricted to the demarcated mining area.⁷⁰

100. The final impact identified by the Wheeler report is the loss of Red Data species. In this regard the report states as follows:

*“Many species of conservation importance have been noted on the property and surrounding areas. The impacts of the proposed mining activities (noise, increase human presence, etc.) can result in the loss of individuals of Red Data Species in this area. Considering the importance of the IBA as foraging and breeding habitat for species such as the crane species the impact will be severe for species only dependent on Grassland. Loss of individuals of some species with low abundance, especially species classified as Critically Endangered and Vulnerable, can reduce the viability of the species in the long term.”*⁷¹

101. To mitigate this highly significant negative impact, the report proposes once again that natural areas on the properties be maintained as microhabitats and mining activities be restricted to the demarcated mining area.⁷²

102. The inadequacies of the Wheeler report were dealt with by BirdLife and the EWT in comments submitted to WPB’s environmental consultant Menco.

⁶⁹ p. 20 Wheeler Report

⁷⁰ pp. 18, 20 Wheeler Report

⁷¹ p. 22 Wheeler report

⁷² p. 22-23 Wheeler Report

103. In “BirdLife South Africa’s comments on the Avifauna Study” (“BirdLife’s comments”), BirdLife pointed out that:

“Some of the data presented in the avifaunal study are questionable or incorrect. The study states that 32 endemic bird species occur in the proposed mining site and immediate surrounding areas (nine pentads in total). However, these data are incorrect, since only 16 of the 32 endemic species listed in Table 3-1 are in fact endemic or near-endemic (i.e. roughly 70% or more of the South African population). Species descriptions are also inaccurate in certain instances. For example, the avifaunal study states that cranes are “only dependent on grassland”, which is untrue because Grey Crowned Crane (Vulnerable) and Wattled Crane (Critically Endangered) breed in wetlands. Protecting breeding habitats is of equal or higher conservation concern and importance than protecting foraging habitats alone. With only a 100m buffer zone around wetlands, as the wetlands report proposes, these and other wetland birds will be severely impacted upon by mining operations, yet this is not highlighted in the avifaunal study. Water quality degradation due to mining operations could have severe negative impacts for birds through habitat degradation, yet this is also not addressed in the avifaunal study.”⁷³

A copy of Birdlife’s comments is attached marked “**BL4**”.

104. In its comments the Endangered Wildlife Trust pointed out that:

“As the site visit was conducted in May/June when most birds would have moved off the site, and the fact that the full specialist report acknowledges the list of all potential birds (including a number of threatened species) to be found on site, it is important to consider the full aspect of this. Further to this, the report acknowledges only the impact on the bird species on site. However, the impact of the mining operations, through increased disturbance, noise and visibility, could have significant impacts on birds and mammals

⁷³ p 1-2 BirdLife’s comments

within close to medium proximity to the mine. Listed impacts included habitat loss, loss of Red Data species, and changes in migration routes. Mitigating efforts to reduce the impact on species on site will have little impact on those close to the mining operation. This is of significant concern, as all three crane species breed within the neighbouring Lakenvlei wetland and catchment, and Blue Cranes nest in the surrounding area, and specifically related to this application, on Groenvlei. Lakenvlei currently holds one of the only two regular breeding pairs of Wattled Cranes remaining in Mpumalanga, and its catchment one of only two wintering flocks of Grey Crowned Cranes on the Steenkampsberg.”⁷⁴

105. With reference to the mitigation measures proposed in the Wheeler report, the Endangered Wildlife Trust stated that *“these recommendations are neither sufficient mitigation nor a reasonable ecological requirement for the sustainable retention of any specialist, sensitive or rare species that may occur in the given area”*.⁷⁵ The Endangered Wildlife Trust went so far as to say bluntly that the Wheeler report must be redone.⁷⁶
106. In response to the appeal lodged by the Escarpment Environment Protection Group and three others mentioned above, WPB filed a “replying submission” attached to which was a “supplementary” avifaunal assessment of the proposed mining site prepared by Geoff Lockwood (“the Lockwood report”). A copy of the Lockwood report is attached marked **“BL5”**.
107. The Lockwood report is dated 13 April 2011, although it refers to a site visit that took place on 21 and 22 December 2011. It is thus unclear precisely when this report was prepared and whether or not it was submitted to the DMR as part of WPB’s mining right application. It is nevertheless an important report which is far more comprehensive than

⁷⁴ p 4 EWT comments

⁷⁵ p. 9 EWT comments

⁷⁶ p. 9 EWT comments

the Wheeler Report and contains important information regarding the negative impact of the proposed mining operation.

108. The Lockwood report recognizes that the proposed mining on the WPB properties will have significant negative impacts on the local status of critically endangered, endangered and vulnerable bird species notwithstanding the fact that the WPB properties themselves have been extensively transformed with the result that habitat on the properties is marginal for large terrestrial Red Data bird species. This is primarily due to the fact that the properties are immediately adjacent to habitat classified as either “Important and sensitive areas”; areas of “High Significance” or areas considered to be “irreplaceable”.⁷⁷

109. The Lockwood report identifies four significant negative impacts of the proposed mining.

110. Loss of critical wetland habitat as a result of reduced inflows and/or the release of acid mine water into these systems is identified as the most significant threat posed by the proposed opencast coal mining on the WPB properties. The Lockwood report states that *“any deterioration in these wetlands is likely to have an impact on the status of the critically-endangered Wattled Crane and White-winged Flufftail populations; as well as the vulnerable Grey-crowned and Blue Cranes, African Marsh-Harrier and African Grass-Owl populations associated with these habitats”*⁷⁸ Whilst the proposed mining plan makes provision for a lined impoundment to capture and store contaminated mine water, the Lockwood report notes that this *“could potentially also reduce surface or sub-surface flows into these systems”*. The report also states that there is *“also a potential*

⁷⁷ p. 3 Lockwood report

⁷⁸ p. 10 Lockwood report

risk of overtopping and accidental discharge of contaminated mine water during high precipitation events.”⁷⁹

111. Loss of foraging as a result of habitat destroyed through the removal of overburden to expose the coal reserves is the second significant impact identified in the Lockwood report. The report states that *“although the proposed mining plan makes provision for conventional roll-over strip mining – with rehabilitation of mined-out areas to run concurrently with operations, it is likely that high levels of noise (e.g. blasting) and human activity will prevent birds from returning to rehabilitated sections until after final closure. Depending on the level to which rehabilitation measures are applied, it could also be several years before the agricultural productivity of these sections is restored”*.⁸⁰

112. The third impact identified in the Lockwood report is deterioration of grassland habitat adjacent to the road linking the site to the Belfast – Dullstroom road as a result of coal dust pollution. The report notes that *“at full operation it is anticipated that a total of 35 coal trucks will be travelling this route and, depending on operational aspects such as whether on-site crushing and washing is planned, it is possible that significant amounts of dust will be deposited”*.⁸¹ Associated with this impact is the deterioration of the Lakenvlei wetland as a result of coal dust pollution run-off from the road linking the site to the Belfast – Dullstroom road. The proposed method to reduce these impacts is to manage coal truck driver behaviour and maintain road surfaces. Notwithstanding these measures dust deposition adjacent to the road and run-off from the road is likely.

⁷⁹ p. 11 Lockwood report

⁸⁰ *Ibid.*

⁸¹ p. 11 Lockwood report

113. The final impact identified in the Lockwood report is the loss of foraging and nesting habitat as a result of increased human activity and noise. The report notes that mining operations such as blasting, crushing, loading as well as vehicle traffic are all likely to reduce bird activity in proximity to the site and along the road link to the R540. The report states that this negative impact is likely to continue until final closure and states that *“no practical mitigation measures could be identified”*.⁸²
114. The Lockwood report concludes by re-iterating that the proposed site *“is located in close proximity to important populations of several threatened bird species and significant, negative impacts on the local status of many of these are likely, should mining go ahead”*.⁸³
115. In preparing this appeal, BirdLife obtained a further report from Dr. Doug Harebottle, a bird and wetland expert, that assessed the findings of both the Wheeler and Lockwood reports (*“the Harebottle report”*). A copy of the Harebottle report is attached marked **“BL6”**.
116. Whilst Dr. Harebottle was critical of the mitigation measures proposed in the Wheeler report, he was largely in agreement with the findings of the Lockwood report. In particular Dr. Harebottle was also of the view that the proposed mine *“will have severe impacts on the terrestrial environment (vegetation and landscape), surface and sub-surface water, and the avifauna, particularly threatened species associated with wetlands and/or grasslands. The greatest impacts will be related to water management*

⁸² p. 12 Lockwood report

⁸³ *Ibid.*

*issues with groundwater, surface water and associated wetland systems likely to be the most affected”.*⁸⁴

117. Dr. Harebottle emphasized the importance of cumulative impacts and stated that *“for this project, envisaged cumulative impacts will most likely manifest in changes to the surrounding natural wetlands and/or grasslands through potential pollution of groundwater aquifers and coal dust on surrounding grassland vegetation. Seepage and run-off from additional mining operations, such as the existing sand mining operation, plus run-off from agriculture (including trout farms) in parts of the catchment will all have long-term negative impacts on these systems. The geo-hydrological report mentions that pollution from potential mining activities on the aquifer supplying Lakenvlei could take up to ten years to impact the wetland. As a result, impacts to birds closely associated with wetlands (cranes, marsh owl, grass owl, flufftails) may therefore not be immediately apparent but as the system deteriorates they will respond by moving to other suitable areas. Breeding areas for some species may be lost and lead to lower reproductive success, especially if no other suitable sites can be located locally. As is the case with this mining operation, cumulative impacts from developments are generally of a long-term nature and need to be assessed as such (Kuvesky 2007, Masden 2010)”.*⁸⁵

118. It is evident from what is set out above that due to the proximity of the proposed mining project to the highly sensitive wetlands located to the north of the proposed mining area and important populations of several threatened bird species, the proposed mining on the WPB properties will have significant negative impacts on these bird species.

⁸⁴ p. 4 Harebottle report

⁸⁵ P. 7 Harebottle report

119. It is further evident from the Wheeler, Lockwood and Harebottle reports and the comments submitted by BirdLife and the Endangered Wildlife Trust that many of these impacts, such as the loss of foraging and nesting habitat as a result of increased human activity and noise cannot be mitigated at all. While mitigation measures have been identified for other significant impacts such as those measures to prevent the loss of critical wetland habitat as a result of reduced inflows and/or the release of acid mine water into these systems it is evident that these mitigation measures themselves pose significant environmental risks and certainly do not eliminate the risk of the complete eradication of the threatened bird populations of the area.
120. Taking into account the NEMA principles discussed above in relation to the impacts on water resources, it was incumbent on the Director-General to adopt *a risk-averse and cautious approach when* considering the impact of the proposed mining on the WPB properties on the threatened bird populations in the area and to ensure that extraordinary measures were in place to protect these populations against the identified negative impacts of the proposed mining operations.
121. Having regard to the negative impacts on the threatened bird species identified in the above reports and comments from interested and affected parties and the criticisms levelled at the mitigation measures proposed, it is clear that the Director-General failed to act in accordance with his obligations and ensure that extra-ordinary measures were in place to protect the threatened bird populations against the identified negative impacts of the proposed mining operations.

122. It is BirdLife's submission that had the Director-General acted in accordance with his obligation he would have found that the negative impacts on the threatened bird species posed by the proposed mining operations constituted unacceptable ecological degradation or damage to the environment. The Director-General ought therefore to have refused to grant the mining right to WPB.

THIRD GROUND OF APPEAL: 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

123. Section 2 of the MPRDA sets out the objects of the Act. While it is clear from section 2 that the objects of the MPRDA are to promote economic growth and mineral and petroleum resource development and to promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa, section 2(h) expressly stipulates that in doing so effect must be given to section 24 of the Constitution (the environmental right) and to the objective that the nation's mineral and petroleum resources must be developed in an orderly and ecologically sustainable manner.

124. Section 24 (b) provides that everyone has the right 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.”

125. Section 37(2) of the MPRDA further reinforces the notion that mining must be conducted in accordance with the principles of sustainable development. These principles are expounded on in section 2 of NEMA and, by virtue of section 37(1) of the MPRDA, apply to all decisions concerning the authorisation of mining operations.

126. The import of these provisions is that when considering whether to grant or refuse an application for a mining right, the Director-General was required to ensure that adequate mitigation measures were in place to prevent ecological degradation, to promote conservation and to secure ecologically sustainable development.⁸⁶ In deciding whether such measures were adequate, the Director-General was required to adopt a risk-averse and cautious approach.⁸⁷ Finally, the Director-General was required to ensure that the grant of a mining right in the circumstances was consistent with national environmental policy, norms and standards.⁸⁸

127. It is BirdLife’s submission that having regard to:

127.1. the undisputed sensitivity of the wetlands situated adjacent to the proposed mining area;

127.2. the undisputed vulnerability of the bird species dependent on these wetlands;

⁸⁶ s 24(b) Constitution

⁸⁷ s 2(4)(a)(vii)NEMA

⁸⁸ s 3(3) MPRDA

127.3. the undisputed risk that the proposed opencast coal mining operations pose to the wetlands and the bird species dependent on them;

127.4. the inadequacies of the measures proposed by WPB and its consultants to mitigate these risks; and

127.5. the numerous national and provincial initiatives to conserve the biodiversity of the broader area in which the proposed mining is to take place,

the Director-General's decision to grant WPB a mining right over the properties failed to give effect to the constitutional and statutory imperatives described above. The decision to grant the mining right is contrary to the various policies, frameworks and plans drawn up for the area by other governmental entities and agencies which identify the area as a sensitive conservation area. The decision in fact seriously undermines the state's (and hence the DMR's) obligation to take reasonable and other measures to promote conservation and secure ecologically sustainable development of the use of natural resources while promoting justifiable economic and social development and constitutes a retrogressive measure which if given effect to, will unjustifiably negatively infringe the section 24(b) right. It is accordingly unlawful and falls to be set aside.

APPLICATION FOR CONDONATION FOR LATE LODGING OF APPEAL

128. The decision to grant WPB a mining right over the properties was apparently made by on or about 10 December 2012.

129. BirdLife only became aware of the decision on 4 March 2013 when the Mpumalanga Tourism and Parks Agency (the MTPA), which had also raised an objection to the application, forwarded BirdLife a letter, dated 27 February 2013, that the MTPA had received from the Mpumalanga Regional Manager) advising it that its objection had been overruled and that a mining right had been granted to WPB. A copy of this letter to the MTPA is attached marked "**BL7**".
130. As can be seen from the letter, the Regional Manager advised the MTPA that the mining right had been granted to WPB by the **Minister of Mineral Resources** on 10 December 2012.
131. Since no appeal in terms of section 96 of the MPRDA would lie if the decision to grant the mining right had indeed been made by the Minister, BirdLife's attorneys, the Centre for Environmental Rights (CER), wrote to the Regional Manager and to the DMR on 8 March 2013, inquiring as to who in fact had made the decision and whether or not an appeal could be noted against the decision. In its letter the CER stated that on the basis of the Regional Manager's letter to the MTPA, which indicated that the mining right had been granted to WPB by the Minister, the CER's understanding was that no internal appeal lay against the grant of the mining right in terms of section 96 of the MPRDA and that BirdLife would have to seek relief by means of judicial review proceedings. The CER requested to be notified as a matter of urgency if this was incorrect. A copy of this letter is attached hereto marked "**BL8**".
132. Having received no response to this letter, the CER again wrote to the Regional Manager on 27 March 2013. A copy of this letter is attached hereto marked "**BL9**". In this letter

the CER referred to its letter of 8 March 2013 and advised that no response had been received to that letter. The CER reiterated its understanding that, when the Minister grants a mining right, no appeal lies against that decision in terms of section 96 of the MPRDA and that an aggrieved party is therefore entitled to approach the Court directly for the review of the decision concerned. The CER advised the Regional Manager that its client was preparing to launch a judicial review of the Minister's decision and that it reserved its client's rights to seek a costs order against the DMR should it transpire that the mining right was granted by an official other than the Minister. The Regional Manager also did not respond to this letter.

133. On 7 June 2013 the CER wrote to the Minister, requesting her to furnish BirdLife with written reasons for her decision to grant a mining right to WPB within 90 (ninety) days of the request, i.e. by 4 September 2013. This request has not yet been acknowledged and no reasons for the decision have been furnished to Birdlife. A copy of this letter is attached hereto marked "**BL10**".
134. On 12 June 2013, BirdLife was provided with a copy of WPB's replying submission to the appeal submitted by the Escarpment Environment Protection Group and others referred to above. In this replying submission reference is made, in paragraph 1, to "*...the grant of a mining right by the Director-General of the Department of Mineral Resources*".
135. In light of the uncertainty created by the conflicting assertions of the Regional Manager on the one hand and WPB on the other, the CER wrote another letter to the Regional Manager and the Director-General on 25 June 2013 in a final attempt to obtain clarity as to who had taken the decision to grant the mining right. The CER requested a response

to this letter by no later than close of business on Friday 28 June 2013. Neither the Regional Manager nor the Director-General responded to this letter. A copy of this letter is attached marked "**BL11**".

136. Notwithstanding the absence of any response to its various letters requesting clarification from the DMR, BirdLife and its attorneys have assumed, on the basis of the pending appeals lodged by EEPOG and others and HHD Plase (Pty) Ltd referred to above, which appeals the DMR appears to be processing, that an appeal against the grant of the mining right does in fact lie and that this internal remedy must be exhausted before judicial review proceedings may be launched.

137. As the above recount of events illustrates the failure to meet the 30 day deadline for the noting of an appeal prescribed in regulation 74 of the regulations to the MPRDA is largely a result of the DMR's failure to respond to BirdLife and its attorneys' repeated requests for clarification as to who the relevant decision-maker was and the reasons for the decision. This clarification was precipitated by the advice contained in the Regional Manager's letter of 27 February 2013 and was necessary in order for BirdLife to ensure that it followed the appropriate course as prescribed by the MPRDA as read with the Promotion of Access to Justice Act, 2000 in challenging the decision.

138. Since its final request to the Regional Manager and the Director-General on 25 June 2013 for information about who took the decision, BirdLife has taken all steps necessary to finalise this appeal as soon as possible, including commissioning an expert to draw up a report for it and briefing counsel to settle the appeal papers.

139. Having regard to the grounds of appeal, which are dealt with in detail above, BirdLife submits that its appeal has good prospects of success. Furthermore, no prejudice will be suffered by any party as a result of the delay in submitting this appeal because there are other appeals currently pending before the Minister which have yet to be disposed of.

140. BirdLife submits that good cause has been shown for the granting of condonation and accordingly applies for condonation for the late noting of this appeal.

RESERVATION OF BIRDLIFE'S RIGHT TO SUPPLEMENT ITS APPEAL PAPERS

141. As mentioned above, notwithstanding its request therefore, BirdLife has not been furnished with reasons for the Director-General's decision to grant the mining right to WPB. This appeal has accordingly been compiled without reference to these reasons. BirdLife notes that it is entitled to reasons in terms of section 5 of the MPRDA as well as section 3 of the Promotion of Administrative Justice Act, 2000. It persists with its request for the reasons for the decision and reserves its right to supplement its grounds of appeal on receipt of the reasons.

CONCLUSION

142. It is respectfully submitted that in light of the grounds for this appeal, the decision of the Director-General to grant a mining right to WPB falls to be set aside.

143. Alternatively, it is further respectfully submitted that this is a suitable case for the Director General to exercise the powers granted in terms of section 103(4)(b) of the MPRDA and withdraw the decision of the Director-General to grant WPB a mining right.
144. In addition, and in order to avoid the harm described in this appeal from materializing it is respectfully requested that the Director-General's decision be suspended pending the finalisation of this appeal as contemplated in section 96(2) of the MPRDA.
145. Should the Minister require further information in order to make a decision concerning the above it is respectfully requested that BirdLife be provided an opportunity to submit such further information as may be required for a decision to be made.
146. The proof of payment of the appeal fee of R500-00 contemplated in regulation 74(3) of the MPRDA regulations read with regulation 75(1)(f) is attached hereto marked "**BL12**".

Yours faithfully

Centre for Environmental Rights
Attorneys for the Appellant

per:

T Davies
Attorney
Direct email: tdavies@cer.org.za

Centre for Environmental Rights
223 Lower Main Road
Observatory
Cape Town
7925

SIGNED at CAPE TOWN on this the 30th day of July 2013 for and on behalf of Birdlife South Africa