ZERO HOUR

Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga

May 2016
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<td>Air Quality Management Plan</td>
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<td>CBO</td>
<td>Community-Based Organisation</td>
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<td>CER</td>
<td>Centre for Environmental Rights</td>
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<td>Department of Environmental Affairs</td>
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<td>Dullstroom Plateau Grasslands</td>
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<td>Department of Performance Monitoring and Evaluation</td>
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<td>Escarpment Environmental Protection Group</td>
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<td>Environmental Management Programme</td>
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<td>FPIC</td>
<td>Free Prior and Informed Consent</td>
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<td>Federation for a Sustainable Environment</td>
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<td>Industrial Development Corporation</td>
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<td>MBCP</td>
<td>Mpumalanga Biodiversity Conservation Plan</td>
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<td>Mpumalanga Biodiversity Sector Plan</td>
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<td>MDEDET</td>
<td>Mpumalanga Department of Economic Development, Environment and Tourism</td>
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<td>MPAES</td>
<td>Mpumalanga Protected Area Expansion Strategy</td>
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<td>MPE</td>
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<td>NCOP</td>
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<td>National Environmental Management Act, 1998</td>
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Mpumalanga faces unprecedented environmental threats that will have significant consequences for South Africa’s future prosperity.
Mining is a destructive activity that poses significant threats to the environment, health and livelihoods. Managing these threats to avoid the violation of Constitutional rights requires strong, well-resourced and principled regulation.

For the past fourteen years, Mpumalanga has experienced a proliferation of prospecting and mining right applications, particularly for coal. Regulation by the two departments with primary responsibility for mining – the Department of Mineral Resources (DMR) and the Department of Water and Sanitation (DWS) – has been poor. Communities and the natural environment are paying an indefensibly high price as a consequence of such poor governance and failure by these departments to ensure that mining companies comply with the law.

Alarm bells are ringing in Mpumalanga. Civil society organisations, communities, researchers, farmers and other government agencies have expressed concern about the detrimental impacts of mining on water security, soil and food security, and the health, well-being and development prospects of communities in Mpumalanga. Many have implored the DMR and DWS to stem the tide by refusing to authorise mining and water use that will cause unacceptable pollution and degradation.

South Africa is a water-scarce country which is experiencing its worst drought in thirty years. Yet while Mpumalanga contains areas of immense hydrological importance – areas that are strategic for the country’s water supply – the DMR and DWS continue to grant mining and water use rights in these areas, risking water security.

This report was compiled using an in-depth review of evidence spanning more than five years, including academic studies, reports, litigation and pre-litigation cases, access to information requests, portfolio committee submissions, and parliamentary questions and answers. It entailed field work in the province, community meetings and consultations, meetings with local government officials, and meetings with mining companies. Repeated attempts to engage the DMR’s Mpumalanga Regional Office were unsuccessful.

Our conclusion is that Mpumalanga faces environmental threats that will have dire consequences for South Africa’s future prosperity. These are some of the reasons:

- By 2014, 61.3% of the surface area of Mpumalanga fell under prospecting and mining right applications. Mining involves the removal of huge quantities of topsoil, essential for cultivation. A mere 1.5% of SA’s soils are considered high potential, and 46.6% of these are found in Mpumalanga. If mining continues at its current rate, around 12% of SA’s total high potential arable land will be ruined.
- On the Mpumalanga Highveld, air quality is among the worst in the world. Air pollution from mining can be caused by particle emissions from activities such as processing, blasting, wind erosion of overburden, and dust entrainment.
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Key findings

Mining-affected communities are exposed to water, soil, noise and dust pollution – causing ill health – and almost always experience social disruption ranging from increased crime to forced resettlement. Often the most vulnerable communities suffer the worst of these consequences: settlements are frequently located in close proximity to mines; houses crack from blasting operations; and some settlements are perilously situated above or close to abandoned mines, and collapse when subsidence occurs. With environmental non-compliance left unchecked, mines can continuously leach toxic water into ground and surface water, on which many depend in the absence of piped water.

Key recommendations

1. Remove responsibility for environmental regulation of mines from the DMR, and have mining governed by environmental authorities — as is the case for all other industries.
2. Implement legal protection for areas in which mining would be too harmful, giving legal certainty to licensing authorities, mining companies, communities and civil society organisations. Priority should be given to protection of South Africa’s “water factories”.
3. Commit to licensing decisions that are informed by science, that are responsive to the views and concerns of environmental authorities and affected communities, and that take into account the compliance history of mining companies.
INTRODUCTION

Mining has provided the backdrop to much of South Africa’s economic and political history. Although gold, copper, tin and iron were mined in pre-colonial times\(^1\), the international discovery of minerals propelled the region’s mainly subsistence society into its first Industrial Revolution, when mining became large-scale and a source of enormous profit.

After a gold rush in the late 1800s, the country’s first stock exchange was established in the town of Barberton in Mpumalanga – formerly known as the Eastern Transvaal\(^2\). And while many other minerals are mined throughout the province\(^3\), a concentration of gold mines can still be found in the Lowveld.

On the Highveld, mining is dominated by coal, which has been extracted in the area for more than a hundred years. The coal industry was born when a railway line running from Pretoria to Lourenço Marques (now Maputo) was built close to Witbank in 1894\(^4\). The area has been described as a “coal treasure chest”, where coal “simply bursts out of the ground”\(^5\), and when Witbank was renamed in 2006, it became eMalahleni, meaning “place of coal” in Nguni languages.

But the province is also rich in non-mineral resources, such as high potential soils, strategic and critical water resources, and an abundant diversity of species and...
habits, all providing vital ecosystem services for sustaining human activities and livelihoods.

Today, however, Mpumalanga’s natural environment is in crisis. Mining is proliferating at an unprecedented pace, and it is estimated that more than 60% of the province is under either a prospecting or mining right application6.

In 2014, the Mpumalanga Tourism and Parks Agency (MTPA) released statistics on development applications in the province7. It analysed trends by creating a map overlay of the number of applications it had received for comment over a period of 14.5 years, between 2000 and 2014. The data revealed that by far the greatest land-use pressure in Mpumalanga was mining-related.

More than half of Mpumalanga’s land surface area (54.2%) is under prospecting right applications, while a further quarter (24.5%) is under mining right applications8. Together, because of overlapping applications, these account for 61.3% of the total land surface area of the province, with Nkangala District Municipality under the most pressure for land-use change9. Comparatively, other development applications constitute far less, with built infrastructure coming in at 9%, residential development at 4.3%, and cultivation at a mere 0.7%10.

Scientists, academics, conservation and tourism authorities, other government departments, and civil society have been sounding the alarm for nearly a decade about the impact of mining in Mpumalanga. These warnings have fallen on deaf ears, leading to increased contestation from environmental organisations and affected communities, and ultimately resulting in many costly and protracted legal battles, which would be unnecessary if government properly applied the laws applicable to mining and water.

In this report, we take a close look at the governance issues surrounding mining in Mpumalanga, presenting evidence to support our allegation that the State, and more specifically the DMR and the DWS, are not fulfilling their Constitutional and statutory mandates in Mpumalanga, and in so doing are facilitating the violation of environmental rights through the poor regulation of mining.

In Section 1, we briefly describe the costs and detrimental impacts of mining in the province, and the State’s inadequate response to the crisis. In Section 2, we look at the governance failures that have contributed to these cumulative impacts, using specific cases as evidence of government departments not fulfilling their Constitutional mandates and evading or neglecting their legal obligations.

Finally, in Section 3, we conclude by analysing the inherent conflict of interest in the DMR’s mandate, as well as the special treatment reserved for the mining industry, making recommendations for national reform.

We use the dire example of Mpumalanga to demonstrate shortcomings in South Africa’s statutory framework.
A suite of South African laws provides the framework within which government and mining companies must operate to ensure that minerals are mined responsibly. When appropriately applied, these laws should mitigate some of the social and environmental impacts of mining.

The Constitution is South Africa’s supreme law, and section 24 enshrines the environmental right as follows:

Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other 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.

The following is a brief overview of the main statutes regulating the impacts of mining in South Africa:

1. The MPRDA (Mineral and Petroleum Resources Development Act, No. 28 of 2002) governs mining, and the DMR is the competent authority for administering this Act. The MPRDA stipulates that the exploitation of mineral resources must be done in a sustainable manner, to the benefit of all, for present and future generations. One of the purposes of this Act was the transformation of the mining sector, so that previously disadvantaged communities could benefit from mining. Until December 2014, the MPRDA governed the environmental management of mining.

2. NEMA (National Environmental Management Act, No. 107 of 1998) is South Africa’s framework environmental legislation. This Act contains general principles for environmental management, and the requirement to obtain an environmental authorisation upon submission of an application under the 2014 Environmental Impact Assessment Regulations.

Under NEMA, the Minister of Environmental Affairs must list all the activities that could cause environmental degradation, and companies who plan these kinds of listed activities must first obtain permission, in the form of environmental authorisation, from the Department of Environmental Affairs (DEA) or provincial environment departments to do so. That is, unless the listed activity is prospecting and mining. Then companies must obtain environmental authorisation under NEMA from the DMR. For all industries except mining, the DEA is the competent authority to grant environmental authorisation. For the mining industry however — since December 2014 and the commencement of the “one environmental system” (OES) — the DMR is the competent authority for issuing environmental authorisations for mining under NEMA, as well as for enforcing compliance with those licences.
NEMA also requires that reasonable measures be taken to prevent pollution and environmental degradation, and makes it a criminal offence to intentionally or negligently cause significant pollution or degradation of the environment.

3. When the *National Water Act, No. 36 of 1998* came into effect in 1999, the State became the trustee of South Africa’s water resources, and the DWS has the mandate to govern the sustainable use of those water resources. Under this Act, to obtain permission from the DWS to use water for defined (controlled) activities, mining companies must not only complete specialist environmental reports, but also consult with those likely to be affected by their water use, and ensure that their operations do not cause unacceptable pollution or ecological degradation. This permission takes the form of a water use licence (WUL). The MPRDA has since its promulgation stipulated that mining and prospecting operations were subject to the NWA.

4. Under the *National Environmental Management: Protected Areas Act (Act 57 of 2003, or NEMPAA)*, defined areas can be awarded protected status in varying degrees. For example, NEMPAA prohibits commercial prospecting, mining, exploration, production or related activities in a special nature reserve, national park, or nature reserve. However, such activities may take place in a protected environment (PE) with the written permission of both the Ministers of Mineral Resources and Environmental Affairs.

5. The *National Environmental Management: Air Quality Act (Act 39 of 2004, or NEMAQA)* provides the regulatory tools for the State to ensure that air quality is of an acceptable standard and not detrimental to people’s health. NEMAQA introduced ambient air quality and local emission standards, and placed the responsibility for air quality management on local authorities.

6. More generally, the *Promotion of Administrative Justice Act (Act 3 of 2000, or PAJA)* and the *Promotion of Access to Information Act (Act 2 of 2000, or PAIA)* set requirements for administrative decision-making and access to information respectively.

Under the statutes listed above, before any minerals can be prospected for or mined, mining companies must obtain rights. Operating without the required rights means that mining companies are operating illegally. To apply for these rights, companies must compile a number of applications for approval by the DMR, including an Environmental Impact Assessment (EIA) in support of an Environmental Management Programme (EMPR), a Mine Works Programme, and a Social and Labour Plan. Furthermore, because mining operations can require large amounts of water and cause significant water pollution, companies must, in most cases, also apply for a water use licence from the DWS. Prospecting or mining without these licences is illegal and a criminal offence.
The One Environmental System

When the MPRDA came into effect in 2004, it acknowledged that South Africa’s mineral and petroleum resources belong to the nation, with the State as custodian. The environmental management of mining was regulated primarily under this Act. One of its purposes was to give effect to the environmental rights enshrined in the Constitution by stipulating that the nation’s mineral and petroleum resources be developed in an orderly and ecologically sustainable manner. Under the MPRDA, the Minister of Mineral Resources also had to ensure the sustainable development of resources “within a framework of national environmental policy, norms and standards while promoting economic and social development.”

On 8 December 2014, however, government started rolling out the so-called “One Environmental System” (OES), which purported to “streamline” and “synchronise” the application processes for mining, environmental and water use authorisations within a shorter 300-day period. The OES is controversial for a number of reasons, and it is the result of a complicated law reform process. It has been eight years since its conception, and it is still underway. After many poorly drafted amendment Acts, legislative uncertainty abounds. Because of this, additional amendments to key legislation have been necessary and are ongoing. This legal uncertainty, as well as the system’s staggered commencement and the incomplete execution of the various legal amendments, has created loopholes that mining companies have been quick to exploit.

Before the OES, when applicants applied for mining rights, they had to submit an EMPR to the DMR for approval under the MPRDA. Environmental authorisation (EA) — governed under NEMA and regulated by the DEA — was required when the mining operation involved other damaging activities included in the Listing Notices published under NEMA, such as clearing vegetation or building roads. This is no longer the case. The environmental management of mining, and mining-related activities, has been excised from the MPRDA and is now governed entirely under NEMA. While it is critical that the environmental standards prescribed by NEMA — significantly higher than those that were prescribed under the MPRDA — now apply to mining (as they do for every other industry) the OES retains the DMR as the competent authority for environmental management of mining (unlike every other industry where this power is appropriately conferred upon environment authorities).

The OES has expanded the DMR’s environmental obligations and displaced those of the DEA for mining altogether. The DMR has become the competent authority for processing and issuing environmental authorisations under NEMA for all activities in the “mining area”, and for enforcing the conditions of those environmental authorisations and enforcing environmental laws more broadly. This, as we show in this report, is incongruous with environmental protection. The Minister of Environmental Affairs retains only the authority to decide appeals lodged against the granting of, or refusal to grant, these authorisations. The serious conflict of interest in the DMR’s mandate has therefore been aggravated by the OES. Having the DMR as the competent authority for the environmental management of mining means the minerals fox is guarding the environmental henhouse in South Africa.

The serious conflict of interest in the DMR’s mandate has been aggravated by the One Environmental System. Having the DMR as the competent authority for the environmental management of mining means the minerals fox is guarding the environmental henhouse in South Africa.
Section 1

THE COSTS AND IMPACTS OF MINING IN MPUMALANGA
While the costs of coal on people and the environment are recognised globally, the coal industry does not internalise these costs. Often the poorest and most vulnerable communities pay the price for these externalities, and in Mpumalanga, the situation is no different.

Mining is a destructive process. It produces large amounts of toxic waste and water, sterilises land, and destroys biodiversity. Some of its impacts only appear decades after operations have ceased, and many are cumulative. In Mpumalanga, unfettered mining has had catastrophic consequences for the province.

The detrimental impacts generated by mining activities, including their associated social, health and environmental costs, are known, somewhat contentiously, as externalities. These costs are borne by the public and the environment, rather than by the companies whose activities occasion them. Allowing these costs to be passed on to the public and the environment contradicts the duty of the State to recognise, realise and protect Constitutional rights, including the environmental right, as well as the obligations under the MPRDA, the NWA and NEMA. These Acts all enshrine the “polluter pays” principle, which requires that the costs of pollution be carried by those responsible for causing it.

Section 2 of NEMA also requires that development must be socially, environmentally and economically sustainable, and that pollution and ecological degradation must be avoided. Where it cannot be avoided, it should be minimised and remedied. The Constitutional Court gave guidance on the meaning of “sustainable development” in the 2007 Fuel Retailers case. In this decision, the court recognised the interconnected relationship between socio-economic development and the protection of the environment. It also gave clarity on the legal requirements environmental authorities must comply with when making decisions. The court found that environmental authorities must consider the cumulative impacts of development. Developments — including prospecting and mining — must therefore be socially, environmentally and economically sustainable.

The external costs of coal

Beneath Mpumalanga lies a dense network of coal seams, and coal accounts for more than 70% of all mining-related applications in the province. The Witbank, Highveld and Ermelo coalfields produce most of South Africa’s coal, and there are 22 collieries in the vicinity of eMalahleni alone. In addition, there are 12 coal-fired power stations on the Highveld, as well as four new Independent Power Producer (IPP) coal-fired power stations in the pipeline for Mpumalanga.

South Africa depends on coal as its main fuel for energy production, and Eskom generates 95% of the nation’s electricity in power stations that mostly use locally mined coal. According to the Industrial Development Corporation (IDC), Mpumalanga supplies 83% of South Africa’s coal, “most of which is sold to Eskom and Sasol”.

But the mining, transportation and combustion of coal all cause severe pollution and environmental degradation, and the impacts are often irreversible. Coal’s status as the cheapest fossil fuel relies on its actual costs not being reflected in its market price, and the coal industry would likely not remain profitable if these costs were internalised.

In 2008, Greenpeace published “The True Cost of Coal”, for which it commissioned the Dutch Research Institute CE Delft to try to calculate the full costs of coal, by taking into account the costs of environmental impacts, the costs on human health, as well as the costs of mining-related fatalities.

The institute’s findings are staggering. It estimated that global external costs amounted to around EUR 360 billion in 2007, stating that this figure was probably an underestimation, because some costs are impossible to calculate. This is either because of a lack of data, or because some costs are not quantifiable.

The institute then extrapolated these costs, and estimated that over 10 years, these costs could soar to more than EUR 3.6 trillion. The report compared this to the 2008 economic bailout of financial institutions in the United States (USD 700 billion), saying these external costs would equal six times the cost of this bailout.

While the costs of coal on people and the environment are recognised globally, the coal industry does not internalise them. Often the poorest and most vulnerable communities pay the price for these externalities, and in South Africa and Mpumalanga, the situation is no different. But can the State and the South African public continue to bear these costs? And should they be expected to?
1.1 Impacts on water

South Africa is water scarce. It is the 30th driest country in the world, with less water per capita than Namibia or Botswana. The average annual rainfall is less than half the global average, making it critically important to conserve this precious resource.

Section 27 of the Constitution guarantees everyone the right to adequate water, and because water is our most basic need and vital to our survival, successful socio-economic development — which inevitably uses water, frequently in vast quantities — requires coordinated and strategic action. The protection of our water sources must therefore be prioritised.

South Africa’s National Development Plan 2030 recognised and stressed the importance of water conservation in the province as follows: “There is an urgent need for a coherent plan to ensure the protection of water resources and the environment in the Mpumalanga Highveld coalfields, upstream of the Vaal and Loskop dams, as well as in the Lephalale-Waterberg area. Given environmental pressures and development demands, current water allocations in the upper Vaal and Olifants River water management areas urgently need to be revised. Local planning should also ensure that groundwater resources are optimally used.”

With over 4,000 wetlands and five major catchment areas, including the headwaters of the Vaal, Olifants, Nkomati, Crocodile and Usuthu rivers, Mpumalanga is strategically and indeed critically important for regional and international water security.

In 2013, World Wide Fund for Nature South Africa (WWF-SA) and the Council for Scientific and Industrial Research (CSIR) together mapped out the country’s strategic water source areas. These constitute the 8% of South Africa’s land surface that provides 50% of its runoff. The study grouped South Africa’s Water Source Areas into 21 areas, and both the Enkangala Drakensberg Water Source Area (which straddles several provinces, including Mpumalanga), and the Mpumalanga Drakensberg Water Source Area, are threatened by coal mining. Alarmingly, the study also found that although less than 1% of these water source areas are mined, in Mpumalanga, a staggering 70% of these areas that are of “high importance for water run-off”, are the subject of mining-related development applications (17.3% are for mining applications, while 53.9% are prospecting applications).

Early in 2015, scientists unequivocally stated that there was no longer any debate that South Africa was experiencing a water crisis. At the time they said that although it was an issue of quality rather than quantity, water shortages could become a reality in some areas by 2025 because of population growth, development and climate change, and that this water deficit could be between 2% and 13% by 2025. Other media reports also warned about the spectre of “water shedding” that the country would soon have to face and, by late 2015, the country was facing a severe drought.

The Olifants River Catchment

The Olifants River flows through eMalahleni and Middelburg and is described as one of the most polluted rivers in Southern Africa. The catchment, which is subdivided into nine secondary catchments, is vast. It has thirty large dams, including Witbank, Middelburg and Loskop, while the river also snakes across the border into the Massingire Dam in Mozambique.

From as early as 1970, the Witbank, Loskop and Middelburg dams started showing elevated levels of sulphate and TDS (Total Dissolved Solids) concentrations. A 2011 study by the DWA found that “mining, predominantly for coal, and other industrial activities around the Wilge, Bronkhorstspruit, Klein Olifants and Olifants Rivers are the main contributors to poor in-stream and riparian habitat conditions where acid leachate from mines is a primary contributor to poor water quality and instream conditions.”

The Olifants Catchment is therefore under great pressure because of a tremendous demand for natural resources, high pollution levels, and substantial land use changes. According to the CSIR, “mining-related disturbances are the main cause of impairment of river health” in the upper parts of the catchment.

The catchment has been mined for more than 120 years and by 2004, an estimated 50,000 m³ of polluted mine water was being released into the Olifants River per day. An additional 64,000 m³ courses into it from old abandoned mines, damaging freshwater ecosystems and affecting the water supply necessary for irrigation and municipal services.

In addition, the NWA provides for the Reserve, which is defined as consisting of two parts: “the basic human needs reserve and the ecological reserve. The basic human needs reserve provides for the essential needs of individuals served by the..."
MAP 2
Upper Olifants River Catchment showing aquatic health

water resource in question and includes water for drinking, for food preparation and for personal hygiene. The ecological reserve relates to the water required to protect the aquatic ecosystems of the water resource. The Reserve refers to both the quantity and quality of the water in the resource, and will vary depending on the class (our emphasis) of the resource. The Minister is required to determine the Reserve for all or part of any significant water resource. Once the Reserve is determined for a water resource it is binding in the same way as the class and the resource quality objectives.

The Reserve for the Olifants has not yet been determined. In September 2014, the Minister of Water and Sanitation finally published proposed classes for the Olifants catchments. However, it appears that only a single water resource in this profoundly overburdened catchment will receive the status of “high environmental protection and minimal utilization” (Class I).

Eskom’s coal-fired power stations

Mpumalanga is home to 12 of Eskom’s coal-fired power stations. Most of these have their own dedicated mines (known as captive collieries) from which coal is sourced, demonstrating the inextricable link between coal mining and power generation in South Africa. Eskom generates 95% of the country’s electricity, and coal is used for 92% of South Africa’s electricity generation. The power utility depends on regular, clean water to function, and it uses an average of 316 billion litres of water per year. However, water quality is so poor in the Olifants River that it can no longer be used in Eskom’s coal-fired power stations. A new power station, Kusile, is currently under construction and will be ‘one of the biggest in the world’, requiring 71 million litres of water per day. This water will be pumped from the Vaal River in Gauteng, because local water supplies are not of a high enough quality due to pollution. Although Eskom is sometimes regarded as a “strategic water user” (with the implication that the DWS must ensure it a reliable supply of clean water), this concept does not exist in law. Section 31 of the NWA makes it clear that the issuing of a licence gives no guarantee of supply. The designation (“strategic water user”) is furthermore inaccurate. It is the generation of electricity that is a strategic water use. In other words, Eskom may be the major generator of electricity in South Africa, but it is not the only one. And its water usage for electricity generation may be for a strategic use, but this is also the case for any other electricity generation (for example via independent power producers).

Acid mine drainage

Over the years there have been large-scale fish die-offs in the Loskop Dam on the Olifants River in Mpumalanga. The frequency of these events has been increasing since 2003. Nile crocodiles, listed as “vulnerable” in South Africa and indigenous soft-shelled terrapins (Pelusios sinuatus) have died because of it. When scientists examined the dead animals, signs pointed to pansteatitis, a disease that causes the hardening of fatty tissues, and which is the result of eating rancid fish after a fish die-off. The scientists concluded that the deaths appeared to be from acid mine drainage.

Acid Mine Drainage (AMD) occurs when polluted water decants from mines and flows over pyrite, which is commonly known as “fool’s gold”. When pyrite is exposed to oxygen and water, a reaction takes place between the sulphides in the ore rock, and sulphuric acid is formed.

Rivers take on a yellow, rusty colour from the iron oxide in the water, which when AMD is released into the environment, it can pollute both groundwater and surface water. Its effects are devastating as it leaches into aquifers or flows into rivers and streams. It sterilises soils and contaminates food crops, puts fauna and flora at risk, and is dangerous to human health.

The problem of AMD is particularly pressing in the context of South Africa’s legacy of derelict and ownerless mines. Some of these are already causing AMD, while many are ticking time-bombs. According to a report by the Council for Geoscience (CGS), by the end of May 2008 there were 5 906 “officially listed” derelict and ownerless mines in South Africa. The CGS classified 1 730 of these mines as “high risk”, estimating they would require approximately R28.5 billion of the total R30 billion then estimated cost of rehabilitation. In August 2015 it was reported that the estimated cost of this rehabilitation was R60 billion.

Acid mine drainage from coal in eMalahleni and gold on the Witwatersrand is such a serious matter that cabinet convened an Inter-Ministerial Committee (IMC) to investigate this threat and compile a report detailing the estimated costs of resolving the issue. This committee includes the Ministers of Water, Environmental Affairs, Mineral Resources, Finance, Science and Technology, and the Minister in the Presidency for National Planning.
The severity of the matter was also recognised in the 2012 National Water Resource Strategy (NWRS), which stated that acid mine drainage and municipal wastewater pollution had “reached unacceptable levels” 68. Mpumalanga falls under one of the priority areas identified by the strategy, meaning it requires immediate action because of the “lack of adequate measures to manage and control the problems related to AMD”. The NWRS furthermore describes coal mining in the Upper Vaal in Mpumalanga as the most serious future risk to water quality.

CASE STUDY 1: Carolina

The town of Carolina provides a clear example of the socio-economic effects of environmental impacts from mining. The drinking water of Carolina and the nearby Silobela township was contaminated in January 2012, when a storm event caused run-off ponds from coal-handling facilities to overflow. Acid mine drainage then flowed into the municipal Boesmanspruit Dam, which supplied these communities with drinking water.

The water became toxic and unfit for human consumption. The pH level dropped to 3.7, and iron, aluminium, manganese and sulphate levels became elevated69. Fish in the Boesmanspruit dam started dying and the water turned dark green70.

However, neither the municipality (the local responsible authority for treating water and providing a sufficient quantity of water), nor the mines who caused the contamination, remedied the situation. The water remained undrinkable for seven months71, resulting in community unrest during which a protester was shot72.

The municipality provided some water by trucking it in, but the water tanks were not regularly refilled and many people had to walk long distances to receive their water supply.

In late June 2012, and acting on behalf of the Silobela community and the Federation for a Sustainable Environment (FSE) respectively, the Legal Resources Centre (LRC) and Lawyers for Human Rights (LHR) took the Chief Albert Luthuli Local Municipality, Gert Sibande District Municipality, the Minister of Water Affairs and others to court to compel them to provide an adequate water supply to Carolina73. The court found in favour of the Silobela community in July 201274, ordering the Gert Sibande District Municipality to provide temporary potable water to residents within 72 hours. It also ordered the municipality to meaningfully engage with the residents of Carolina. No order was granted against the Minister of Water Affairs or her Department.

The municipality however failed to act as directed by the court and instead appealed the decision. Its appeal suspended the court’s order to provide water to the residents. LHR and LRC were then forced to approach the court to have the original order executed pending the appeal process. Their relief was granted, but the municipality appealed that order, too. It was unsuccessful and was ordered to immediately implement the original order. Despite this, the municipality failed to actively involve the community in addressing their needs. After the water supply was restored, the residents continued to experience problems in both the quantity and quality of their water. They said it was unfit for human consumption and were instead forced to rely on alternative water sources.

In September 2014, the municipality finally withdrew its appeal and tendered to pay the residents’ costs. However, due to its ongoing failure to comply with the Court’s order, the residents’ legal representative then elevated the matter to the DWA. Progress was finally made when the DWA set up a task team consisting of officials from the DWA’s national and regional (Mpumalanga) offices, officials from the local municipality, as well as the residents’ leaders and legal representatives. The residents however assert that the municipality has to date still not sufficiently engaged them in addressing their water related concerns75.

By appealing the two court orders, the local government protracted and delayed the matter, tying up considerable civil society resources, while the residents of Carolina were without water. Furthermore, the Minister of Water and Environmental Affairs, Edna Molewa, at the time told a media briefing that there was a “war against the state”, because the mines responsible for the pollution were not cited in the court action76. LHR and LRC in the media said that although they had considered citing the mines, their main concern was to imperatively ensure an adequate water supply to the residents of Carolina. They believed the court would not have entertained the question of redress for causing the pollution on an urgent basis and therefore did not cite the mines as respondents77.

To date, no legal action has been taken against the mines operating upstream that caused the pollution problem. Subsequent action could and should have been taken by the State, not only to ensure accountability and transparency, but also to protect vulnerable communities against reckless mining companies who pollute water, by enforcing the “polluter pays” principle.

1.2 Impacts on air quality

On the Mpumalanga Highveld, air quality is some of the worst in the world. Air emissions from mining can be caused by particle emissions, known as fugitive dust, from a number of activities, such as processing, blasting, wind erosion of overburden, and dust entrainment from haul trucks. Coal mining is particularly polluting, and can lead to coal fires when seams start burning or when coal storage piles catch alight78.

In 2004, the Trade and Industry Chamber released the “FRIDGE” (Fund for Research into Industrial Development and Growth and Equity) study, and found that
industrial sources, such as coal mining, power generation and the petrochemical industry, were by far the largest contributors of emissions on the Highveld, accounting for 89% of PM$_{10}$, 90% of NO$_x$, and 99% of SO$_2$, all of which are harmful to human health. The levels of these substances in the air on the Highveld significantly exceed World Health Organisation (WHO) recommended levels.

Under NEMAQA, the Minister of Environmental Affairs and MEC have the power to identify air pollution “hotspots” that require specific attention. Because air quality is so poor on the Highveld, the Minister of Environmental Affairs and Tourism declared it a priority area in 2007.

These priority areas can be declared when ambient air quality exceeds ambient air quality standards, or when a situation exists that may cause a significant impact on air quality. This means the Highveld requires urgent air quality management action to prevent harm to human health.

The Highveld Priority Area (HPA) covers 31 106 km$^2$, and overlaps provincial boundaries, including parts of both Mpumalanga and Gauteng. The declaration of the HPA was gazetted by the Minister of Water and Environmental Affairs in March 2012.

The 2011 Highveld Priority Area Air Quality Management Plan (HPA-AQMP) outlines, in the table below, the total PM$_{10}$ emissions from different sources in the HPA.

Alarmingingly, of the total estimated annual emission sources of fine particulate matter (PM$_{10}$), half (49%) was attributable to particulate entrainment (suspended particles) from mine haul roads.

This is significant considering that the 2014 State of the Air Report, which gave annual averages of PM$_{10}$, PM$_{2.5}$, and SO$_2$ data from 2005 to 2013, found that particulate matter was the greatest national cause for concern in terms of air quality, and that national, provincial and local action was required to bring particulate concentrations down to acceptable levels.

The 2015 State of the Air Report confirmed that particulate matter was “still the greatest cause for national concern in terms of air quality”, and again called for national, provincial and local action to reduce particulate levels.

The effective regulation and control of fugitive PM$_{10}$ emissions is therefore essential for attaining compliance with PM$_{10}$ ambient air quality standards in the HPA. It is clear that emissions from mine haul roads are dust related. Other fugitive dust (PM$_{10}$) related emissions from mining include blasting, mine overburden stripping, quarrying, ore and overburden handling; crushing and screening of ore, wind entrainment from mine stockpiles, and stone crushing.

The main tools for controlling dust from mining operations are site specific EMPRs, as well as the Air Quality Act Dust Control Regulations. However, EMPR dust control conditions are often vague and, because of a lack access to information, it is difficult for civil society to interrogate the extent of their enforcement by the DMR.

The Dust Control Regulations have also been heavily criticised. The main problem identified by CER clients is that they only offer a single tool — a Dustfall Standard — for controlling dust emissions, whereas a far greater variety of tools, appropriate to different situations, is required. Not only is the tool flawed, but from our casework it appears that these regulations are not being enforced at mines, and particularly not by the DMR. Municipal officials have also been reticent to do any compliance monitoring at mines, because their jurisdiction was traditionally not recognised. That is, until the Maccsand Constitutional Court decision on 12 April 2012.

<table>
<thead>
<tr>
<th>Source category</th>
<th>PM$_{10}$</th>
<th>NO$_x$</th>
<th>SO$_2$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ekurhuleni MM Industrial</td>
<td>8 909</td>
<td>15 636</td>
<td>25 772</td>
</tr>
<tr>
<td>Mpumalanga industrial</td>
<td>684</td>
<td>590</td>
<td>5 941</td>
</tr>
<tr>
<td>Clay brick manufacturing</td>
<td>9 708</td>
<td>–</td>
<td>9 963</td>
</tr>
<tr>
<td>Power generation</td>
<td>34 373</td>
<td>716 719</td>
<td>1 337 521</td>
</tr>
<tr>
<td>Primary metallurgical</td>
<td>46 805</td>
<td>4 416</td>
<td>39 582</td>
</tr>
<tr>
<td>Secondary metallurgical</td>
<td>3 060</td>
<td>229</td>
<td>3 223</td>
</tr>
<tr>
<td>Petrochemical</td>
<td>8 246</td>
<td>1 48 434</td>
<td>190 172</td>
</tr>
<tr>
<td>Mine haul roads</td>
<td>135 766</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Motor vehicles</td>
<td>5 402</td>
<td>83 607</td>
<td>10 059</td>
</tr>
<tr>
<td>Household fuel burning</td>
<td>17 239</td>
<td>5 600</td>
<td>11 422</td>
</tr>
<tr>
<td>Biomass burning</td>
<td>9 438</td>
<td>3 550</td>
<td>0</td>
</tr>
<tr>
<td><strong>TOTAL HPA</strong></td>
<td><strong>279 630</strong></td>
<td><strong>978 781</strong></td>
<td><strong>1 633 655</strong></td>
</tr>
</tbody>
</table>

NB: SO$_2$ percentage contributions aggregate is greater than 100 due to rounding of numbers
CER submitted a PAIA request to receive copies of the DMR’s environmental management plan (EMP)90. This EMP should have included information about the DMR’s implementation of its air quality management plan (AQMP) over the past five years. Our request was partially granted in February 2016. The DMR’s response was that it was currently preparing its EMP for 2015/2020 (which was not available because it was “still under construction”), but that the most recent EMP was gazetted in July 2008. However, that EMP’s air quality management plan “was not incorporated as the Department’s mine environmental management function as it was still operating under the MPRDA, Act 28 of 2002”. The DMR stated that air quality issues had been dealt with “at operational level and through [the] Mine Health and Safety Act”90. The DMR then added that it was still in discussions with the DEA about their respective mandates for implementing the one environmental management system, because the “implementation of the NEMA only started in December 2014” and “mining is not featured in the NEM:AQA listed activities”.

Strategic and prioritised management of air pollution from mining requires strong cooperative governance, with local government working closely with national government departments to manage and significantly reduce atmospheric emissions. The declaration of the HPA means that poor air quality in the province from multiple sources, including mining, has been acknowledged, and prioritised for resolution. However, the DMR has taken no role or interest in this process, and there appears to be no plan in place to reduce mining’s contribution to the dangerous levels of particulate emissions in the Highveld air.

**CASE STUDY 2: Escarpment Environmental Protection Group (EEPOG)/Glisa Colliery (Exxaro)**

On 29 July 2004, the Department of Water Affairs and Forestry (DWAF), the DME, and the Escarpment Environmental Protection Group (EEPOG) held a meeting at Exxaro’s Glisa colliery in Belfast, Mpumalanga. The meeting minutes clearly illustrate the effects of poor air quality on mining-affected communities: “The blasting on the mine is now daily where it was previously once in seven days. We know that the dust contains particles less than 10 microns that settle in peoples’ lungs. Nobody has been doing anything about it. Without even monitoring. Why was this allowed to happen? Why was this not done during the planning process for the expansions. There is now a huge increase in the health risk to people in town.” The EEPOG chairperson said “a thick black cloud descends on town every time blasting takes place and the wind blows in the direction of the town” and that “there are two schools, an old age home and a children’s home in town. The trucks are also driving within 20 m of the nearest houses by day and night, at a rate of one truck every 2.5 minutes. This is severely distressing to the people next to the road. They cannot sleep, and there is a severe loss of quality of life”.

**1.3 Impacts on soil and food security**

Mpumalanga produces a significant proportion of South Africa’s staple foods, such as soya beans, maize and dry beans. Agriculture is a significant contributor to the economy and a key job creator in the province. However, the unbridled expansion of mining is eroding Mpumalanga’s arable land, and there are rising concerns about the impact of mining on agricultural production. Water, soil and air pollution from mining affect agricultural yields, and pose a threat to food security.

Section 27 of the Constitution guarantees everyone the right to have access to sufficient food and water, and the State must take reasonable measures, legislative and otherwise, to achieve the realisation of this right.

Mining is so destructive that soils can never be rehabilitated back to their full potential after they have been mined91. The Bureau for Food and Agricultural Production (BFAP), 2012 Report states that “the social and environmental impact of mining activities (e.g. air pollution, water pollution, crime, etc.) are in many instances so severe, that farming activities cannot be sustained on the land that is left between the mining activities”92.

Soil degradation as a result of mining is unavoidable, particularly because mining requires the removal of huge quantities of topsoil essential for cultivation. Soil can lose its fertility and become sterile because of acidification, and heavy machinery and the movement of wet soil causes compaction, where roots can no longer penetrate deeply and organic material is smothered. This means water is no longer available to the plants and the soil is not sufficiently aerated.

Subsidence is another environmental impact of mining that affects agricultural production. This occurs as a result of underground “board and pillar” mines. When pillars collapse, they cause the surface area to sink in or subside. All underground mines will eventually collapse. Sometimes this only occurs 100 or more years later and, as is the case with acid mine drainage, the full consequences may only be felt many years later. One of the main consequences of subsidence, even mild subsidence, is ingress of water. Surface water pools in the subsided areas and the higher lying areas dry out, frustrating attempts to revegetate. Subsidence is also a common problem with open cast mining where rehabilitation has not been properly carried out and insufficient and poor quality “back-filling” of open cast pits has taken place. Over time the material used to back-fill the pits compacts and sinks, causing the land to subside.

In 2012, the Maize Trust commissioned a study about the impact of mining on agriculture, choosing Mpumalanga’s Delmas, Ogies and Leandra districts as its focus areas because of their high soil potential and maize production yields93.

The study found that a mere 1.5% of South Africa’s soils could be classified as high potential soils, and nearly half (46.6%) of these soils are found in Mpumalanga.
If mining continues at its current rate, around 12% of the country’s total high potential arable land will be transformed. Furthermore, an additional 13.6% of these soils were under prospecting by mines in Mpumalanga at the time. The researchers calculated that in 2007, 993 301 ha of the study areas were cultivated. They then created a map overlay of mining areas, and found that 326 000 ha of cultivated land would be lost to mining. A further 439 000 ha were also under prospecting at the time, which would mean further losses, totalling 765 599 ha of cultivated land transformed from agricultural land into mining areas.

According to a Bench Marks Foundation report, at the BHP Billiton Middelburg mine alone in an average year, 6 million cubic metres of topsoil and 125 million cubic metres of overburden were removed. It also used 65.5 million kilograms of explosives and a total of 339 hectares of land needed to be rehabilitated in an average year.

Farmers also risk losing contracts with international clients because of poor water quality from mining. In 2012, it was reported that water pollution was “a growing threat to the livelihood of emerging tobacco farmers in Groblersdal, as this affects the contracts the farmers have with British American Tobacco”. The farmers claimed that their previous year’s crop had been rejected because of “chemical residues on the tobacco leaves”. Then, in 2014, it was reported that the European Union had given a final warning that it would “stop imports from crops irrigated with water from the Olifants because of the level of health-threatening pollutants from mines seeping into the river”. Later that year, the non-profit Bench Marks Foundation also released a statement about the impact of poor water quality on the economy, saying that farming exports were “affected by the influx of collieries with many vegetable farmers downstream from the mines in the Kendal Ogies area losing European clients due to the bad quality of water used for irrigation.”

Current data therefore points to the potential for a perfect storm brewing in Mpumalanga, the consequences of which would be felt nationwide. In March 2012, farmers were already warning that the country would face a “national food crisis” if water pollution from mining was not addressed in the province.

According to the 2013 South African National Health and Nutrition Examination Survey, nearly a third of the population of Mpumalanga was food insecure and experienced hunger:

<table>
<thead>
<tr>
<th>Mpumalanga: Food security according to percentage of the population</th>
<th>Food secure</th>
<th>At risk of hunger</th>
<th>Experience hunger</th>
</tr>
</thead>
<tbody>
<tr>
<td>55%</td>
<td>15.5%</td>
<td>29.5%</td>
<td></td>
</tr>
</tbody>
</table>

Source: The South African National Health and Nutrition Examination Survey (SANHANES-1)
Mining is so destructive that soils can never be rehabilitated back to their full potential after they have been mined. The Bureau for Food and Agricultural Production, 2012 Report states that “the social and environmental impact of mining activities are in many instances so severe, that farming activities cannot be sustained on the land that is left between the mining activities”.
The 2014 National Policy on Food and Nutrition\textsuperscript{103} — the aim of which is to reduce hunger and contribute towards the eradication of poverty\textsuperscript{104} — confirms that there had been an overall loss of high agricultural potential land to non-agricultural activities such as mining, and that between 1994 and 2009, shockingly, the overall area under food production declined by 30%.

Then, in March 2015, the Department of Agriculture, Forestry and Fisheries (DAFF) published the Draft Preservation and Development of Agricultural Land Bill for comment\textsuperscript{105}. This Draft Bill states that the "preservation, development and sustainable use of agricultural land are of vital importance to ensure long-term food security in South Africa. It confirms that South Africa "has a limited supply of high agricultural land" and that pressures from activities such as mining "are currently major contributors to the alienation and reduced availability of agricultural land for agricultural production". It also references a spatial analysis undertaken by DAFF in 2011, which found that "the surface area of arable agricultural land that had been converted to non-agricultural uses through urban and mining developments equals the size of the Kruger National Park". However, this Draft Bill has still not been tabled in Parliament and may therefore take years to be passed. Furthermore, it is not clear how DAFF, as a national department, will be able to enforce the Act without the assistance of municipalities, who should in any event be protecting the agricultural land within their areas of jurisdiction from the impacts of mining.

\subsection*{1.4 Impacts on biodiversity}

South Africa is the third most biodiverse country in the world\textsuperscript{106}. And while Mpumalanga occupies only 6% of the country’s land surface, it holds 21% of its plant species, but nearly a quarter of its vegetation types are nationally gazetted as threatened\textsuperscript{107}.

The 2011 Mpumalanga Economic Growth & Development Path warned about the impacts of developments such as mining on biodiversity as follows: "The continued expansion of agricultural, mining and industrial activities in the Province have impacted on the biodiversity of the region through land clearing, deterioration of soil quality, erosion and contamination. Since land is a limited resource, demand for land will become more competitive in the years to come and measures have to be put in place to regulate and balance economic growth priorities, with population growth requirements and the preservation of the environment\textsuperscript{108}.

The province’s economy is predominantly based on agriculture, forestry, mining and ecotourism, and although mining has historically played an important role in economic growth and job creation, it has also had a significant impact on the environment.

- The 2013 Mining and Biodiversity Guideline describes the typical impacts from mining on biodiversity as follows\textsuperscript{109}:
  - The loss and/or degradation or conversion of land, marine and other aquatic habitats [...] and associated loss of species;
  - Significant alteration of ecological processes, sometimes irreversibly;
  - Pollution (including noise and light pollution) and migration of pollutants in air, soils, surface water, groundwater or the ocean;
  - Introduction of invasive alien species;
  - Changes in demand for, or consumption of, natural resources.

In November 2014, the DEA briefed the Select Committee on Land and Mineral Resources\textsuperscript{110} on the current and projected impacts of mining on grasslands, wetlands and watersheds in Mpumalanga\textsuperscript{111}.

\begin{table}[h]
\centering
\begin{tabularx}{\textwidth}{|c|c|c|c|c|c|}
\hline
\multirow{2}{*}{\textbf{Key ecological infrastructure/biodiversity asset}} & \multicolumn{2}{c|}{\textbf{NATIONAL}} & \multicolumn{2}{c|}{\textbf{MPUMALANGA}} \\
\cline{3-6}
 & \textbf{Percentage area with allocated mining rights} & \textbf{Percentage area with allocated prospecting rights} & \textbf{Percentage area with allocated mining rights} & \textbf{Percentage area with allocated prospecting rights} \\
\hline
\textbf{Freshwater Ecosystem Priority Areas (FEPAs)} & 0.6 & 14.1 & 1.7 & 32.2 \\
\hline
\textbf{Strategic Water Source Areas (SWSAs)} & 0.2 & 6.6 & 0.3 & 26.4 \\
\hline
\textbf{Wetlands} & 1.0 & 9.2 & 0.6 & 25.4 \\
\hline
\textbf{Grasslands} & 1.2 & 12.5 & 5.2 & 41.8 \\
\hline
\end{tabularx}
\caption{Percentage of the area of selected key ecological infrastructure or biodiversity assets for which mining or prospecting rights have been allocated.}
\end{table}
In its presentation, the DEA provided a table (using data the DMR had supplied at the end of 2013) indicating area percentages for which mining or prospecting rights had been allocated, both nationally and in the province of Mpumalanga:

The DEA furthermore stated that the proposed expansion of mining in Mpumalanga Province:

- would likely be “extensive, and significant, particularly in the Grasslands Biome”;
- that between 2000–2011, there was “a significant increase in mining applications and prospecting rights”;
- that “as much as 20% of cadasters have been applied for mining rights – 70% of which, for coal (Gert Sibanda and Nkangala District municipalities)”;
- and that the “cumulative long-term mining impacts will be significant on [the] natural environment, biodiversity and water resources”;
- that 76% of Mpumalanga’s grasslands “have been applied for mining rights and prospecting applications”;
- that the proposed mining expansion would occur “largely within pristine water catchments, e.g. Usuthu Sub-WMA and Upper Komatia”;
- that “ecologically sensitive areas within Upper Vaal Catchment (Wakkerstroom Wetlands) and Usuthu Sub-WMA (Chrissiesmeer pans) – relatively pristine – mining and prospecting applications continue to be issued”;
- that “in areas of extensive mining, such as the Mpumalanga Highveld […] the full extent of more localised trade-offs between mining and water security, biodiversity and food security become particularly apparent”;
- that “in provinces like Mpumalanga, the extent to which prospecting overlaps with high value biodiversity/ecological infrastructure suggests that the risk posed by mining continues to increase, with corresponding risks for water, food production and biodiversity in these areas”;
- that there “thus remains an urgent need for discussions on development scenarios for these areas, in order for planning and regulatory decisions to take into account the full range of costs and benefits of mining”;
- and finally that “the analysis does not take into account indirect impacts of mining (e.g. acid mine drainage) on people and ecosystems”.

According to a 2006 South African National Biodiversity Institute (SANBI) report, “opencast mining clearly has a drastic and long lasting effect on biodiversity” and in Mpumalanga “approximately 40 000 ha have already been impacted by opencast mining, with estimates of another 40 000 ha potentially available for opencast mining in future”111. These figures are likely to have increased significantly since that report was published.

The report more specifically analysed the impacts of coal mining in the grasslands biome, and one of its aims was to find ways to address “the threats to biodiversity posed by the expansion of coal mining within the Mpumalanga Highveld grasslands”111. It recognised this biome as “one of the most threatened and under-protected biomes in South Africa”111. It also acknowledged that “the impact of opencast mining on plant and animal species is drastic. The composition of the rehabilitated areas is reduced to a few plant species. Animal diversity is consequently reduced dramatically under the direct footprint area, and to a far greater extent than any other land use”111.

1.5 Impacts on the health and well-being of communities

The detrimental impacts of mining on the health and well-being of communities are well-established. These pernicious consequences lead to a poorer quality of life, and many persist long after mines have been closed or abandoned.

Surrounding communities are exposed to water, soil, noise and dust pollution, and also experience social disruption — in the form of increased crime, for example — or socio-demographic changes that lead to tensions over natural resources117. Communities are also relocated to accommodate mining operations, usually with no choice as to where they are to be moved118, 119.

CER Field Trip, 2014

In June 2014, a team of CER staff undertook a field trip to various parts of the Highveld and met with mining-affected communities in Middelburg and Hendrina. There we facilitated meetings, conducted environmental rights training, and asked participants to complete a questionnaire. We invited mining-affected community members, the DMR, the DWS, and local authorities to these meetings. Only community members and a few municipal officials attended.

Our survey results revealed the following:

- The average age of participants was 34;
- A mere 27% were employed, while 49% were heads of households;
- 58% said they were aware of water pollution and 94% were aware of air pollution;
- Only 9% said they were satisfied with the quality of their environment;
- 76% were aware of health problems within their communities;
- 58% said that they (or someone in their household) were suffering from poor health;
- Many respondents suffered from severe coughing, asthma, or other respiratory problems, while only 19% smoked;
- 64% said that they (or someone in their household) were suffering from nausea, migraines or headaches;
- The average cost for a visit to the hospital was R223.33, but only 15% received health support or assistance from government;
- Only 37% said they were sleeping well.
The following responses also paint a distressing picture of the dire living conditions of mining-affected communities on the Highveld:

- “Our water is being polluted by the ashes that are from the mine. It makes our community become sick from different sickness”;
- “The air is dirty and the dust is all over our roofs”;
- “[The] atmosphere is very dirty. Plants and animals are not progressing”;
- “We are not employed by mines. Poor and jobless in our community”;
- “Especially at night we are smelling too much gases”;
- “Water polluted. Every month water comes dirty from our taps”;
- “Cause the asthma, sinus, red eyes, coughing for so long times”.

The damaging effects of coal mining are produced all along what is referred to as its “chain of custody” — in other words, from its extraction, to its passage by road, through to its use in coal-fired power stations during the combustion process.

Often the poorest and most marginalised communities suffer the worst of these consequences, because informal settlements are frequently located in close proximity to mines. Houses crack from the blasting operations of active mines, and some settlements are perilously situated above old abandoned mines. These collapse when subsidence occurs or, if left unrehabilitated, continuously leach toxic water into ground and surface water. They also release dust into the atmosphere. People face significant health risks from exposure to such pollution. The toxins can be ingested by drinking water, eating contaminated food, or even absorbed through the skin.

Mining as a result leads to many chronic health problems and premature deaths, particularly among children, pregnant women, and those with pre-existing health conditions and compromised immune systems. The most notorious health impact from coal is pneumoconiosis, commonly known as black lung disease or CWP, which permanently scars lung tissues. When people are repeatedly exposed to dust that contains crystalline silica, present in coal dust, they can develop this disease which hardens the lungs and prevents oxygen from easily reaching the bloodstream.

Coal pollutants affect the respiratory, cardiovascular and nervous systems, and can lead to heart disease, cancer, strokes, and chronic lower respiratory diseases, while particulate matter from coal-fired power station emissions are described as “the most important environmental health risk globally”.

Results of CER questionnaire in Middelburg and Pullenshoop (June 2014)

Symptoms described by surrounding community:

- 76% were aware of health problems within their communities
- 58% said they (or someone in their household) were suffering from poor health
- 37% said they were sleeping well
- 15% received health support or assistance from government
- 64% said that they (or someone in their household) were suffering from nausea, migraines or headaches
- MANY RESPONDENTS SUFFERED FROM SEVERE COUGHING, ASTHMA, OR OTHER RESPIRATORY PROBLEMS while only 19% smoked

CER Field Trip, 2014/continued

The following responses also paint a distressing picture of the dire living conditions of mining-affected communities on the Highveld:

- “Our water is being polluted by the ashes that are from the mine. It makes our community become sick from different sickness”;
- “The air is dirty and the dust is all over our roofs”;
- “[The] atmosphere is very dirty. Plants and animals are not progressing”;
- “We are not employed by mines. Poor and jobless in our community”;
- “Especially at night we are smelling too much gases”;
- “Water polluted. Every month water comes dirty from our taps”;
- “Cause the asthma, sinus, red eyes, coughing for so long times”.

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Often the poorest and most marginalised communities suffer the worst of these consequences, because informal settlements are frequently located in close proximity to mines\textsuperscript{120}. Houses crack from the blasting operations of active mines, and some settlements are perilously situated above old abandoned mines. These collapse when subsidence occurs.

In 2012, an Australian health report found that adults in coal mining communities had:\textsuperscript{124}

- higher rates of mortality from lung cancer, chronic heart, respiratory and kidney diseases
- higher rates of cardiopulmonary disease, chronic obstructive pulmonary disease (COPD) and other lung diseases, hypertension, kidney disease, heart attack, and stroke, and asthma. Increased probability of a hospitalisation for COPD (by 1% for each 1.462 tons of coal mined), and for hypertension (by 1% for each 1.873 tons of coal mined)

Furthermore, children and infants in coal mining communities had:

- increased respiratory problems, high blood levels of heavy metals such as lead and cadmium, higher incidence of neural tube deficits, a high prevalence of any birth defect, and a greater chance of being of low birth weight.

In February 2013, a South African study published for the Lancet Commission on Global Governance investigated the health impacts of extractive industries, both locally and internationally\textsuperscript{125}. The Lancet study found that “mining, especially coal mining, causes extremely high occupational mortality. Due to poor ventilation in underground shafts, miners are exposed to harmful gases, dust, toxins, and heat, leading to silicosis and other lung diseases, heat stroke, and cancer”\textsuperscript{126}.

In addition, it stated that mining “is often defended on the grounds that there are important economic benefits that accrue to local communities. However, companies are rarely held accountable for meeting these projections” and that companies will furthermore “often incorporate into their proposed mining ventures impressive projections related to employment, local economic development, improved living conditions, and increased opportunities.” It however concluded that communities seldom seemed to receive these benefits, citing the problem of capital outflows from developing countries\textsuperscript{127}.

Mpumalanga facts and figures: Provincial economy, employment and poverty

In June 2015, Mpumalanga’s provincial treasury gave a presentation to the Select Committee on Finance about the province’s economy\textsuperscript{128}. Their data, for which the main source was Statistics South Africa\textsuperscript{129}, revealed that the claims of prosperity that mining is purported to bring are not always credible.

The province is home to 4.2 million people, and youth (under the age of 34) make up 69.9% of the population:

- In 2013, the province’s GDP growth (1.7%) was lower than the national growth (2.2%);
- The forecasted provincial GDP growth (2.2%) for 2013-2018 would again be lower than the forecasted national growth rate of 2.6%;
- Mpumalanga had the “joint fourth highest strict unemployment rate in the first quarter of 2015 among the nine provinces, at 28.4%”;
- The youth (aged 15-34 years) unemployment rate was 38.8%;
- Unemployed youth made up 70% of the total unemployed people at the end of the first quarter of 2015;
- The unemployment rate “increased from 23.6% at the end of Q1 2008 to 28.4% at the end of Q1 2015”;
- The province’s unemployment rate was “5\textsuperscript{th} highest among the provinces at the end of Q1 2008 and joint 4\textsuperscript{th} highest at the end of Q1 2015”,
- 66% of the unemployed had been unemployed for more than a year;
- Between the first quarter of 2008 and the first quarter in 2015, the unemployment rate increased by nearly 50%;
- Between the first quarter of 2008 and the first quarter of 2015, the province only achieved 29% of its annual job creation target;
Mpumalanga facts and figures: Provincial economy, employment and poverty/continued

- The mining sector shed 42,204 jobs (compared to 4,516 jobs in the agricultural sector);
- 36.2% of Mpumalanga’s population lived below the “lower-bound poverty line”;
- In 2013, the province’s share of population below the lower-bound poverty line “was the 4th highest (unfavourable) among the provinces”;
- In 2013, the fastest growing industry, however, was mining, while agriculture was the slowest and had declined by -0.7% between 2009 and 2013;
- However, agriculture contributed 6.7% to Mpumalanga’s employment (but declined by 5.5% in Q1 2014/15);
- Mining contributed less (4.8%) to the province’s employment (and also declined by a staggering 43.1% in Q1 2014/15);
- Of particular interest is the relationship between agriculture and mining, with agriculture in addition being a far greater, and sustainable, generator of employment:

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Agriculture</th>
<th>Mining</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contribution to national industry</td>
<td>8.6%</td>
<td>21.4%</td>
</tr>
<tr>
<td>Contribution to provincial economy</td>
<td>3.0%</td>
<td>25.4%</td>
</tr>
<tr>
<td>Location of activities</td>
<td>41.6% in Gert Sibande</td>
<td>70.2% in Nkangala</td>
</tr>
<tr>
<td>Economic growth per annum (1995–2013)</td>
<td>2.9%</td>
<td>0.8%</td>
</tr>
<tr>
<td>Economic growth per annum (2013–2018)</td>
<td>-0.7%</td>
<td>2.3%</td>
</tr>
<tr>
<td>Contribution to provincial employment</td>
<td>6.7%</td>
<td>4.8%</td>
</tr>
<tr>
<td>Employment growth per annum (Q1 2014–2015)</td>
<td>-5.5%</td>
<td>-43.1%</td>
</tr>
</tbody>
</table>

While the occupational health impacts of coal mining are beyond the ambit of this report, they are relevant to the extent that many mine workers reside in communities surrounding the mining area, and are therefore exposed to the harmful effects of coal mining both at work and at home.

Local research on the state of public health on the Mpumalanga Highveld, and the causal connection between poor health in mining communities and mining operations, is pitifully scarce, but there is ample international research on the health impacts of coal mining on local communities — and clear evidence of the detrimental health impact of exposure to polluted water and high levels of particulate matter caused by coal mining.

In 2003, government announced its plans to build the De Hoop Dam on the Olifants River. The Olifants River flows through both Limpopo and Mpumalanga and, in order to develop the river, the dam would be constructed in Sekhukhune (Limpopo) as a bulk water storage facility for “large mining developments and for reticulation to communities.”

In 2005, the then Department of Water Affairs and Forestry (DWAF) conducted a public health assessment for the proposed De Hoop Dam, as well as its bulk water pipelines, as part of the environmental impact assessment for the Olifants River and Water Affairs Development Project (ORWRDP). DWAF’s report outlined some of the profound social and health consequences to be expected from large-scale developments such as the proposed dam (including from the future mining operations that would depend on the dam’s water supply), and stated that the geographical area for the study “could extend from the immediate vicinity of the construction sites, to the areas supplied with water, to downstream communities as far as Mozambique.”

It emphasised that “mining is one of the least useful industries in terms of human welfare and health. It is highly capital intensive, and most jobs are low skill and low paid. Investment in health and safety is usually low. Migrant workers remit only a fraction of their income to dependants and families. Minerals are usually exported rather than locally processed. Mines are not sustainable; they eventually close down with high social costs. They generally cause significant pollution and environmental degradation.”

“It can be taken for granted that the products (raw materials) and profits made by the mining and construction companies will not accrue to the local community,” it stated. After the initial “boom town climate” dissipates, social disruption and crime increased when “the main beneficiaries of development are a small fraction of the population.”

When members of the Mineral Resources Portfolio Committee visited several provinces, including Mpumalanga, in August 2011, committee members were “confronted with the same picture: some of these mining companies would construct only a community hall, and that was the extent of their contribution to...”
social development, and the companies were satisfied with what they had done. In other areas, children of mining communities were forced to go to school in a church building – one class in each corner. Meanwhile, the wealth of the country was extracted not far away. It had to be asked where the money that the companies were claiming to spend on community development was being spent.  

Because of mining’s externalities, communities find themselves dispossessed and robbed of the possibility of earning a sustainable living. Health costs are paid for by the affected individuals or the State and, therefore, society at large. After more than a century of mining on the Mpumalanga Highveld, the promised economic benefits from the exploitation of minerals have not accrued to local communities or resulted in local economic development proportionately, or at all. Indeed, many mining-affected communities are without electricity or clean piped water, while the mines on their doorsteps consume vast quantities of both.

However, hope may spring from unlikely corners. In what was a profound shift in discourse from the mining industry, chief executive of Rand Gold Resources, Mark Bristow, reportedly “pulled no punches and came short of calling the mining industry dishonest over its lack of sharing the spoils of mining operations with communities.” Bristow was speaking at the African Mining Indaba held in Cape Town in February 2016, where he said that mining companies had to do more to fulfill their promises to communities. He added that “all those miners are mining national assets without returns, that is a waste of government assets. We must be more diligent in creating profitable business. We must be honest with host communities so they know the risks of mining.”

1.6 Impacts on roads

The damage caused to roads by haulage of minerals is another impact and external cost of mining. Large numbers of heavy transport vehicles degrade road surfaces and infrastructure, and reduce the potential income from other more sustainable sources such as tourism and agriculture. It also creates traffic hazards and accidents.

In October 2013, because of a spate of accident fatalities, Eskom announced it was launching a safety drive to reduce accidents by stopping all coal road transportation over weekends in Mpumalanga. According to the parastatal, this period accounted for 36% of fatal road accidents. As an indication of traffic volumes, the coal road-haulage companies contracted to Eskom “trucked around 14 million tons of coal and a further 20 million tons was transported by companies contracted directly with mining companies that supply Eskom’s power stations.”

According to the 2011 Mpumalanga Economic Growth and Development path, the province had “a number of roads infrastructure that varies in state from good to
extreme disrepair. The backlog in roads infrastructure maintenance is a major challenge and has negative implications for commerce and industry. The farming industry is particularly affected by the state of rural access roads as transport costs affects competitiveness. The lack of good surfaced roads into many of the rural nodes could seriously hamper the future tourism development of these areas.144

Around 5 000 coal trucks reportedly use the Mpumalanga road network per day, and the road network is rapidly deteriorating. According to the Mpumalanga Department of Public Works, Roads and Transport (MDPWRT), only 14% of the province’s national road network is in a good or very good condition, while 46% is in a fair condition, and 37% is in a poor to very poor condition. The overall condition has “declined substantially during the last two decades, resulting in a significant backlog of rehabilitation and maintenance requirements and consequent high budget requirements”.145 This is because a significant amount of freight transport, including that from mining, has moved from rail to road transport, putting “tremendous pressure on the road network leading to early pavement failure.”146

The roads in a very poor condition “are generally located south of Ermelo, mostly around the N11 between Ermelo and Volksrust. The provincial road network in the coal haulage area (generally the area between Witbank, Middelburg, Secunda, Ermelo and Amersfoort) has deteriorated significantly in recent years, due to the increased road-based transport of coal between mines and power stations,” and “the number of heavy vehicles in the coalfields in Gert Sibande and Nkangala districts is substantial” 147.

The Department of Public Works, Roads and Transport furthermore acknowledges that this road infrastructure requires “urgent attention in the form of rehabilitation and strengthening. The amounts required for road maintenance and improvements are substantial...” and that a “combination of factors such as the phenomenal growth in demand for electricity as a result of accelerating growth and development, and rail service bottlenecks, coal haulage by road has grown considerably, on Mpumalanga’s provincial roads. The rapid increase in coal hauling by road (especially to the Majuba and Tutuka power stations) has resulted in significant road condition deterioration to the point where the surface on some roads has broken up completely. This, in turn, has forced Eskom to use alternative longer routes to reach destinations thereby placing an unnecessary premium on the cost of coal. A consequent effect is that the alternative routes are suffering the same degradation as the preferred routes” 148.

However, that Department states that it only has limited funds for the “frequent rehabilitation and maintenance needs related to the coal haulage network,” once again demonstrating the impact, and burden, of the external costs of mining on society. Despite the enormous damage that the road transport of coal causes, mining companies are not required to contribute to road maintenance costs, further adding to the burden on the taxpayer.

1.7 Cumulative impacts, including climate change

A 2013 Biodiversity Impact Assessment for a coal mining development150 found that “within the greater southern Mpumalanga study region there are currently numerous applications for mining” and that “if a significant portion of these applications are approved”, the combined impacts of development activities, including mining, would have “a massive deleterious impact on Biodiversity at provincial and national levels”151.

The impact assessment stated that the potential cumulative impacts would include:

- Water, air, noise and light pollution.
- Reduction and deterioration of regional groundwater.
- Deterioration and loss of wetland habitat, species, ecosystem functioning and services.
- Deterioration of aquatic habitat, species, ecosystem functioning and services.
- Increased erosion, sedimentation and invasion of alien species.
- Loss and deterioration of threatened terrestrial floral communities, vegetation types, ecosystem functioning, services and faunal habitats.
- Reduction in the richness and abundance of floral and faunal species, and extirpation of locally restricted populations or species152.

The extent and severity of mining’s cumulative impacts ultimately contribute to climate change, and coal production and combustion is one of the biggest sources of greenhouse gas emissions in the world. According to the Center for Climate and Energy Solutions, “[coal] mining can result in the direct release of methane (which has a global warming potential 23 times higher than CO₂, but only persists in the atmosphere for 12–17 years), particularly from underground mines. In 2012, methane emissions from U.S. coal mining were 0.9 % of overall U.S. greenhouse gas emissions. The EPA estimates that coal mine methane contributes 8–10 % of human-made methane emissions worldwide.”153

An estimated 150 000 people worldwide die annually because of the effects of climate change, such as droughts, floods, rising sea levels, the erosion of coastlines, extreme storm events, forest fires, and an increase in diseases affected by warmer weather patterns. According to a 2008 Greenpeace report, the world could risk losing a quarter of its fauna and flora species if nothing is done to halt its progression. It will also impact access to water resources, as higher temperatures will increase evaporation rates. Crops and plants will need more water, affecting agricultural yields and food supply. These consequences will ultimately lead to increased conflict and instability, as well as the displacement of people.

In South Africa, climate scientists are predicting a temperature increase of between 5% and 8% by the end of the century.156 In 2010, the CSIR published a handbook presenting a series of climate change projections for north-eastern South Africa, namely the Mpumalanga, Limpopo and Gauteng provinces. The
study recognised that South Africa’s political history and its resulting inequalities increased communities’ vulnerability to climate change. Communities depend on natural resources, and because these resources are already under pressure, “future use combined with changes in production as a result of climate change may lead to unsustainable levels of harvesting”. Furthermore, people living in informal settlements are among the most defenceless worldwide. Informal settlements “are often vulnerable to water-related disasters such as floods and severe storms, particularly in cases where the communities are located on flood plains and there is an absence of proper water infrastructure”.

In October 2011, Mpumalanga province held a climate change summit at Ehlanzeni District Municipality, during which the MEC for Economics, Environment and Tourism reportedly stated that “climate change poses a serious threat to the existence of human beings and other living organisms, and if drastic measures are not taken to combat climate change, we will continue to be the biggest threat towards the environment”. He added that “we must play a critical role in the reduction of greenhouse gas emissions, subsequent to the declaration of the Highveld Priority Area”. It was also reported that the Minister of Water and Environmental Affairs, Edna Molewa, said, “South Africa needs to act now to prevent irreversible damage to the environment”.

South Africa’s seventeenth Conference of the Parties (COP 17) discussion paper acknowledged the province’s “vulnerability to climate change, including the possible impact on the province’s agricultural resources, biodiversity and conservation”. Signatories to Mpumalanga’s Climate Change Declaration, put forward by the Minister of Water and Environmental Affairs, agreed to a number of commitments, including:

- Mitigating climate change impact through reducing greenhouse gas emissions;
- Cooperating with affected sectors (e.g. agriculture, water, mining, forestry, local authorities, industry, energy, transport) to reduce the impacts;
- Improving cooperation between government, business and all social partners to address environment challenges;
- Ensuring the conservation of biodiversity in the province;
- Ensuring the contribution of ecosystem goods and services to the social and economic development of the Province;
- Encouraging government, business and industry to engage in sustainable climate change projects in Mpumalanga.

Internationally, Business for Social Responsibility (BSR) released a primer called “Adapting to Climate Change: A Guide for the Mining Industry”. This guide states that the impacts of climate change will create a number of opportunities and challenges for the mining sector, but importantly that “the extent to which mining avoids undermining host communities’ resilience to climate change, and even fortifies that resilience, will directly impact the industry’s reputation, social license to operate, and access to project financing”.
Section 2

THE STATE’S FACILITATION
OF THE VIOLATION OF
ENVIRONMENTAL RIGHTS

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South Africa’s environmental laws may not be perfect, but they are sound. If they were correctly and courageously applied by the competent authorities, many immediate and cumulative impacts of mining could be mitigated to a degree that would meet the requirements of section 24 of the Constitution, NEMA, and the NWA. Coupled with strong enforcement, these laws would ensure the protection and realisation of environmental rights.

In Mpumalanga, however, the State is facilitating the violation of environmental rights through poor and inappropriate decision-making, a lack of cooperative governance, inadequate institutional capacity, and a failure to ensure compliance through proper monitoring and enforcement at mining operations.

Communities and civil society are furthermore prejudiced by inadequate consultation, appeals that are not being decided by the State in accordance with the law, and a culture of secrecy surrounding the mining industry that prevents access to some of the most basic environmental information.

All these weaknesses are exploited by an industry that is aimed at making profits as quickly as possible, that externalises the costs of its impacts, and that can therefore not be left to regulate itself.

In this section, we list, with evidence, the ways in which environmental rights are being violated in Mpumalanga.

2.1 Poor licensing decisions

Both the DMR and the DWS make poor licencing decisions that do not give effect to their Constitutional and legislative obligations.

2.1.1 Department of Mineral Resources

i. The DMR has failed proactively to prohibit or restrict prospecting and mining in areas identified as important and sensitive

The environmental right in section 24 of the Constitution requires the State to implement reasonable legislative and other 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. The Minister of Mineral Resources therefore has a Constitutional obligation to use his statutory powers to prohibit prospecting and mining in sensitive areas.

In addition to the measures provided in NEMA, NEMPAA, and NEMBA, section 49 of the MPRDA gives the Minister of Mineral Resources the power to declare certain areas as prohibited for mining (so-called “no-go areas”), or to declare restrictions in certain areas. This mechanism gives significantly more protection to sensitive areas than NEMPAA and NEMBA, because a section 49 declaration means that the DMR would have to refuse to accept an application for prospecting or mining in such no-go area.

Preventing the DMR from accepting prospecting or mining right applications in these areas from the outset would avoid investment by mining companies into inappropriate applications. It would also obviate the need for costly and time-consuming comments and objections — the burden of which currently falls on the shoulders of other national and provincial departments and agencies, and civil society. Unfortunately, despite Cabinet commitments, undertakings given in Parliament, and even a suggestion by a DMR official to the MTPA to submit an application for protection under section 49 of the MPRDA for Wakkerstroom, various Ministers of Mineral Resources and the DMR have utterly failed to give formal legal protection to environmentally sensitive and important areas in Mpumalanga.

For many years, civil society organisations have called upon government to declare critical biodiversity and important hydrological areas as no-go areas under section 49 of the MPRDA, but — save for a temporary moratorium on new prospecting rights in September 2010 — these calls have gone unheeded.

In June 2010, the Ministers of Mineral Resources and Environmental Affairs met to discuss the issue of mining in environmentally sensitive areas and the “alignment of regulatory processes”. This resulted, according to the Minister of Environmental Affairs, in the appointment of an interdepartmental task team to “carefully consider the agreement reached in 2008” and “to advise the Ministers on whether the agreement (and Acts) should be amended to transfer the regulatory and implementation functions to the environment authority in the immediate future; or the agreement should be reconsidered and alternate means of alignment/integration of regulatory processes pursued”.

By September 2010, the task team was “in the process of finalising a proposal to the Ministers”. The CER, on behalf of a number of non-government organisations, offered to provide assistance to the task team concerning the criteria for identifying sensitive areas. This offer was not accepted by either Department.

In July 2010, CER notified both Ministers of our intention to submit a formal application under section 49 of the MPRDA to the Minister of Mineral Resources to declare certain areas prohibited or restricted for mining (see below). In September 2010, the Minister of Environmental Affairs replied that:

“... on approval of the Delivery Agreement attached to Outcome 10 by Cabinet and the signing of all contributing Ministers to same, a process will commence to identify areas where mineral development could be restricted in terms of section 49 of the Minerals Petroleum Resources Development Act of 2002. This again would
allow an opportunity for the CER and the organisations subscribing to the submitted proposal to contribute. The finalisation of the Delivery Agreements by all are due towards the end of September 2010…”166.

The promised Outcome 10 Delivery Agreement (“Outcome 10”) was duly signed in September 2010. Launched with fanfare by national government, this charter included the commitment to manage “environmental impacts from mining and related activities” through “areas identified for restricted mineral development”167. Outcome 10 acknowledged that “the inability of the current spatial planning and land use management system to integrate mineral development has resulted in the latter occurring in areas where it permanently sterilised areas of high agricultural potential or impacted severely on sensitive and prioritised ecosystems. Mineral development priority areas should with equal standing ‘compete’ in a spatial planning and land use management system with other policy imperatives such as biodiversity protection, food security, water security, etc. The inclusion of mineral development in the spatial planning and land use management system and identification of agreed ‘mining restriction areas’ is accordingly an important step in doing things differently towards achieving the desired outcome”168.

Outcome 10 set specific targets for declaration of no-go areas169. One of these commitments was to negotiate and publish national areas identified for restricted mineral development by 2015170. This included a comparison of “environmentally sensitive areas” and “mineral development priority areas” by December 2012. It also included public and stakeholder consultation by June 2013, and the gazetting of “restricted mineral development areas in terms of s.49 of the MPRDA by April 2014.”

In February 2011, on behalf of 13 civil society and non-governmental organisations, CER addressed a formal submission to the Minister of Mineral Resources171, proposing that she uses her powers under section 49 to give effect to Outcome 10 to identify “mining restriction areas” and to declare the prohibition of granting rights and permits in terms of the MPRDA in the following areas:

- Mountain Catchment Areas declared under the Mountain Catchment Areas Act, 1970;
- RAMSAR sites; and
- recognised endangered and critically endangered ecosystems, including the following areas in Mpumalanga:
  - Wakkerstroom-Luneburg;
  - Chrissiesmeer;
  - Dullstroom; and
  - Mananga Cycad Sanctuary

The coalition also called for a restriction on the granting of rights and permits under the MPRDA in, inter alia, the following areas:

- protected environments declared under section 28 of NEMPAA;
- Focus Areas for protected areas expansion identified in the NPAES172;
- Priority Areas for protected areas expansion identified in the MPAES173;
- Critical Biodiversity Areas (CBAs) identified in systematic biodiversity plans adopted by the competent authority or in bioregional plans;
- areas identified in an approved Biodiversity Management Plan for ecosystems or species under section 43 of NEMBA174, and national FEPAs175.

The CER received no response to this letter from the Minister of Mineral Resources.

On 4 March 2011, the Minister published a notice of intention to declare a prohibition or restriction on the granting of prospecting and mining rights in the Chrissiesmeer Biodiversity Site for a period of three years in the Government Gazette.

Then, in June 2012, Environmental Affairs Minister, Edna Molewa, was quoted as telling a media briefing:

“South Africa is mineral-rich and the mining industry has for long been the cornerstone of our economy. It will remain a significant contributor to our economy and currently contributes approximately 7.7% of our GDP. It is therefore imperative that this important sector be treated as key in our greening of the economy. Not only do we need to restore the significant legacy of environment degradation caused by past policies and practices, but also ensure that current and future mining activities takes place in such a way that we do not leave the same undesirable legacy for the next generation.

We are therefore working very closely with the relevant government departments to ensure that mining methods are less destructive and that appropriate mitigation and rehabilitation measures are in place and financially provided for. The Minister of Mineral Resources would soon be announcing mining no-go’ areas based on ecological sensitivity and we will also publish our jointly developed mining and biodiversity guidelines.”

In addition, in May 2012, the Minister of Mineral Resources, Susan Shabangu, said in her budget vote speech to the National Council of Provinces (NCOP) that “the extension of the moratorium in Mpumalanga owing to environmental complexities in that province culminated in 41 Rights that are located in Wakkerstroom and Chrissiesmeer being identified as those belonging to the category of ecologically sensitive areas. As a result, the department has taken a decision to prohibit mining in these areas. In addition, I lifted the moratorium on applications for prospecting rights in Mpumalanga at the end of September 2011, as I had promised”176 [See case study 1: Chrissiesmeer below].

Then, on 12 November 2012, after her notice of intention to declare a restriction or prohibition against the granting of prospecting or mining rights in the Chrissiesmeer Biodiversity Site on 4 March 2011, the Minister was asked in parliament whether or not she had finally declared such a restriction or prohibition. She confirmed that “… any activities that relate to mining and prospecting have been prohibited...”
and/or restricted,” and that “… the process is complete” and [the] “prohibition and restriction is already in place”\textsuperscript{[177]}.  

Despite these statements, and save for a short-lived prohibition on accepting new prospecting rights in Mpumalanga between 1 September 2010 and 30 September 2011, no formal declaration of no-go areas for mining (using section 49 of the MPRDA or any other provision) has been made by the Minister of Mineral Resources in the province, including in Chrissiesmeer. In 2013, the DMR accepted a mining right application from Duiker Mining (Pty) Ltd in the Chrissiesmeer Biodiversity Site.

The Outcome 10 targets have therefore not only never been met, but in subsequent progress reports and delivery plans, this target has been dramatically reduced to “one environmentally significant area” that should be “identified, negotiated and published through NEMA by 2016 (2016/17)”. The baseline used for this disappointing new target was a matrix of identified biodiversity areas sensitive to mining.

On 19 August 2015, in response to a PAIA request to the Department of Performance Monitoring and Evaluation (DPME) — responsible for monitoring Outcome 10 — CER received an updated biodiversity matrix on mining in sensitive areas, an updated Outcome 10 progress report, and a draft no-go area notice under section 24(2A) of NEMA. From this it appears that:

- While the DEA had submitted specific lists or information to the DMR, most categories in the progress report show that the DEA was still “awaiting information from the DMR”, or that the DMR was yet to “advise on progress”;
- The draft notice is intended as the “one environmentally significant area” to be published through NEMA by 2016, and it relates to the “prohibition or restriction of the granting of environmental authorisation by the competent authority for mining activities in the Mapungubwe Cultural Landscape World Heritage Site” in Limpopo under section 24(2A) of NEMA\textsuperscript{[178]};
- The biodiversity matrix on mining in sensitive areas is not limited to the identification and publication of no-go-areas for mining. Instead, it deals with a number of issues related to prospecting and mining in environmentally sensitive areas, including a proposed approach to:
  - rights and permits issued in protected areas before and after NEMPAA came into force;
  - prospecting and mining in protected environments and mountain catchment areas;
  - prospecting and mining in priority areas for national and provincial protected areas expansion;
  - prospecting and mining rights in World Heritage Sites and the buffer of World Heritage Sites;
  - Transfrontier Conservation Areas;
  - Ramsar Sites; and
  - proposed listed threatened ecosystems.

It therefore appears that, while the DMR has made no progress on its obligations under Outcome 10, the DEA is now considering ways in which prospecting and mining in declared protected areas, and other sensitive and important areas, should be approached. This is also consistent with indications in various cases described in this report that environment authorities are buckling under the pressure of the DMR and the mining industry to accommodate prospecting and mining, even in areas that environment authorities themselves have given legal protection to because of their sensitivity and importance.

The only formal legal protection for sensitive areas came from the Mpumalanga MEC for Economic Development, Environment, and Tourism, who declared four new protected environments and one new protected area under NEMPAA in January 2014\textsuperscript{[179]}. Unfortunately, protected environment status does not constitute a complete prohibition on prospecting and mining, as is powerfully demonstrated in the Mabola case study. [See section 2.1.1(b), Case study 1: Mabola Protected Environment.]
Environment authorities appear to be buckling under pressure from the DMR and the mining industry to accommodate prospecting and mining, even in areas that environment authorities themselves have given legal protection to because of their sensitivity and importance.

**CASE STUDY 1: Chrissiesmeer**

Chrissiesmeer, South Africa’s largest freshwater lake, lies near Ermelo in the Mpumalanga Lake District. It consists of an intricate network of hundreds of wetlands and pans, all lying within a 20 km radius, feeding into the headwaters of the Vaal, Olifants and Komati Rivers. Chrissiesmeer has been declared under the Ramsar Convention (formally the Convention on Wetlands of International Importance, especially as Waterfowl Habitat). It is also a declared threatened ecosystem under NEMBA, a FEPA, and a CBA. It was declared a Protected Environment (PE) under NEMPAA in January 2014 by the then MEC for Economic Development, Environment, and Tourism.

In 2010, the MTPA submitted a detailed request to the DMR in support of declaring Chrissiesmeer a no-go area under section 49 of the MPRDA. Later that year, in what seemed like a positive step for biodiversity conservation, the Minister of Mineral Resources announced a moratorium on granting new prospecting rights in the province. The following year, she gazetted a notice of intention to declare Chrissiesmeer a no-go area under section 49. This declaration was to be effective for three years.

For the next few months, the Minister reiterated her intention to declare Chrissiesmeer a no-go area by affirming her commitment, both in her budget speech before the NCOP in May 2012, and in a written response to a parliamentary question on 2 November that year. There the Minister advised parliament that “any activities that relate to mining or prospecting have been prohibited or restricted in the Chrissiesmeer Biodiversity Site”, that no challenges were being experienced to the prohibition or restriction; and that “the process is complete”. Finally, the Minister advised that “prohibition and restriction is already in place”.

However, a new application to mine coal — submitted by Msobo Coal (Pty) Ltd for its proposed Harwar Colliery — was accepted by the DMR in 2013 (immediately after the expiration of the three year period contemplated by the notice) for five properties within the Chrissiesmeer site. It became apparent that the declaration of the area as a no-go area was therefore never gazetted, despite the contrary representations by the Minister of Mineral Resources. The reasons for this are unclear.

The MTPA and various civil society organisations, such as the Endangered Wildlife Trust (EWT), the Federation for a Sustainable Environment (FSE) and BirdLife South Africa, were forced to submit comprehensive objections to the granting of the mining right and the approval of the mine’s EMPR.

The MTPA and some of these civil society organisations had also made oral submissions to the Regional Mining Development and Environmental Committee (RMDEC), the committee that considers objections to applications made for rights and permits under the MPRDA.

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At February 2016, the appeal was still pending.

The DMR continues to accept mining right applications in the Chrissiesmeer Protected Environment. For example, in 2015, the DMR accepted applications from MA Coal (Pty) Ltd and Blue Moon (Pty) Ltd. This proves that PE status is not enough to persuade the DMR to refuse rights applications, leaving conservation authorities and civil society to plough significant resources into defending protected environments on an application by application basis.
ii. The DMR grants rights in sensitive and protected areas in Mpumalanga

Mpumalanga is home to a range of environmentally sensitive and hydrologically important areas, including:

- Critical Biodiversity Areas (CBAs)
- Ecological Support Areas (ESAs)
- Threatened Ecosystems (TEs)
- National Freshwater Ecosystem Priority Areas (NFEPA)
- Strategic Water Source Areas (SWSAs)
- Important Bird Areas (IBAs)
- RAMSAR sites

**Critical Biodiversity Areas (CBAs)**

The Mpumalanga Biodiversity Sector Plan Handbook defines CBAs as all areas “required to meet biodiversity pattern and process targets”. They are “areas of high biodiversity value that should be maintained in a natural or near-natural state”.

**Ecological Support Areas (ESAs)**

Ecological Support Areas are defined as “areas that are not essential for meeting targets, but that play an important role in supporting the functioning of CBAs and that deliver important ecosystem services”.

**Threatened Ecosystems (TEs) see map 3**

In 2009, the Minister of Water and Environmental Affairs gave notice of her intention to publish a national list of threatened ecosystems classified under the following categories: critically endangered (CR), endangered (EN), or vulnerable (VU).
The threatened ecosystems listed in 2009 made up 9.5% of the country (with critically endangered and endangered ecosystems together accounting for 2.7%, and vulnerable ecosystems accounting for a further 6.8%). These statistics refer to the percentage of remaining natural areas that are threatened. In Mpumalanga, the statistics for TEs were as follows:

<table>
<thead>
<tr>
<th>CR</th>
<th>EN</th>
<th>VU</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>000 ha</td>
<td>%</td>
<td>000 ha</td>
<td>%</td>
</tr>
<tr>
<td>6</td>
<td>0.1</td>
<td>634</td>
<td>8.3</td>
</tr>
</tbody>
</table>

**Freshwater Ecosystem Priority Areas (FEPAs)** see map 4

FEPAs were published as maps by the South African National Biodiversity Institute (SANBI). These maps identify networks of critical freshwater ecosystems and are used as spatial tools for better land-use planning in the sustainable use of water resources. There are 430 FEPAs nationwide. However, FEPAs are not aligned with provincial boundaries and often straddle multiple provinces. To illustrate, the Olifants, Inkomati, Upper Vaal and Usuthu-Mhlathuze water management areas (WMAs) are situated in Mpumalanga. Only the Inkomati WMA falls exclusively within Mpumalanga. Below is a breakdown of the FEPAs densities for each WMA in the province:

- Olifants: 14 (a high percentage of the FEPAs in this WMA falls within Mpumalanga, roughly 75%)
- Inkomati: 33
- Upper Vaal: 23 (with roughly a quarter of all FEPAs falling within Mpumalanga Province)
- Usuthu-Mhlathuze: 37 (roughly half of these fall within Mpumalanga Province)

**Strategic Water Source Areas (SWSAs)** see map 5

SWSAs are described as “national assets vital for our water security.” Recently mapped, SWSAs make up 8% of the land area of South Africa, Lesotho and Swaziland, but produce more than 50% of their water supply. These areas are important because “they have the potential to contribute significantly to overall water quality and supply, supporting growth and development needs that are often a far distance away.”

Three SWSAs are located in the province of Mpumalanga:

- Mpumalanga Drakensberg SWSA (in the Steenkampsberg area between Dullstroom and Belfast);
- Enkangala Drakensberg SWSA (in southern Mpumalanga near Wakkerstroom);
- Mbabane Hills SWSA (this SWSA includes a small portion of Mpumalanga to the northwest of Swaziland).

For many years, civil society organisations have called upon the DMR to declare critical biodiversity and important hydrological areas as “no-go” areas under section 49 of the MPRDA, but these calls have gone unheeded.
The State’s Facilitation of the Violation of Environmental Rights

Important Bird Areas (IBAs)
The IBA Programme is a Birdlife International initiative that identifies areas vital to conserving bird species that are (a) globally threatened, (b) have a restricted range and (c) are restricted to specific biomes or vegetation types. There are nine IB&BA (Important Bird and Biodiversity Areas) in Mpumalanga, and the Grasslands IB&BA in southern Mpumalanga (including the areas surrounding Wakkerstroom) is listed as an IB&BA in danger. The IB&BAs located in the coalfields are:

- Steenkampsberg IB&BA (between Belfast and Dullstroom)
- Chrissie Pan IB&BA (Chrissiesmeer)
- Amersfoort-Bethal-Carolina District IB&BA

Ramsar Sites
Ramsar sites are wetlands of international importance that have been declared under the 1971 Convention on Wetlands, known as the Ramsar Convention. In Mpumalanga, Verloren Vallei (near Dullstroom) is a declared Ramsar site. Furthermore, both Chrissiesmeer and Wakkerstroom qualify as Ramsar sites and are in the process of being proposed as such.

Protected areas
Some environmentally sensitive and hydrologically important areas already enjoy some level of protection through declarations under NEMPAA. The aim of NEMPAA is to conserve biological diversity by declaring areas that represent South Africa’s ecosystems and habitats. Safeguarding their ecological integrity not only preserves rare and threatened species, but also ensures that ecological infrastructures can continue to provide vital ecosystem services.

Protected areas are classified as follows:

<table>
<thead>
<tr>
<th>Map category</th>
<th>Description</th>
<th>Sub-category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protected areas</td>
<td>Areas that are formally protected by law and recognised in terms of the Protected Areas Act, including contract protected areas declared through the biodiversity stewardship programme.</td>
<td>National Parks and Nature Reserves</td>
<td>Includes formally proclaimed National Parks, Nature Reserves, Special Nature Reserves, and Forest Nature Reserves.</td>
</tr>
<tr>
<td>Protected Environments: Natural</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Protected Environments: Modified</td>
<td>Heavily modified areas in formally proclaimed Protected Environments.</td>
<td></td>
<td></td>
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</tbody>
</table>


Commercial prospecting and mining are prohibited in Protected Areas (PAs), while these activities may take place in Protected Environments (PEs) only with the written permission of both the Ministers of Mineral Resources and of Environmental Affairs.

According to the MTPA, “nearly half of the ecosystems in Mpumalanga are poorly, hardly or not protected”, and protected areas cover “19.65% of the surface area of the Province, but only 7.7% without the contribution of the Kruger National Park.”

Source: Nel J.L., Colvin C., Maitre D.C., Smith J. and Haines J. 2013. Defining South Africa’s Water Source Areas. WWF Report, Newlands, South Africa
In 2014, there were 117 protected areas in Mpumalanga.196

See map 6

The first National Protected Areas Expansion Strategy (NPAES) was published in 2008. This strategy identifies areas suitable for protected area expansion and sets targets for these.197 Then, in 2009, Mpumalanga developed its own strategy and spatial priorities in a plan called the Mpumalanga Protected Areas Expansion Strategy (MPAES).198 This plan set targets for protected area expansion over a twenty year period, mainly through biodiversity stewardship by negotiating conservation contracts with private landowners.

See map 7

Protected area expansion is furthermore listed as a key pillar of combatting climate change in the 2010 Green Paper on South Africa’s Climate Change Response.199 However, according to the State Land Audit, most land in South Africa is privately owned (roughly 65%).200 The State does not have enough funds to buy land for expanding the protected areas network, and South African National Parks (SANParks) and provincial conservation agencies have limited resources for managing new PAs. The declaration of PEs is therefore one of the few legal mechanisms available to the State and private landowners to protect areas and ecosystems that provide critical environmental goods and services.

In Mpumalanga, at least two PEs have been earmarked for inclusion into the network: the De Berg PE and the Greater Lakenvei PE. However, mining companies are opposing the declaration of these areas as PEs, arguing that this would deprive them of their right to property, as a mining right is a real right.201

The DMR and successive Ministers of Mineral Resources have publicly acknowledged that at least some areas in Mpumalanga are environmentally sensitive, and that mining was potentially threatening them.

In August 2010, the Minister of Mineral Resources imposed a moratorium on the granting of all new prospecting rights.202 That moratorium was extended on 28 February 2011 for one month until 31 March 2011, except in Mpumalanga, where the moratorium was further extended to 30 September 2011.203

At the time of the February extension, the Minister of Mineral Resources told a media briefing that the reason for not lifting the moratorium in Mpumalanga was that the DMR had “challenges bigger than what we expected, so we will lift eight provinces, and Mpumalanga will continue... for two to three months before we lift the moratorium.”204
According to the Minister, the biggest challenge in Mpumalanga was environmental matters, referring to “issues of ecology” 205. “You will find sensitive areas where rights have been granted,” she said. “We intend to address that matter, hence we are not going to lift the moratorium, so as to make sure we respond to the challenges of nature. Unfortunately rights were granted, but we’ll have to address those issues” 206.

At the 2011 Mining Indaba, the DMR again announced it would not be issuing prospecting or mining rights to applicants wanting to mine in areas that are hydrologically sensitive or of critical biodiversity value 207.

The DMR’s Annual Report for 2011/2012 stated that “[t]he previous extension of the moratorium in Mpumalanga was due to the complex nature of environmental challenges in that province. It culminated in over 41 Rights that are located in Wakkerstroom and Chrissiesmeer being identified as those belonging to the category of environmentally sensitive areas and consequently action has been taken to prohibit mining within those areas (our emphasis).”

Accordingly, the environmental sensitivity of the Wakkerstroom and Chrissiesmeer areas have been publicly recognised by a cabinet minister responsible for minerals. Representations have furthermore been made that, notwithstanding that rights had already been granted, action had been taken to prohibit mining in that area. The DMR has however still not declared the areas as no-go areas for mining, nor has it decided the MTPA’s applications to declare Wakkerstroom and Chrissiesmeer as no-go areas for mining.

Despite the comprehensive preparatory work undertaken by the MTPA and other authorities, the DMR continues to accept applications and grant rights in these areas, most notably in nature reserves and protected environments.

In November 2014, the DMR briefed the Select Committee on Land and Mineral Resources, stating that in Mpumalanga, 220 mining and prospecting rights applications had been received that “related to protected areas” 208. It seems there are some discrepancies in the DMR’s figures, but according to the meeting minutes, of these:

- 54 were rejected
- 26 were accepted
- 66 were refused
- 57 had lapsed
- 7 were pending at the time 209

It was furthermore stated that of the applications that had been accepted, 12 rights had been granted and 8 had been issued.

The DMR and successive Ministers of Mineral Resources have publicly acknowledged that at least some areas in Mpumalanga are environmentally sensitive, and that mining was potentially threatening them, yet the DMR continues to accept applications and grant rights in these areas.
CASE STUDY 2: Mabola Protected Environment (MPE)

In January 2014, Mpumalanga MEC for Economic Development, Environment, and Tourism, Yvonne “Pinky” Phosa, declared Mpumalanga’s Mabola a PE, along with four other areas.

The Mabola Protected Environment is also classified as a CBA in the Mpumalanga Biodiversity Sector Plan (MBSP). The area falls within the Enkangala Drakensberg SWSA, and the rivers, wetlands and wetland clusters in the Mabola PE are classified as FEPAs. It is also classified as a priority area in both the NPAES and the MPAES. In addition, a section of the endangered Wakkerstroom/Luneberg Grasslands ecosystem (listed as endangered and in need of protection in the List of Ecosystems published under NEMBA) falls within the Mabola PE. Therefore, not only does the area enjoy legal protection, but its environmental sensitivity is indisputable.

Nevertheless, a year after the Mabola PE was declared, mining company Atha-Africa Ventures (Pty) Ltd (AAV) called a public meeting. It claimed it had been granted a mining right by the Minister of Mineral Resources over properties falling within the Mabola PE in September 2014 (eight months after Mabola was declared).

Hoping that the Minister of Mineral Resources would set aside the granting of the mining right, a coalition of eight civil society and community-based organisations (CBOs), represented by CER, launched an appeal in April 2015, since a considerable percentage of the area in which AAV’s right was granted fell inside the Mabola PE. Therefore, not only does the area enjoy legal protection, but its environmental sensitivity is indisputable.

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Unbeknownst to the appellants, after its mining right was granted, AAV requested the DMR to remove certain environmental conditions from the grant, claiming it would be impossible to mine and observe those conditions.

Two weeks after the appeal was launched, the Minister acceded to AAV’s request and removed the environmental conditions. The civil society and CBO coalition was accordingly obliged to launch High Court proceedings for the judicial review of the Minister’s decision.

The applicants in the court case contend that the Minister of Mineral Resources’s decision to grant the right was unlawful and should never have been granted, because coal mining in such a strategically important area will result in unacceptable pollution, ecological degradation and damage to the environment.

Moreover, because it is a PE, commercial mining may only take place with the permission of both the Ministers of Mineral Resources and of Environmental Affairs. No permission had been given by, or even sought from, the Minister of Environmental Affairs. The Minister of Mineral Resources also disregarded the views of the DWS and conservation agencies who opposed the granting of the right. On these grounds, his decision should be set aside by the court.

The granting of this right creates an expectation that other mining right applications in South Africa’s environmentally sensitive areas will be granted, even when those areas have protected status.

CASE STUDY 3: Birdlife and the Escarpment Environment Protection Group (EEPOG) v W P Bower (Pty) Ltd

In 2011, mining company William Patrick Bower (Pty) (Ltd) applied for a mining right on properties in the Belfast district in Mpumalanga. The properties are located on a watershed, and runoff from the site drains into the Lakenvlei wetland system and into the Elandsfonteinspruit catchment.

Immediately adjacent to the properties lies habitat classified in the Mpumalanga Terrestrial Biodiversity Assessment either as “Important”, of “High Significance”, “Irreplaceable”, or as “Sensitive Areas”. It is described as being “of exceptional biodiversity value” and as “truly exceptional and irreplaceable” and that “this sensitivity has been objectively established by means of a multitude of planning and sensitivity products that are aimed at ensuring sustainable development.”

On 19 August 2011, the MTPA and several NGOs submitted a motivation to the Minister of Mineral Resources, requesting her to prohibit the granting of new mining or mining-related rights in the Steenkampsberg Wet Grasslands (SWG) under section 49 of the MPRDA. The properties that are the subject of the William Patrick Bower (Pty)Ltd mining right application fall within the SWG. The properties also fall within the Dullstroom Plateau Grasslands, listed as an endangered ecosystem in terms of section 52(3)(a) of NEMBA.

The properties lie within 100 m of a wetland that 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). The catchment areas of both the Olifants River and the Inkromati River contain two FEPA wetland clusters and many NFEPA wetlands.

The FEPA also classifies the Belfast-Dullstroom area as a high water yield area that 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.

The area between Belfast and Dullstroom furthermore forms part of the Mpumalanga Drakensberg SWSA.
The MBSP comprises a series of GIS maps that show the spatial distribution of ecosystems in Mpumalanga. These maps identify and describe biodiversity priority areas that must be conserved by legal protection or proactive management to meet biodiversity targets or thresholds. 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.

The MPAES identifies the Steenkampsberg, located south of Dullstroom, as a “priority 1” level area for protected area expansion. In addition, the properties over which William Patrick Bower (Pty) Ltd applied to mine fall within the boundaries of the Steenkampsberg IBA.

Despite this avalanche of evidence demonstrating the area’s sensitivity and importance, and in contempt of the vociferous objections from civil society and the MTPA, on 10 December 2012, the Director-General (DG) of the DMR granted William Patrick Bower (Pty) Ltd a right to mine for coal.

EEPOG and BirdLife South Africa then launched appeals against this decision on 25 March 2013 and 30 July 2013 respectively. In both appeals it was argued that the DG’s decision was unlawful because the mining operation would result in unacceptable pollution and environmental degradation. When the Minister of Mineral Resources failed to decide these appeals within the specified timeframes, BirdLife South Africa and EEPOG were obliged to institute review proceedings in the High Court. Their application is still pending.

CASE STUDY 4: Mpumalanga Tourism and Parks Agency/Barberton Mines (Pty) Ltd

The Barberton Nature Reserve in Mpumalanga is exceptionally rich in biodiversity, with many endemic animal and plant species. It holds some of the oldest geological formations on earth, and is currently on UNESCO’s tentative list of World Heritage Sites. It is also regarded as one of the most important protected areas managed by the MTPA.

Barberton Mines (Pty) Ltd (“Barberton Mines”) applied for a prospecting right over land that falls within the Barberton Nature Reserve. This right was granted by the DMR.

The MTPA objected to this application, because prospecting and mining in nature reserves is prohibited under NEMPAA. The MTPA’s objection was ultimately dismissed by RMDEC. It alleged that the Barberton Nature Reserve was not a “nature reserve” as contemplated in NEMPAA, because it had never been properly declared as such.

In 2008, the MTPA submitted an appeal against the decision to grant Barberton Mines a prospecting right to the Director-General of the DMR. The MTPA alleged that the Barberton Nature Reserve had indeed been properly declared as such. The appeal was never decided by the DG.

When Barberton Mines attempted to start its mining operation, it was denied access to the Barberton Nature Reserve by MTPA officials and owners of land in the nature reserve. Barberton Mines consequently approached the High Court for an interdict restraining the MTPA and the various landowners from denying it access.

The MTPA opposed this application. It also launched a counter-application to the High Court, requesting that the DMR’s decision to grant a prospecting right to Barberton Mines be set aside on review. In this application it alleged that the Barberton Nature Reserve was indeed a nature reserve as contemplated in NEMPAA, and that it was in any event unlawful for the DMR to have granted a prospecting right to Barberton Mines owing to the extreme importance of the conservation of the Barberton Centre of Endemism within which the reserve falls.

At the time of writing this report, both of these court applications were still pending.

CASE STUDY 5: Federation for a Sustainable Environment/Umsimbithi Mining (Pty) Ltd (Wonderfontein Colliery)

Umsimbithi Mining (Pty) Ltd holds a mining right over land in the eMakhazeni Local Municipality. Its operation on this land is known as the Wonderfontein Colliery. A portion of this land falls within the Cecelia Nature Reserve, which was declared a private nature reserve in 1956. Mining continues to be conducted in contravention of section 48(1) of NEMPAA, which prohibits mining in a protected area. The mining right was furthermore granted by the DMR in contravention of section 48 of the MPRDA, which provides that no mining right may be granted in protected areas identified in section 48 of NEMPAA.

iii. The DMR grants rights in Mpumalanga without having regard to cumulative impacts on water resources, biodiversity, ambient air quality, and food security

The Mining and Biodiversity Guideline was published in 2013 by the DEA, the DMR, the Chamber of Mines, the South African Mining and Biodiversity Forum (SAMBF), and SANBI. This key document was therefore co-launched and endorsed by government and industry, and should be used as a tool to find a “balance between economic growth and environmental sustainability.”
In the current economic climate there is a rising trend of mining companies declaring bankruptcy or deregistering once the profitable extraction years come to an end. In the absence of secured, adequate financial provision held by or in favour of the State, environmental liabilities left behind by these companies become the burden of the taxpayer.
The guideline defines cumulative impacts as “those impacts from [a] project combined with the impacts from past, existing and reasonably foreseeable future projects that would affect the same biodiversity or natural resources (e.g. a number of mines in the same catchment or ecosystem type collectively affecting water quality or flow, or impacting the same local endemic species). Impacts may endure in the short term (e.g. during construction only), or may last for decades or centuries, and may effectively be irreversible.”

It furthermore confirms that “areas where mines are interconnected or their impacts are integrated to such an extent that the interconnection results in cumulative impact should be identified by DEA in consultation with DMR” and that “cumulative impacts have to be taken into account”.

Under the MPRDA regulations, applications for a mining permission, right or permit “must be accompanied by a plan of the land to which the application relates.”

This plan must contain:

- the coordinates and spheroid of the land to which the application relates;  
- the location and where applicable, the name and number of the land to which the application relates;  
- the extent of the land to which the application relates;  
- the boundaries of the land to which the application relates.

These land plans should therefore assist the DMR in identifying potential cumulative impacts.

In 2008, it was reported that the DME was investigating a regional mine closure strategy. The reasons for this strategy were to “address the cumulative impacts from a number of mines, and the impacts of one mine on another” and that the “criteria for defining a regional mine closure strategy included interconnectivity and geohydrology, cumulative environmental impacts, regional economic development objectives, crossing municipal and regional boundaries, and surface catchments boundaries.”

The DME Annual Report for 2010/2011 then stated that “several strategies and guidelines relating to environmental management have been drafted and are awaiting approval” and that these “included […] the regional mine Closure Strategies to provide guidance on the management of water at a regional scale in the different mining areas.”

Although the outcome of the regional mine closure strategy proposal remains unclear, the Department has clearly acknowledged the issue of cumulative impacts and interconnectivity.

Under the MPRDA, the Minister of Mineral Resources, “in consultation with the Minister of Environmental Affairs and Tourism, may identify areas by notice in the Gazette, where mines are interconnected or their safety, health, social or environmental impacts are integrated which results in a cumulative impact.”

Section 43(10) then states that the Minister of Mineral Resources “may, in consultation with the Minister of Environmental Affairs and Tourism, publish by notice in the Gazette, strategies to facilitate mine closure where mines are interconnected, have an integrated impact or pose a cumulative impact.”

These tools should be used by the DMR, specifically in Mpumalanga, given the extremely high number of mines already in the province, as well as the extent of their environmental impacts (as exposed, with extensive evidence, in section 1 of this report). It is therefore essential for a list of interconnected mines to be considered when licences are issued. To illustrate, between 2004 and 2010, the DMR granted 4 700 prospecting and mining rights in Mpumalanga alone, accounting for the highest number of authorisations granted nationwide.

According to the DMR, in 2016 there were 122 operating coal mines in the province, although these figures do not take into account smaller artisanal coal mining operations.

**CASE STUDY 6: Mpumalanga Lake District Protection Group/Black Gold Coal Estates (Pty) Ltd**

In June 2006, the DMR granted a coal mining right to Black Gold Coal Estates (Pty) Ltd (Black Gold Coal) in respect of land that falls within the Chrissiesmeer Biodiversity Site, despite objections from the Mpumalanga Lake District Protection Group (MLDPG), landowners and other I&APs. The MLDPG and two land owners consequently launched an application to the High Court for an order setting that decision aside. These parties also successfully applied to the High Court for an interdict prohibiting Black Gold Coal from starting mining, pending the outcome of their review application.

One of the bases for review was that the DMR did not consider the cumulative impacts of Black Gold Coal’s proposed coal mining operation in Chrissiesmeer. The applicants provided maps depicting the numerous prospecting and mining applications and prospecting and mining operations in the areas surrounding the proposed mining site. These were not included in Black Gold Coal’s environmental impact assessment report, as required in terms of Regulation 50(a) of the MPRDA Regulations, 2004, and were not considered by the DMR when it took its decision to grant a mining right to Black Gold Coal. It was further argued that the failure to take the cumulative impact of the proposed colliery into account was particularly alarming given the sensitivity and the significant hydrological and ecological value of the Chrissiesmeer ecosystem.
The DMR grants rights to companies already in violation of the MPRDA

The MPRDA sets out the conditions and reasons for which the Minister may grant or refuse a prospecting or mining right. Sections 17(1)(e), 18(3)(a), and 23(1)(g) and 24(3)(a) all provide that the Minister must grant rights and renewals of rights if, amongst other peremptory requirements, the applicant or right holder is not in contravention of the MPRDA, including being in violation of an EMPR.

A refusal may be due to any number of technical, procedural, social or environmental reasons, but the Act prescribes that the Minister of Mineral Resources or a delegate of the Minister may not grant a right or a permit to an applicant that is in contravention of any of the provisions of the MPRDA.

In practice, however, this is frequently disregarded by the DMR. For example, when mining companies have illegally commenced their activities before having received the necessary rights to do so — a clear contravention of sections 5(3)(d) and 5(4)(a) and (b) of the MPRDA — they are nevertheless awarded rights by the DMR.

Because of the negligible monitoring undertaken by the DMR for compliance with the MPRDA's environmental provisions (and NEMA since December 2014), unless the applicant discloses violations in its application (a legal requirement), such evidence will not be before the DMR when it considers a new application. In addition, even when evidence of this is put before the DMR, it is often disregarded.

CASE STUDY 7: Mashala Resources

In the Mashala Resources case, a mining right was granted even though the company was not complying with the MPRDA. Mashala Resources applied for a right to mine coal in the district of Ermelo in 2008, and the right was granted by the DMR in May 2010. The granting of this right was then appealed as, according to the testimony of the appellants, the company had already started its activities a year and a half earlier, in 2008. This means the company was in contravention of the MPRDA, and therefore the Minister should have refused the right. The DMR was already aware of this non-compliance, because the appellants had objected to the granting of the right in February 2010.

v. The DMR does not ensure adequate financial provision for the rehabilitation of environmental damage

Financial provision is security that mining rights holders are legally required to put up for the rehabilitation of environmental damage caused by mining. Because of the enormous (and underfunded) problem of AMD, and the large number of derelict and ownerless (D&O) mines, it is imperative that mining companies set aside enough money to remedy the environmental degradation caused by their operations, so that this burden does not fall on the State, and therefore the taxpayers. Financial provision should ensure that mining companies rehabilitate their sites once operations end.

Until 8 December 2014, under section 41 of the MPRDA, companies applying for a mining right first compiled an EMPR. This included a mine rehabilitation plan, a closure plan, and a calculation of adequate financial provision to fund these costly activities. The DMR was responsible for ensuring that these funds were sufficient and secured, and that the mining company had to put up security (financial provision) before the Minister could approve the EMPR.

When mines ceased their activities, the DMR issued — or should have issued — a closure certificate once the environmental impacts of the mining operations had been rehabilitated. Mine owners remained responsible for all environmental
liabilities resulting from their operations until this certificate had been issued\textsuperscript{237}. Once issued, the Minister should then have released the financial provision to the mining company. If the mining company departed before fulfilling its rehabilitation obligations, the Minister was entitled to use the financial provision to rehabilitate the negative environmental impacts\textsuperscript{238}. In practice, closure certificates are rarely, if ever, applied for or granted.

From 8 December 2014 and the commencement of the OES, the statutory requirements for EMPRs and financial provision are located in NEMA. An EMPR is required before the DMR can consider an environmental authorisation application for mining\textsuperscript{239}. It must address management, mitigation, protection or remedial measures at all stages of the operation, from planning and design, to rehabilitation and closure\textsuperscript{240}. Both the assessment of financial provision, and the approval of EMPRs and EAs for mining, remain the DMR’s responsibility under the one environmental system.

However, even before the OES, the DMR failed to assess the adequacy of financial provision proposed by mining companies, or to enforce the prescribed annual reassessment of financial provision and closure obligations. Furthermore, the DMR’s 2005 guideline “master rates” are not adjusted for inflation\textsuperscript{241}. This means financial provision calculations are generally not sufficient by the time funds are released for rehabilitation and closure\textsuperscript{242}.

Frequently companies declare bankruptcy or deregister once the profitable extraction years come to an end, and, in the absence of secured, adequate financial provision held by the State, environmental liabilities become the burden of the taxpayer\textsuperscript{243}.

South Africa has a long legacy of abandoned mines\textsuperscript{244}. In 2009, the Auditor-General released a scathing report after a performance audit of abandoned mine rehabilitation by the DME. The report recognised that one of mining’s main environmental impacts was due to abandoned mines and the “legacy of old practices of inadequate, insufficient or non-existent mine closures”\textsuperscript{245}.

The Auditor-General found that “despite the significance and extent of the environmental impact of unrehabilitated abandoned mines, measures were not in place to ensure that abandoned mines were rehabilitated effectively and timeously. This resulted in the environmental and social impacts of these mines not being addressed, a lack of accountability, delays with the progress of planned projects, and inefficient service delivery\textsuperscript{246}.”

A report compiled by the Council for Geoscience (CGS) for the DME found that at the end of May 2008 there were a staggering 5 906 abandoned mines in South Africa, with most having ceased their activities before the 2002 MPRDA came into effect\textsuperscript{247}. Of these, 1 730 were classified as “high risk”\textsuperscript{248}. However, this figure of nearly 6 000 abandoned mines is already eight years old. Given the small number of mines rehabilitated by the DMR, and that mining operations continue to be abandoned, this figure could potentially be even higher. In August 2015, the cost to close and make the mines safe was estimated at 45.1 billion rand, and a further 2 billion rand for old asbestos pits, according to a study by the DMR and the CGS. Cleaning up toxic AMD leaking from mines would cost about 10 billion rand, according to the DWS\textsuperscript{249}.

In November 2014, the DMR briefed the Parliamentary Portfolio Committee on Mineral Resources on the progress made in dealing with D&O mines. According to their statistics, Mpumalanga province has the second highest number of “high priority” D&O mines nationwide (41), after Limpopo (44).

<table>
<thead>
<tr>
<th>High priority</th>
<th>Moderate priority</th>
<th>Low priority</th>
<th>No rehabilitation appears necessary</th>
<th>Operational/owned</th>
<th>Visited but no access</th>
</tr>
</thead>
<tbody>
<tr>
<td>41</td>
<td>34</td>
<td>34</td>
<td>299</td>
<td>194</td>
<td>186</td>
</tr>
</tbody>
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\textit{D&O mines in Mpumalanga Province\textsuperscript{250}}

It is clear that the State must ensure mining companies make adequate financial provision for the rehabilitation of environmental damage, if we are to avoid history repeating itself. The fulfilment of this obligation would also give full effect to the “polluter pays” principle, enshrined in all three main Acts governing mining in South Africa, namely the MPRDA, the NWA, and NEMA.

However, DMR’s ongoing failure to implement and enforce financial provision requirements is aggravating, in a disastrous way, the legacy of derelict and ownerless mines.

For example, in 1997, DRD Gold Limited (DRD Gold) became a majority shareholder of the existing Blyvooruitzicht mine – formerly the Blyvooruitzicht Gold Mining Company (BGMC) – in Carletonville. Following the commencement of the MPRDA in 2004, BGMC was compelled to convert its old order right to a new order right and part of this process was for it to revise its EMPR. DRD Gold compiled its revised EMPR for Blyvooruitzicht in 2007, which included financial provision for closure. Although the estimated cost of rehabilitation was calculated as R56 734 742 (elevated to R75 026 023 after contingencies and VAT) in the amended EMPR, DRD Gold’s 2007 annual report revealed that there was only R24 319 735 in its trust fund. There were substantial shortfalls in the trust fund throughout the period in which DRD Gold had control of, and made profits from, the mine. DRD Gold transferred its mining rights in 2011 without ever meeting its rehabilitation obligations. The DMR never approved DRD Gold’s revised EMPR, for reasons that are not clear. Accordingly, DMR never required DRD Gold to put up the amended estimated financial provision. As the DMR did not ensure that appropriate financial provision was put up, when DRD Gold transferred its mining rights in the Blyvooruitzicht mine, it was released from its environmental obligations without the security for these being addressed\textsuperscript{251}. 

\textit{SECTION 2 The State’s Facilitation of the Violation of Environmental Rights}
In our work, the CER has noticed vast differences in the quality of EMPRs and the adequacy of financial provision calculations. The following cases illustrate.

**CASE STUDY 9: Samson Sibande/Cousins Coal Co (Pty) Ltd**

Cousins Coal conducted a coal mining operation on Samson Sibande’s farm near Belfast between September 1998 and September 2000. This mine’s EMPR required R290 000 as financial provision.

Before the expiry of its mining right in September 2000, Cousins Coal abandoned its mining operation without rehabilitating the environmental damage it had caused. At the time of this report, Sibande’s farm remains unrehabilitated.

When the DME conducted an inspection on Sibande’s property in 2005, the senior environmental manager in the DME’s Witbank branch found that “an amount of R47 000 has been submitted in the form of a bank guarantee, and is regarded as insufficient to cater for the outstanding rehabilitation.”

It is unclear why only R47 000 was accepted by the DME when the company’s EMPR specified an amount of R290 000 as financial provision.

In June 2015, CER commissioned a closure and rehabilitation cost estimate for Cousins Coal’s former mining operation. The cost estimate amounts to R13 271 548. This estimate excludes the rehabilitation of the underground water and the rehabilitation of the wetland damaged by Cousins Coal’s mining operation. The mining area covers a mere five hectares.

**CASE STUDY 10: Exxaro Arnot Coal**

Exxaro’s Arnot Coal operation is located midway between the towns of Middelburg and Carolina in Mpumalanga. In July 2010, Exxaro Resources submitted an EMPR to the DMR to expand its open cast coal mining activities at Arnot. At the time, the land it wished to expand into was being used for agricultural purposes, and the mining operations would have required a change of land use. The EMPR stated that if rehabilitation was not appropriately carried out, land capability would be negatively impacted in the long term, and the company therefore proposed concurrent rehabilitation.

Comments from I&APs reveal that many were concerned about the impact mining would have on wetlands located within the mine site and, in consequence, on groundwater in the area (which was predominantly being used for the irrigation of crops and livestock watering). The MTPA notably stated that “the risk in terms of the poor rehabilitation of water pollution and contamination of fertile soils of such a proposed coal mining operation are currently too high. More scientifically based data to mitigate or to prevent the risks and threats must be addressed in the EMP[R].”

The rehabilitation and closure plans in the report appear to be cursory. The report itself states that “a brief closure report” had been included in the EMPR and would be updated annually as per the DMR requirements. It went on to state that the DMR’s algorithm for calculating the quantum of financial provision had been used and the total amount to be set aside was R3 349 926. The EMPR does not appear to provide adequate details or show any maps of the aerial extent of the proposed mining activity associated with the rehabilitation plan.

The mine was ranked as class “A” in terms of risk — the highest risk. Of the total amount for financial provision, the cost of water management was calculated as R682 507, although this figure did not include the costs of water treatment as the treatment of decant water would be done at a central plant to be used for all the company’s operations within the Arnot area. This doesn’t appear to be a valid reason not to make provision for water treatment costs. The total amount set aside for the two to three years of maintenance and aftercare was a mere R35 653.

**CASE STUDY 11: Nkomati Anthracite**

The company Nkomati Anthracite, jointly owned by Sentula Mining Limited and the Mpumalanga Economic Development Agency, had an existing opencast mine, approximately 50 km south of Komatipoort (eastern Mpumalanga). In March 2011, the company submitted an EMPR to extend its mining operations to an area adjacent to the Madadeni community. The new EMPR specifically stated that the company held an “approved EMP[R]” for its existing operations.

The company acknowledged that the new EMPR “must include cost [sic] for premature closure, decommissioning and final closure and post-closure management of the residual and latent environmental impacts.” It then went on to say that, for the new EMPR, “the quantum was determined for the premature closure of the mining operation,” which included the “cost for decommissioning, final rehabilitation and post-closure maintenance of the mine”. Of concern, however, is that the document states that the new quantum would be integrated into the quantum for the existing mining operation “which is in the process of being finalized.” It is unclear how the company could have held an approved EMPR for its existing operations, since it is the DMR’s responsibility to ensure that financial provision is adequate before the Minister can approve an EMPR.

It appears the mine was ranked as a “B” category – medium risk. The total amount of financial provision was calculated as R4 370 574. Of this total amount, R132 000 was earmarked for water management, and R46 200 for two to three years of maintenance and aftercare. No amount was allocated for water treatment.
Significantly, although the EMPR does state that rehabilitation would be ongoing and undertaken concurrently, these activities do not appear to be clearly outlined, nor does the EMPR contain any maps, as per the legal requirement. Overall, the report appears to outline the relevant legislation, but does not seem to indicate clear actions.

CASE STUDY 12: Vuna Mining Enterprises (Pty) Ltd

Vuna Colliery’s EMPR showed the company had estimated an amount of R8.9 million would be adequate financial provision for the rehabilitation of its open cast coal mining activities at its colliery near Middelburg in Mpumalanga. This amount included a figure of R220 000 for “water management” over an area of 10 hectares. It did not include any provision whatsoever for the treatment of polluted water.

The catchment affected by its mining operations had been classified as a Class 2 water quality under the recently finalised Olifants Water Classification process. This classification means that very good water quality is required to balance the needs of the entire Olifants River. The estimated financial provision was therefore woefully inadequate, particularly since Vuna’s own experts had indicated the long-term impacts the operations would have on both ground and surface water in the area.

2.1.2 Department of Water and Sanitation

The DWS has allowed many mines in Mpumalanga to use and discharge polluted water without WULs

Certain water uses require a water use licence (WUL) under the NWA, and before mining companies may use water as specified, they must first apply for and be issued these licences.

Operating without a required WUL is against the law, but in practice many mines operate without them. Some companies blame the DWS’s backlog in processing WUL applications (WULAs), but using water without a valid licence is a violation of the NWA, and a criminal offence.

Companies whose applications remain undecided after having submitted complete WULAs also have recourse under PAJA, and this remedy has been successfully used. The DWS has made some progress in clearing its backlog.

Information provided by the Minister of Water & Sanitation in a series of parliamentary questions between 2009 and 2015 charts developments over the years. The many discrepancies in these replies are indicative of the DWS’s poor grasp over the mining sector’s use of water in Mpumalanga:

Mines operating without water use licences

According to the DWS, there were 104 mines operating without water use licences in South Africa in 2009. By 2015, there were still 96 mines operating without water use licences nationwide. In Mpumalanga, the statistics were as follows:

The DWS says it inspected 55 mines for compliance with the NWA in Mpumalanga in 2014/15. During this period, there were only two DWS officials in Mpumalanga dedicated to compliance and enforcement. Monitoring compliance against WULs for 55 mining sites requires checking and verifying results at hundreds of monitoring points – an almost impossible feat for two officials, and a difficult task for even four or five officials. Given the limited compliance and enforcement capacity, it is likely that many more mines have been operating without WULs since 2009 than those detected by the DWS.
In a written reply to a 2009 Parliamentary Question, the Minister of Water and Environmental Affairs stated that an estimated 104 mines were operating without valid WULs. Of these, 13 were in Mpumalanga. Some of the reasons for this included applications that had not been submitted to the DWS. She added that certain mining activities do not require a licence under the NWA—for example some prospecting and sand mining activities. Thus, other WULAs were incomplete and lacked relevant information. She said these issues caused processing and decision-making delays.

Three months later, the Minister again provided the names and locations of all mines operating without WULs. In Mpumalanga, there were still 13, indicating that no progress had been made within that period.

In June 2010, the Minister furnished another list of mining companies operating without WULs, providing details about whether these had been applied for and what their status was. The number of mines operating without WULs in Mpumalanga increased significantly to 54.

A further eight months later, in February 2011, the Minister provided an updated list. In Mpumalanga, 41 mines were still operating without WULs. However, seven had been issued, while two WULAs had been withdrawn and one had been declined during this period.

The Minister was furthermore asked to give a timeframe for when all mines would be operating with valid WULs. She said, “There has been a concerted effort to ensure that the licensing process is fast tracked, coupled with a review of the processes involved.” There has been an urgent need to group licences per sector and further reprioritise licence applications which are of strategic nature across the sectors. In this regard, the mining and energy sector (Eskom) are given high priority in that the specific focus has been given to Eskom licence applications for energy generation. This includes the prioritisation of applications for coal mines as feeders to power generation for Eskom.” She then said that, subject to applicants submitting all the required information, the DWS’s aim was for all applications to be dealt with by the end of October 2011.

However, by October 2011, 24 mines were still operating without WULs in Mpumalanga, and 10 had been issued with licences. The Minister announced that the DWS had launched a special initiative, known as the Letsema Project, to expedite the process of issuing WULs and to eradicate the backlog in applications.

On 2 March 2012, the Minister said 53 mines were operating without WULs, and 17 of these were in Mpumalanga. She said her licensing team had dealt with many other sectors besides mining, and that “the processes and procedures are very long, but dealt with thoroughly and that include [sic] reserve determinations.” She added the Letsema project had processed 3,250 WULAs, leaving 521 still to be finalised.

By 25 July 2014, 103 mines nationwide were stated to be operating without valid WULs, and, of these, 55 had applied for a WUL. Sixteen of the 103 mines were operating without WULs in Mpumalanga and of these, two had not submitted WULAs: Arnol Colliery (operated by Exxaro) and Sumo Coal Kopermyne Colliery.

Then, according to a 2014 press release, 104 mines were operating nationally without WULs by July 2014, but the DWS said it was “important to note that in 2010 the water use licensing backlog stood at 125. This prompted the initiation of the Letsema Project which was set up to specifically look into and work down these backlogs. Due to this process, the numbers of unlicensed water users came down to 39 as at 2013.” However, through its “Compliance, Monitoring and Enforcement process”, DWS had found more mines “in contravention of the water use licensing regulations, raising the number to 104” nationally.

In March 2015, the Minister was asked a question concerning a 2014 report released by the South African Human Rights Commission (SAHRC). This report highlighted the issue of mines operating without WULs and made recommendations as follows:

- All mines operating without water use licences should be instructed to suspend operations immediately;
- The DWA must put in place a system whereby mines are responsible for cleaning up water sources that they have polluted within a specific time. The relevant departments must seek compensation and action from courts in the event that a mining company fails to comply;
- Regional offices of mineral resources must ensure regular site visits are made to mining sites and to surrounding communities. This will assist with the monitoring and implementation of environmental management plans and social labour plans;
- An amendment of the current Mineral and Petroleum Resources Development Act and National Environmental Management Act is needed to move the decision-making powers regarding mining and prospecting licences from the Department of Mineral Resources to the Department of Environmental Affairs.

The Minister replied that 96 mines were operating without WULs. Of these, 40 had submitted WULAs, while 56 had not. She however said the DWS had instituted various administrative, criminal and civil enforcement measures to address non-compliant mines. Alarmingly, she added that “the actual information cannot be furnished because it shall prejudice the outcome of the administrative action and criminal prosecution by the Department, which is sub judice according to the National Prosecuting Authority.”

Then, in July 2015, the Minister revealed there were 328 applications for WULs in process at the DWS in Mpumalanga (although these would not have been for the mining sector alone). She reiterated delays were due to: applicants not submitting all relevant information, the complexities of applications, and the volume of
supporting documents required. She added that internal specialist inputs were intensive, and therefore turnaround times were protracted.

The second edition National Water Resource Strategy (NWRS2) acknowledged the DWS had managed to significantly reduce their backlog, largely because of Project Letsema, but that challenges remained. The DWS’s limited enforcement capacity had resulted in high levels of illegal water use and pollution, and therefore processes needed to be streamlined to “ensure and maintain an efficient, equitable and effective authorisation process and to prevent a new backlog from developing.”

While the DMR has the legal authority — and the obligation to stop mines using water without a WUL, the DWS can issue directives to stop all illegal water use. It can also arrest and prosecute anyone using water without a WUL. Both departments therefore have powers to stop contravening mines. However, in our case work, there have been many mines operating without the required licences that have faced no legal sanction at all for doing so. It seems as though this illegal activity goes unchecked in part because of the DWS’s internal backlog, and in part because the DWS lacks the necessary capacity or will to enforce the law.

The DWS grants poor quality licences

WULs are regulatory tools provided for by the NWA to ensure that water use and discharge take place in a way that promotes the objectives of the NWA. The NWA recognises water as a scarce resource and, to adequately govern and protect South Africa’s water resources, licences must comply with the law.

All water use must be authorised, and chapter 4 of the NWA sets out the general principles for the regulation of water use. Under this Act, water use must be licensed, except when:

- a particular usage is already permitted as an existing lawful use;
- is listed in Schedule I;
- is permissible under a general authorisation; or
- the responsible authority waives the need for a licence.

When issuing a general authorisation or licence, the responsible authority must take into account all the relevant factors, including the consideration of existing lawful water uses, the need to redress past racial and gender discrimination, the socio-economic impact of the water use (both if it were to be authorised or denied), as well as any catchment management strategy applicable to the water resource. Importantly, any water use authorisation should be efficient and beneficial to the public interest.

The DWS must also assess:
- the likely effect of the water use on the water resource and other water users;
- the class and the resource quality objectives of the water resource;
- the investments already made and to be made by the water user;
- the strategic importance of the water use;
- the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and
- the probable duration of any undertaking for which a water use is to be authorised.

The DWS must also consider the principles set out in section 2 of NEMA, including the “polluter pays” and “precautionary” principles. The precautionary principle dictates that, when a proposed activity poses a risk to the public or the environment, decision-makers must assume that the impacts will be detrimental. This provides officials with the opportunity to ensure that they have all the necessary information before them, and where adequate information is not available, they must require applicants to provide the relevant data so that a sound decision can be made.

Section 29 of the NWA states that the responsible authority may attach conditions to every general authorisation or licence. These conditions may specify management practices and general requirements for any water use, including water conservation measures, and may furthermore require the monitoring and analysis of the water use, imposing a duty to measure and record aspects of water use on mining companies.

However, poor quality licences mean that mining companies who use water cannot properly be monitored, nor can they be adequately held accountable when water resources become polluted.

The DWS suffers from a lack of capacity and high staff turnover. Licensing staff, particularly in the regional offices, are sometimes inappropriately qualified and inexperienced. This is exacerbated by the licensing backlog and the complexity of licensing applications, as well as the absence of proper information — not only in the WULAs presented by applicants, but also of statutorily required information (such as the determination of the Reserve contemplated by the NWA). This means the quality of WULs is often not of a sufficient standard to adequately protect South Africa’s water resources.

To illustrate the quality issues affecting licensing, a private environmental lawyer who works for mining companies, and who spoke to CER on the condition of anonymity, uses the example of some WULs imposing design and construction obligations for facilities that have already been constructed. The private lawyer says that water users simply ignore these conditions, because they cannot redesign or construct, and “nobody from government ever follows up on this anyway”.

The private lawyer described a licence where a water user had been exceeding river abstraction limits for nearly 10 years. In addition, the company had a waste-water dam that was sited in close proximity to the river bank, “as in two metres away”. A new WUL, which had only recently been issued, made no mention of this
Poor quality licences mean that mining companies who use water cannot properly be monitored, nor can they be adequately held accountable when water resources become polluted.
The State’s Facilitation of the Violation of Environmental Rights

WULs are often of such poor quality that water expert, Carin Bosman, was quoted in the media as saying that they are “word salads”\textsuperscript{282}. Bosman, a former DWS official, is contracted by companies (mainly in the mining and industrial sector) to conduct WUL audits. Over 2013 and 2014, she had conducted such WUL compliance audits at 14 facilities, including two gold mines and six coal mines\textsuperscript{283}. Under normal circumstances, WUL conditions would be used as the criteria for the audit. However, Bosman found that WUL conditions themselves first needed to be audited, as they are often scientifically or technically incorrect, or not applicable to the site-specific conditions, and could therefore not be used as audit criteria.

Prior to auditing compliance of the activities of the mine against the conditions of the WUL, Bosman therefore firstly determines whether all water uses that require authorisation by means of a WUL are included and correctly described in the WUL. She then makes use of PAJA to determine whether or not the conditions in the WUL are legally correct (and based on empowering provisions in the NWA), or whether they are based on an error in law. She also looks at whether irrelevant considerations were considered (for example when conditions are vague, incomprehensible, or not applicable to site-specific situations), whether any relevant considerations were not considered, meaning the conditions are scientifically or technically incorrect, and finally, whether any conditions are unreasonable\textsuperscript{284}. Only those WUL conditions that meet the PAJA requirements would then be used as the criteria for the audit.

Some of her main findings included that water uses requiring authorisation were not correctly identified in the WUL, and the properties on which water uses were to take place were incorrectly described. In addition, some water uses that needed to be licensed were not included in the WUL. Moreover, perhaps 60 out of an average of 300 conditions set out in WULs (around 20%) were legally and technically correct, and could be used as valid audit criteria.

iii. The DWS does not use its powers to require financial provision for water treatment

Section 30(1) of the NWA provides that a responsible authority may, if necessary for the protection of the water resource or property, require the applicant to give security for any obligation or potential obligation arising from a licence issued under this Act.

When considering or issuing water use licences, the DWS must consider the principles set out in section 2 of NEMA, particularly the “polluter pays” principle. According to this principle, companies must internalise the costs of any negative environmental impacts arising from their operations.

While the NWA empowers the DWS to require a WUL applicant to give security\textsuperscript{285}, a requirement to this effect is only occasionally made a condition of the licence. Where such security is required, there is no enforcement of compliance with this condition and, as a result, financial provision is not secured.

CASE STUDY 13: Gold mine (North West Province)

The first example of an audit was for a gold mine that was more than 40 years old. There were nine water uses that required authorisation that were never included in the WUL. Furthermore, 128 out of the 148 WUL conditions could not be used as audit criteria.

CASE STUDY 14: Underground coal mine (Mpumalanga)

The second case was for a new underground coal mine that was not yet operational. There were five water uses requiring authorisation that were not included in the WUL. A third (127 out of the 387) of this WUL’s conditions could not be used as audit criteria.

CASE STUDY 15: Opencast coal mine (Mpumalanga)

Another audit was of an opencast coal mine, which was also not yet operational. There were six water uses that required authorisation that were not included in the WUL. The licence contained 264 conditions, but 49 of these did not contain any compliance requirements, and a further 64 were duplications or contradictions. There were however certain conditions that contained more than one compliance requirement. There were 247 compliance requirements in total, of which 167 could not be used as audit criteria, because they did not meet PAJA requirements.
The following examples illustrate the inadequate formulation of financial provision conditions by the DWS. These often appear as single sentences on water use licences:

- “The Licensee shall make full financial provision for the investigations, designs, construction, operation and maintenance for a water treatment plant should it become a requirement as a long-term water strategy”.
- “The water user must ensure there is a budget sufficient to complete and maintain the water use and for successful implementation of the rehabilitation monitoring programme”...

These conditions are vague and unenforceable. They are not site specific, measurable or reasonable.

CASE STUDY 16: Federation for a Sustainable Environment (FSE)/Vuna Mining Enterprises (Pty) Ltd

In 2010, Coal of Africa Ltd’s Vuna Mining Enterprises applied to amend its EMPR for its Vuna Colliery.

FSE was concerned about the lack of financial provision made for water treatment costs in this EMPR and, as an I&AP, wrote to the DWS. It requested a copy of the WUL to ascertain what Vuna’s obligations were under the licence, and specifically whether Vuna had been required to put up financial provision for water treatment costs under this WUL.

Financial provision was indeed a condition of the WUL. FSE therefore sought to establish whether Vuna had complied with that condition, as well as other conditions around monitoring and inspections. It did so by submitting an access to information request to the DWS under PAIA.

The records requested pertained to payment of financial provision and compliance monitoring and inspections. The DWS’s response to the PAIA request was that none of the requested records existed, indicating that the DWS had conducted no compliance monitoring or enforcement for the duration of the project (which had started in approximately 2007).

FSE then wrote painstakingly to the DWS, outlining concerns about the predicted pollution plume from this operation, the absence of any financial provisioning for water treatment, and the failure to conduct any compliance monitoring or enforcement. The DWS did not respond to any of these letters.

iii. The DWS does not require notification of or public participation for WULAs

Consultation is vital to the process of issuing authorisations, not only because it involves the public in decisions that may directly affect them, but also because communities often have local knowledge that can help companies and competent authorities ascertain and mitigate the potential negative impacts from proposed projects.

In 2012, the Minister of Water and Environmental Affairs seemed to endorse the importance of public participation when, in an interview, she said: “[in] mining, because we do give conditions by the way, it’s not a licence that says do anything you want. So it’s important that people around that area know about those conditions and are also able to help us in keeping a check on those mines.”

Under section 41(4) of the NWA, the responsible authority may require the applicant to give suitable notice of its WULA. These notices must describe the licence being applied for and give the timeframes I&APs have to lodge their objections.

The applicant must also include any other details, or take any other steps, the responsible authority deems fit “to bring the application to the attention of relevant organs of state, interested persons and the general public.” Importantly, the notification’s purpose is to satisfy the responsible authority that “the interests of any other person having an interest in the land will not be adversely affected.”

This principle is confirmed by section 41(2)(c) of the NWA, which states that a responsible authority may invite written comments “from any organ of state which or person who has an interest in the matter”.

The Minister can therefore decide whether or not an applicant for a WUL should conduct a public participation process. (In practice, this decision is made by the Director-General or Regional Head under delegation.) And while this discretion must be exercised under PAJA, there is no legal imperative in the NWA for the applicant or the DWS to conduct a public participation process. When the Minister does not exercise her discretion to call for one, any comments or objections submitted by communities or civil society do not have any legal standing, although they demonstrate their willingness and wish to be involved in the process.

The Constitution, NEMA and PAJA all require consultation as an element of just administrative action. However, when the DWS does not use section 41 to ensure effective public participation in compliance with PAJA, affected parties are often not even aware of any WUL application. In the past, this has meant they have not been able to access their right of appeal against the granting of the licence or its conditions to the Water Tribunal. The absence of consultation therefore compromises both the quality and lawfulness of licences.
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CASE STUDY 17: BirdLife South Africa and Escarpment Environment Protection Group (EEPOG) v William Patrick Bower (Pty) Ltd

In 2012, William Patrick Bower (Pty) Ltd submitted an application to the DWA for a WUL for a coal mine. The proposed mine was situated in an area that included sensitive and irreplaceable wetland systems, and the applicant did not conduct any public participation process.

More than a year after submitting its application, it gave a copy of its WULA to an I&AP for information purposes. The copy was distributed to several I&APs, including EEPOG and BirdLife South Africa, who firstly pointed out several fatal flaws in the WULA (to both the environmental assessment practitioner who compiled the WULA and to the DWA), and secondly wrote numerous letters to the Minister requesting that she require the applicant to conduct a public participation process.

The Minister did not exercise her discretion to require the applicant to conduct a public participation process. I&APs were consequently not officially afforded an opportunity to comment on the WULA. However, both BirdLife South Africa and EEPOG submitted objections anyway.

On 4 October 2015, the DWS Director-General granted the applicant’s application for a WUL. EEPOG received reasons for the decision in which no reference is made to either BirdLife South Africa’s or EEPOG’s objections.

In December 2015, both BirdLife South Africa and EEPOG submitted appeals against the grant of the WUL to the Water Tribunal.

CASE STUDY 18: Escarpment Environment Protection Group (EEPOG)/Umcebo Mining (Pty) Ltd (Klippan)

Umcebo Mining (Pty) Ltd planned to open a new colliery, Klippan, on a farm in Belfast, Mpumalanga. EEPOG sent numerous requests to the competent authorities, asking to be involved in the public participation process for the granting of the company’s WUL, as well as its waste management licence. From the documentation, it appears that the mining company had commenced its activities before obtaining its WUL. These requests for inclusion in a public participation process were however ignored. EEPOG finally submitted a formal objection against the WULA to the DWS. There remains ambiguity about whether I&AP objections were taken into account.

CASE STUDY 19: BirdLife and Escarpment Environment Protection Group (EEPOG) v William Patrick Bower (Pty) Ltd

In 2011, the mining company William Patrick Bower applied for a coal mining right on portions of the farms Groenvlei and Lakenvlei in Belfast, Mpumalanga. The proposed site was part of an ecosystem of irreplaceable value, and the area is crucial to water security in South Africa. The application was vigorously contested, and there were 143 registered I&APs, all of whom objected to the granting of the right because of the area’s high biodiversity conservation value and its hydrological importance.

The properties on which the proposed coal mining would take place had been earmarked for protected area expansion by both SANBI and the MTPA. It was furthermore classified as an “irreplaceable” CBA in the MTPA’s Biodiversity

2.2 Failure of cooperative governance

2.2.1 The DMR ignores objections from other government departments

The principle of cooperative governance is enshrined in section 40(2) of the Constitution. All spheres of government must observe and adhere to this principle by cooperating with one another in mutual trust and good faith.

By working together and adhering to this principle, the various spheres of government can meet their mandates and take well-planned and integrated decisions. In the context of mining, which affects the interests of numerous sectors of society, the principle of cooperative governance should ensure that the DMR has all the relevant considerations before it when deciding applications for prospecting and mining rights. This is particularly important for governing the impacts of mining, where other organs of state (such as the DWS, DEA or MTPA), may have far more information and expertise.

This constitutional principle was amplified in the MPRDA, which — until December 2014 — required the Minister of Mineral Resources to consult any State department that administers any law relating to environmental matters when considering environmental management plans or programmes292.

The requirement to consult with other departments is now dealt with under NEMA and is amplified in the 2014 EIA regulations293.

However, in practice, the DMR often simply ignores the input and objections from other government departments, even in cases where environmental sensitivity and hydrological significance are indisputable.
Conservation Plan, as well as a national FEPA, a SWSA, and a priority area under NPAES. It was also listed as an endangered ecosystem under NEMBA, and was an area of high agricultural value.

The area’s conservation value was therefore significant and, in 2011, the MTPA made representations to RMDEC, objecting to the application. These objections were, however, “overruled” by RMDEC, and the company’s mining right was granted.

CASE STUDY 20: Mabola Protected Environment: Atha Africa Ventures (Pty) Ltd

Atha-Africa Ventures (Pty) Ltd applied for a mining right for a coal mine in Wakkerstroom, Mpumalanga. Following a consultation in terms of section 40 of the MPRDA, the DWA addressed a letter to the Mpumalanga Regional Manager of the DMR in which it expressly stated that it did not support the proposed mining development. The DWA gave many detailed reasons for its position, which reasons included that the proposed mine would result in environmental damage which is not capable of being mitigated. Furthermore, the DWA emphasised the extent of the proposed mining area which constitutes wetland (at least 42%), that the greatest fatal flaw of this site is that it is situated within a designated National Freshwater Ecosystem Priority Area and that it is predicted that mining will lead to the dewatering of subsurface water resources and the pollution of both surface and subsurface water resources. The DMR regardless granted the mining right in September 2014.

CASE STUDY 21: Umcebo Mining (Pty) Ltd (Klippan)

The Klippan colliery is situated in the district of Carolina in Mpumalanga, and the mining company applied for a mining right for a coal mine. The area’s terrestrial and aquatic biodiversity was identified as being “highly significant”, and there were two IUCN Red Data species present on the site. The MTPA therefore lodged express objections to the granting of the right. Mining authorisation was nevertheless granted by the DMR.

CASE STUDY 22: Xstrata-Verkeerdepan

Xstrata South Africa applied for a mining right over 1 385 hectares of a farm in Carolina in Mpumalanga. According to Xstrata’s EMPR, 51% of the proposed site was covered by wetlands, and therefore highly environmentally sensitive. The MTPA (and the Mpumalanga Lakes District Protection Group) strongly objected to the granting of the mining right, but authorisation was nevertheless granted by the DMR.

2.2.2 The DMR ignores key environmental documents and spatial planning guidelines

Poor governance and the proliferation of mining in Mpumalanga have led to authorisations being granted in environmentally-sensitive areas, strategic water source areas, and areas that are vital for agricultural production. It is therefore clear that proactive and rigorous land-use planning, a prerequisite for mitigating these impacts, is being ignored and not enforced.

All three spheres of government share the responsibility for spatial planning, and competent authorities must apply the laws, regulations and zoning schemes that identify suitable land-uses in specific areas. Over the years, various spatial development tools have been created to guide decision-making and land-use planning, and they must be used to ensure better environmental management.

Although mining is the exclusive competence of the national executive under the Constitution, the Constitution also grants competencies to local and provincial government for issues like planning (a municipal and provincial competence), and environment (a provincial competence). Nevertheless, the DMR frequently fails to adhere to existing spatial planning tools prepared by other departments or spheres of government, such as Environmental Management Frameworks (EMFs), Spatial Development Frameworks (SDFs), or town-planning schemes. These all clearly identify areas that are too sensitive to develop, and in which mining authorisations should not be granted.

EMFs are land-use planning tools provided for under section 24(3) of NEMA. They are used by municipalities and should guide decision-making by competent authorities. In Mpumalanga, by April 2013, five EMFs were in various stages of development and adoption, namely the Emakhazeni Local Municipality, Msukaligwa and Albert Luthuli Local Municipalities, Dr Pixley ka Isaka Seme Local Municipality, Olifants-Letaba Catchment Area, Gert Sibande District Municipality.
EMFs take into consideration the specific environmental assets of defined geographical areas, such as water resources, cultural and heritage resources, and areas of agricultural potential. These assets are then evaluated according to their sensitivity to development. EMFs therefore facilitate sustainable and environmentally responsible development by establishing development priorities and constraints.

Similarly, the 2014 Mpumalanga Biodiversity Sector Plan (MBSP), which, when adopted by Cabinet, will replace and supersede the earlier Mpumalanga Biodiversity Conservation Plan of 2006, is also a spatial and land-use planning tool. This plan includes maps of spatially-defined biodiversity priority areas and provides information and land-use guidelines to be used in development planning, environmental assessment, and natural resource management.

The MBSP has boundaries that coincide with administrative boundaries, such as those of municipalities, and should be used to guide planning and decision-making, along with existing frameworks, including integrated development plans (IDPs), SDFs, land-use management schemes, EMFs, and environmental management plans.

The MBSP states that “Integrated Development Plans (IDPs), and their associated Spatial Development Frameworks (SDFs), provide an important strategic opportunity to incorporate biodiversity considerations into decisions relating to the location of land-uses (such as residential developments and mining), the provision of services, environmental management and other economic activities that provide much needed employment”.

Furthermore, a SDF is the spatial depiction of an IDP. It shows the desired pattern of land-use in the municipality and provides strategic guidance on the location of these land-uses (including which land should be set aside primarily for the conservation of biodiversity).

The 2013 Mining and Biodiversity Guideline, adopted and endorsed by government and the mining industry, furthermore encourages “mining companies, regulatory authorities and other mining stakeholders to use the high quality, readily accessible spatial and non-spatial biodiversity information that is available to guide thinking and decision making in respect of the mine planning process”.

However, despite all the work undertaken by other departments and organisations to produce guidelines for where mining should and shouldn’t take place, the DMR routinely ignores these plans, as illustrated by the following cases.

### CASE STUDY 24: Eyesizwe Coal (Zoekop, Blyvooruitzicht)

The Eyesizwe Coal case relates to a prospecting (and subsequently mining) right application in Belfast, Mpumalanga. The MTPA’s biodiversity conservation plan identified the area as “highly significant” because of its terrestrial and aquatic biodiversity, and this land-use category specifically excludes surface mining and restricts underground mining from being suitable in such areas. The mining company’s EMP stated that drilling would take place 16–30 m from open water, which is in contravention of NWA regulations. These state that prospecting and mining activities may not occur within 100 m from a water resource, unless an exemption has been obtained. Despite the exclusion of mining by the MTPA’s biodiversity plan, and the mandatory provisions of the NWA, the DMR nevertheless granted the prospecting right.

### CASE STUDY 25: Benicon Bankfontein

The company Benicon Mining applied for a mining right for coal on a farm near Breyton in Mpumalanga. A MTPA spatial planning tool classified a large portion of the proposed area as “highly significant”, while another smaller portion was identified as being “important and necessary from a biodiversity perspective”. These and other flaws were raised in an objection to the mining right application. The DMR granted the mining right regardless.

### CASE STUDY 26: Khulile Mines (Witkranz)

Khulile Mines applied for a prospecting right for coal in Ermelo, Mpumalanga, and the site was located in Chrissiesmeer. This area is known for its highly-significant biodiversity and water quality, and there are also many farming and eco-tourism ventures in the area. The MTPA biodiversity conservation plan identified the site’s terrestrial and aquatic biodiversity as “highly significant”, because of the important wetland areas. DMR granted the prospecting right despite this.

### CASE STUDY 27: Eyesizwe Coal (Paardeplaats)

Similarly, the Eyesizwe Coal (Paardeplaats) case related to a prospecting right for coal in Belfast, Mpumalanga. The site fell within an area that was also identified as “highly significant” by the MTPA’s biodiversity conservation plan because of its terrestrial and aquatic biodiversity, and the site had wetlands and natural grasslands. This was however disregarded by the DMR and the prospecting right was granted.
CASE STUDY 28: Umcebo Mining (Pty) Ltd (Klippan)

This case involved a new colliery known as Klippan on a farm in Belfast. There are many productive farms in the area, and ecotourism is also an important local economic activity. There were concerns about the cumulative impacts of mining on groundwater. The area holds a number of very sensitive pans, including Blinkpan and Grootpan. A mining right was granted by the DMR, despite one of the pans below the mine being classified as “irreplaceable” in the Mpumalanga Biodiversity Conservation Plan. An initial appeal against the mining right was granted, but mining activities nevertheless commenced.

CASE STUDY 29: Federation for a Sustainable Environment (FSE)/Umsimbithi Mining (Pty) Ltd (Wonderfontein Colliery)

The portion of land on which Umsimbithi conducts its coal mining operations is zoned solely for agricultural use in the eMakhazeni Municipality’s Land Use Scheme. The land in question is classified as “high potential” agricultural land. The DMR failed to take into account soil quality and the zoning of the land when it took its decision to grant a mining right to Umsimbithi.

Despite all the work undertaken by other government departments and organisations to produce scientifically based guidelines for where mining should and shouldn’t take place, the DMR routinely ignores these plans when accepting applications and granting rights.

2.3 Appeals

2.3.1 The Minister of Mineral Resources does not decide appeals against rights and EMPRs in compliance with the MPRDA

Section 96 of the MPRDA provides for appeals to the Minister of Mineral Resources against decisions by responsible authorities granting rights. Under this provision, any person taking issue with the granting of a prospecting or mining right must submit an internal appeal to the DMR within 30 days of becoming aware of this administrative decision. However, launching an appeal does not automatically suspend the original decision (in other words, operations can commence despite the pending appeal), but the Director-General or the Minister can suspend the decision.

The Act does not provide any timeframes for these appeals to be finalised by the Minister. The Regulations state that the appeal authority must decide an appeal within 30 days of receipt of a responding statement. However, they do not provide a timeframe within which the appeal authority must send copies of the appeal, both to the decision-maker for reasons and to the relevant mining company for a responding statement.

In practice, this puts civil society and communities at a significant disadvantage. Preparing an appeal is time-consuming and costly, and appellants have no clear indication of when their appeals will be decided. Many appeals go undetermined, and no decision is made on most requests to suspend the decision to grant the right. This effectively nullifies the right to an appeal in its entirety, while prospecting or mining — and the accompanying environmental damage — continues.

Mining lawyers in private practice have told CER attorneys that, for this reason, mining companies rarely appeal rights if they are not satisfied with conditions, instead choosing to call on the Minister to use section 103 of the MPRDA that allows for the amendment of those conditions after the fact, without any notice to or consultation with I&APs (the legality of this section of the MPRDA is disputed by the CER and many other NGOs).

Importantly, section 96 also used to be the provision applicable to appeals against approvals of EMPRs (in addition to the granting of rights). However, the application of NEMA to prospecting and mining now means that, when an appeal is lodged under NEMA’s section 43 against an environmental authorisation for prospecting or mining, that authorisation is automatically suspended pending the appeal108.
The following is a list of undetermined appeals we have encountered in Mpumalanga:

<table>
<thead>
<tr>
<th>Name of mining company</th>
<th>Name of colliery</th>
<th>Mining Right (MR) or Prospecting Right (PR)</th>
<th>Name of appellant</th>
<th>Date of grant of right</th>
<th>Date of submission of internal appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eyesizwe Coal (Pty) Ltd</td>
<td>PR Escarpment Environmental Protection Group</td>
<td>30 October 2006</td>
<td>03 May 2009</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Optimum Coal Mine (Pty) Ltd (wholly owned subsidiary of Glencore Operations South Africa Ltd; formerly, BHP Billiton Energy Coal South Africa Ltd)</td>
<td>Optimum Colliery</td>
<td>MR</td>
<td>Jacobus Oosthuysen and the Jaco Oosthuysen Trust</td>
<td>19 May 2008</td>
<td>September 2010</td>
</tr>
<tr>
<td>Khulile Mines (Pty) Ltd</td>
<td>PR</td>
<td>Mpumalanga Lake District Protection Group and affected landowners</td>
<td>17 November 2008</td>
<td>21 June 2009</td>
<td></td>
</tr>
<tr>
<td>Xstrata Coal (Pty) Ltd</td>
<td>Verkeerdepan</td>
<td>MR</td>
<td>Mpumalanga Lakes District Protection Group</td>
<td>Sometime during 2010</td>
<td>10 April 2011</td>
</tr>
<tr>
<td>Mashala Resources (Pty) Ltd</td>
<td>Ferreira Mine</td>
<td>MR</td>
<td>Dolla van Rensburg Trust, van Rensburg Family, Kleinbegin Boerdery, Lawyers for Human Rights</td>
<td>19 May 2010</td>
<td>14 September 2010</td>
</tr>
<tr>
<td>Umsimbithi (Shanduka subsidiary – Umcebo Mining)</td>
<td>Wonderfontein</td>
<td>MR</td>
<td>EEPOG/WCA</td>
<td>09 February 2012</td>
<td>11 June 2012</td>
</tr>
<tr>
<td>William Patrick Bower (Pty) Ltd</td>
<td>WPB Colliery</td>
<td>MR</td>
<td>Escarpment Environmental Protection Group, John Mansfield (neighbouring landowner), Dullstroom Trout Farm and the Federation of South African Flyfishers</td>
<td>10 December 2012</td>
<td>25 March 2013</td>
</tr>
<tr>
<td>William Patrick Bower (Pty) Ltd</td>
<td>WPB Colliery</td>
<td>MR</td>
<td>HHD Plase (Pty) Ltd (owner of neighbouring property)</td>
<td>10 December 2012</td>
<td>26 March 2013</td>
</tr>
<tr>
<td>Cousins Coal Co (Pty) Ltd</td>
<td>Fortam Colliery</td>
<td>PR</td>
<td>Samson Sibande</td>
<td>17 July 2013</td>
<td>20 September 2013</td>
</tr>
<tr>
<td>Northern Coal</td>
<td>Weltevreden</td>
<td>MR</td>
<td>Highlands Organics</td>
<td>04 December 2013</td>
<td>06 March 2014</td>
</tr>
</tbody>
</table>
2.3.2 Appeals against WULs are not being decided in accordance with the NWA

Section 148 of the NWA provides for appeals to be decided by the Water Tribunal. The Water Tribunal, established by section 146(1) of the NWA, consists of “a chairperson, a deputy chairperson and as many additional members as the Minister considers necessary”, appointed by the Minister of Water Affairs, on the recommendation of the Judicial Service Commission. The existence of this tribunal is an unusual feature in environmental governance in South Africa, since all other appeals are essentially “political” appeals to the executive.

A number of issues have plagued the existence and operation of the Water Tribunal in the recent past. These have paralysed the adjudication of appeals by the Tribunal. Instead of facilitating and supporting its operation, the DWS for several years stalled its functioning, and has indicated its intention to dismantle the Tribunal. This has had tragic consequences for water resources in Mpumalanga.

The first of these issues is the way in which the Water Tribunal has interpreted its mandate.

Appeals can be lodged against a responsible authority’s decision on a licence application by the applicant or by any other person who has timeously lodged a written objection against the application.

Unlike MPRDA appeals, appeals against the granting of a WUL do suspend the decision automatically, pending the outcome of the appeal, unless the Minister directs otherwise.

Because section 148(1)(f) limits appeals against decisions to grant WULs to persons that had “timeously lodged a written objection against an application”, the Water Tribunal interpreted this to mean that appeals could only be lodged by persons who had submitted comments and objections during a public participation process initiated by the DWS.

In other words, the Water Tribunal found that when a public participation process had not been called, appeals could not be brought against the decision to grant a WUL by I&APs. It found that the appellants did not have locus standi before the Water Tribunal, even though they had timeously lodged objections to the WUL application.

The matter involved three appeals to the Water Tribunal. The review application in one of the matters was launched in 2011, and in the other two matters in 2012. The applicants applied for the three matters to be consolidated, and this application was opposed, but not argued, and overtaken by a direction that the appeals and reviews all be heard together. One of the matters was settled before the hearing of the High Court matter. Judgment was handed down on the remaining two reviews on 18 November 2013.

The review court noted that the action of requiring publication in terms of section 41 is one of an undefined range of methods available to an authority to bring the licence application to the notice of potentially affected persons. A notice through the media is by no means the only appropriate notice method, particularly where the licence application affects marginalised people with limited access to the media.

The Court held that the objectors (the appellants) had participated in the process not because notice was given to them, but because of their own vigilance, which indicated that their concerns about the licence applications might well be legitimate. That they entered the process at the level of the responsible authority through their own vigilance was hardly a rational ground for a denial of the right to participate at the next level (at the Water Tribunal).

The Court upheld the appeals and set aside the decision of the Water Tribunal in each case. The Court declared that the appellants had standing to pursue their appeal(s) before the Tribunal. However, for the reasons described below, the appeals have still not been decided by the Tribunal.

The second issue is the effective sabotage of the Tribunal by the Minister and DWS officials.

The Water Tribunal is an important institution established by the NWA, but it stopped functioning optimally many years ago. Initially, the Tribunal was intended to be — and at least at the outset was — a cost-effective and efficient remedy that allowed communities and civil society to challenge decisions without the uncertainties and often significant expense of court proceedings.

In August 2012, in a written reply to a parliamentary question, the Minister of Water and Environmental Affairs said that between 1 January and 2010 and April 2012, the Water Tribunal had convened for a total of 50 days, during which 42 appeals were finalised, while 44 were still pending.

When asked whether the Water Tribunal was required to convene a minimum number of times per year, she said there was no minimum legal imperative under the NWA that required mandatory sittings of the Tribunal and that therefore there were no specific number of days that it had to convene. She added that the Registrar was responsible for processing the appeals until they were ready to be heard and that the Registrar then schedules the matters for hearing after consultation with the Tribunal’s chairperson and members, as well as the parties.

She acknowledged that the Tribunal had been facing many challenges, namely that its existing chairperson had resigned. In the interim, it was functioning with the deputy chairperson at the helm. The NWA however prescribes that the chairperson must have a legal background, yet the deputy chairperson was a psychologist, and the Tribunal’s other members were all engineers without practical legal
The DMR has never had a dedicated and adequately staffed compliance and enforcement unit for environmental violations of mines that is sufficiently mandated, trained and experienced to compel compliance (and deter noncompliance).
experience. Furthermore, the deputy chairperson and the Tribunal members’ terms of office were coming to an end in August 2012.

The Minister then referred to the Goede Wellington case, where the court found that the Tribunal was not competent to decide appeals, because it was not legally constituted. The Minister added that as a result, in all subsequent matters before the Tribunal, appellants and respondents were challenging its legal competency, and the Tribunal was therefore facing an issue of confidence.

The Chief Director: Legal Services of the DWA was of the opinion that the Tribunal was not legally competent, a view that was confirmed by a legal opinion drafted by Advocate Paul Kennedy SC, who concluded that “in the absence of a replacement person being appointed validly by the Minister (on the recommendation of the Judicial Service Commission as required in the legislation), no other Tribunal member can lawfully be designated to preside over any specific appeal or application. If they were to do so and to purport to make a decision on such appeal or application, they would be acting without authority. In consequence any decision they make would be ultra vires and liable to be set aside on review”.

Astoundingly, the Minister then stated that as a result it was “clear to the Department that [sic] Water Tribunal was in desperate need of legal reform (our emphasis),” and the DWA had therefore investigated legislative amendments to improve the operations of the Water Tribunal. The activities of the Tribunal were therefore suspended pending the outcome of the legislative amendments.

This was contrary to the conclusions reached by the Minister’s counsel, who expressly stated that there was “an urgent requirement that the process laid down in the Act and Schedule 6 item 3 be followed to ensure the valid appointment of a new chairperson by the Minister (after following the process for nominations and recommendation by the Judicial Service Commission)”.

Instead, the Minister chose to refer to section 150 of the NWA to institute mediation and negotiation proceedings to deal with the 44 pending appeals, and said that she was in the process of appointing members of the Mediation Committee. Under the NWA, the Minister can institute mediation proceedings for disputes between any persons relating to any matter in the Act, at the request of the person involved, or on the Minister’s own initiative, by ordering that the persons concerned attempt to settle their dispute through a process of mediation and negotiation.

The Minister added that the DWA’s Draft Amendment Bill 2012 (to have been tabled to Cabinet in the 2013 legislative programme, but which has still not seen the light of day) proposed a new process for nominating and appointing Tribunal members, and that in terms of this new proposal, “the involvement of the Judicial Service Commission and the Water Research Commission is dispensed with.”

However, in December 2012, in the judgement in Exxaro v Minister of Water Affairs and the JSC by the North Gauteng High Court, in which mining company Exxaro challenged a rare directive by the DWA against it to stop what DWA argued was illegal water use in a wetland in Mpumalanga, the court confirmed that the Minister, in her decision not to reconstitute the Water Tribunal pending the promulgation of the amendments, failed to comply with her duties under the NWA. It found that by disbanding the Tribunal, the Minister was acting ultra vires. Unfortunately, the court did not order the Minister to re-establish the tribunal.

In June 2013, the Minister gazetted an invitation for nominations for the positions of chairperson, deputy chairperson and additional members to fill vacancies in the Water Tribunal. On 28 February 2014 and 24 June 2014 the Minister once again called for nominations for the position of chairperson to fill that vacant position. The Minister however failed to make any appointments.

Then, in the 2013 National Water Policy Review, it was stated that “an appropriate, administratively simpler mechanism is required where disputes are resolved through internal dispute resolution such as round-tables, negotiation and mediation. Failure to resolve an appeal through this mechanism may proceed to adjudication in a court of law.”

In 2015 the Escarpment Environmental Protection Group (EEPG) and the Wonderfontein Community Association instituted proceedings in the North Gauteng High Court for an order reviewing and setting aside the Minister’s failure to appoint members to the Water Tribunal. The applicants also sought an order directing the Minister to appoint a chairperson and deputy chairperson and other necessary members to comply with section 146 of the NWA. The applicants were then informed by DWS’s Chief Director of Legal Services, Puseletso Loselo, that six members had been appointed to the Tribunal. However, Sputnik Ratau, DWS’s spokesperson, was not aware of the development and who had been appointed.

As far as CER has been able to establish, by December 2015, the new Tribunal had only sat once since the appointment of its new members. At this stage, it is not clear how many appeals are still waiting adjudication, but what is clear is that, in these circumstances, aggrieved parties no longer see appeals to the Tribunal as a feasible remedy. Sometimes appeals are taken to court, as in the Exxaro case described above. In other cases, the appeal become academic because they are not decided.

In addition, subsequent to the National Water Amendment Act, 2014 (NWAA), and specifically the amendment of section 148 of the NWA, mining companies can lodge appeals against the granting of WULs with the Minister of Water and Sanitation, rather than the Water Tribunal. Whether intended or not, this amendment has created a situation where applicants are able to bypass the Tribunal and appeal to the Minister, while I&APs are limited to appealing the Tribunal.

One of the important features of appeals against WULs under section 148 of the NWA is that an appeal suspends the operation of that WUL. This is a powerful public interest tool to prevent damage to water resources from an unlawful decision.
to grant a WUL. Unfortunately, section 148(2)(b) also provides a discretion for the Minister to uplift suspensions. In practice, mining companies therefore petition the Minister to uplift the suspension in place, which — with the delay in processing appeals stretching into years — renders the supposedly accessible, cheap remedy of a Tribunal appeal worthless. Moreover, water use is then allowed to proceed without adjudication of the appeal, with irreparable damage to water resources.

2.3.3 Other flawed appeal mechanisms

i. Appeals against environmental authorisations granted under NEMA

Appeals may be lodged against environmental authorisations granted under NEMA. In September 2014, the NEMA amendments came into effect, changing the internal appeal process. Now, an appellant only has 20 days from the date on which the notification of a relevant decision was sent to that appellant, to lodge an appeal. Previously an appellant had 30 days from the date the notification of decision was received. Given the complexity of environmental decision-making and the volume of documentation involved, 20 days is an unreasonably short timeframe within which I&APs are expected to lodge an appeal.

The effects of this unreasonable timeframe will be aggravated by a further significant change: an appellant no longer has the opportunity to submit an answering statement following the right-holder’s response. Given that appellants frequently have insufficient information at the time of lodging their appeals, for reasons discussed elsewhere in this report, it is unreasonable that they can no longer reply to the right-holders’ response.

On the positive side, the new appeal regulations provide for the constitution of an appeal panel when the “appeal administrator reasonably believes that expert evidence must be sought or that an appeal panel must be appointed.” Appeal panels must consist of independent experts, who must advise an appeal administrator on matters in appeal documents requiring their expertise. Appeal panels may render the decision-making process relating to appeals more impartial and more scientifically robust.

There are cases where internal appeals were not decided appropriately, and which put appellants at a significant disadvantage.

CASE STUDY 30: Federation for a Sustainable Environment (FSE)/Mafube Coal Mining (Pty) Ltd

FSE submitted an appeal against the decision of the Mpumalanga Department of Economic Development, Environment and Tourism (MDEDET) to grant environmental authorisation to Mafube Coal Mining to excavate a pan between Middelburg and Belfast in Mpumalanga. FSE also asked for the suspension of the environmental authorisation, pending the outcome of the appeal.

There were two significant pans on the property and one of the conditions of the environmental authorisation issued to Mafube was an offset measure, under which the company had to identify and adopt a pan in the same catchment area, similar to the other pan on the proposed site — which the company had already excavated without environmental authorisation — as a biodiversity offset measure.

In November 2013, FSE lodged an appeal against the decision of MDEDET to grant environmental authorisation, and also challenged the use of an offset as an appropriate remedy for the illegal destruction of the pan. MDEDET did not respond to the request for suspension of the environmental authorisation pending the outcome of the appeal. The applicant and the appellant both filed responding and answering statements in the appeal, but MDEDET has to date (nearly two and a half years later) not decided the appeal, notwithstanding repeated requests from FSE that it do so. Without a suspension of the environmental authorisation, it is probable that the pan, which is not visible from the nearest public road, has been mined in the interim.

ii. Dysfunctional processes and poor representation of relevant authorities at RMDEC

Under the MPRDA, the DMR Regional Manager must refer any objections to prospecting or mining rights to a committee established under the MPRDA known as the Regional Mining Development and Environmental Committee (RMDEC). These objections cover “the entire spectrum of environmental, economic and social aspects of an application.” The purpose of RMDEC is that it “serves as an affordable avenue other than a court of law, where mediation around competing interests pertaining to land use can be resolved.”

RMDEC consists of “not more than 14 members who have been drawn from the relevant Government Departments or organs of State from National, Provincial and Local level.” This composition must “ensure competency and expertise in minerals and mining development, petroleum exploration and production, social and labour issues pertaining to the Act and mining environmental management.”
The primary purpose of RMDEC is to provide the Minister with advice on, and recommendations for, mining and prospecting rights applications that are being opposed. Authorities who have mandates and expertise relevant to mining and the environment meet at RMDEC to consult and consider objections to rights applications. Before the commencement of the OES, when RMDEC had convened and made recommendations on an EMPR, the Minister could not approve that EMPR without considering these recommendations.

While its functions are vital in the MPRDA regime, RMDEC has unfortunately been plagued by difficulties such as poor attendance and lack of consistent representation. Certain authorities with valuable insight, and who should be able to put forward their recommendations, are often not offered a seat and can therefore not make representations.

Moreover, RMDEC does not convene unless there has been an objection to a rights application.

However, it appears RMDEC previously in addition considered EMPRs and EMPS because of section 39(4)(b)(i) (although it is unclear how this process was initiated). The MPRDA regulations do not provide any clarity, since they do not deal with the convening of RMDEC. Section 39 has subsequently been deleted, and it seems that RMDEC’s convening will not be triggered for assessing EMPRs, EMPs or EAs, because neither NEMA nor the 2014 EIA regulations mention RMDEC. It remains to be seen how, if at all, RMDEC will consider objections to rights applications on the basis that the mining will result in unacceptable pollution, ecological degradation or damage to the environment. The MPRDA Amendment Bill 2014 referred back to the National Assembly also does not address this.

However, when RMDEC does not convene, there is no scope, for example, for environment, water and conservation authorities to give input and, in many cases, these authorities will not even know that there is an application before the DMR.

I&APs are also at a disadvantage, because RMDEC meetings are closed or partially closed, and the decisions and content of RMDEC recommendations are notoriously difficult to gain access to. There is furthermore no legal imperative under the MPRDA for RMDEC to keep minutes of its meetings or to record proceedings, and outcomes are not communicated to applicants or objectors. RMDEC’s procedures are also not prescribed, which means that regional managers frequently develop these on an ad hoc basis.

CASE STUDY 31: Mpumalanga Tourism and Parks Agency (MTPA)

The MTPA is mandated to promote and manage tourism, nature conservation, and the sustainable use of natural resources in Mpumalanga province. The agency’s representation on RMDEC is therefore critical for biodiversity issues to be adequately considered before mining authorisations are granted.

In January 2016, in response to a query from the CER, the MTPA confirmed that “the MTPA was represented at the RMDEC meetings by appointed or alternate members up until late 2013. Towards the end of 2013, the alternate MTPA member was informed by the Regional Manager for the DMR (also the chairperson of RMDEC Mpumalanga), that MTPA members could not continue as a members [sic].”

The reasons given for this included Regulation 39(4) of the Mineral and Petroleum Resources Development Regulations, which states that “The Board may appoint a representative from any parastatal organisation or a consultant from time to time: provided that such representatives shall have no right to vote at any meeting of the RMDEC.”

The DMR also said the MTPA “did not participate in the RMDEC processes as a regulating authority, but as a commenting authority, and therefore the MTPA could not be represented in RMDEC”.

The decision was immediately implemented, and the MTPA subsequently only attended RMDEC meetings on the same basis as other I&APs.

However, regulation 39(3) states that the 14 RMDEC members appointed by the Board shall include “representatives of relevant Government departments within the national, provincial or local sphere of government or relevant organs of state within each sphere.”

Created under section 2 of the Mpumalanga Tourism and Parks Agency Act, the MTPA is an “organ of state and a public body as defined in section 1 of PAIA.” CER therefore reads regulation 39(3)(c) as providing for MTPA’s membership on RMDEC as an organ of state and therefore possibly mandatory. There is furthermore no other organ of state that is more qualified to provide input into the environmental impacts of mining in Mpumalanga.

The DMR’s regional manager’s decision to exclude MTPA from RMDEC is however said to have been accepted by the MTPA. Acting CEO VA Sibiya stated that the agency is “satisfied that the biodiversity issues at RMDEC Mpumalanga meetings is sufficiently covered by the MTPA representatives acting on the same basis as Interested and Affected Parties.”
Regional Mining Development & Environment Committee (RMDEC) meetings are closed or partially closed, and the decisions and content of RMDEC recommendations are notoriously difficult to gain access to. There is no legal imperative for RMDEC to keep minutes of its meetings or to record proceedings, and outcomes are not routinely communicated to applicants or objectors. RMDEC’s procedures are also not prescribed, which means that DMR regional managers frequently develop these on an ad hoc basis.
CASE STUDY 32: Escarpment Environment Protection Group (EEPOG) v William Patrick Bower (Pty) Ltd

In its appeal against the granting of a mining right to William Patrick Bower (Pty) Ltd, EEPOG stated that it was invited to a RMDEC meeting on 7 February 2012. EEPOG alleges that the regional manager, who was also the chairperson of RMDEC, Aubrey Tshiuhandekano, showed bias “in the extreme against the objectors”.

The appeal documents illustrated this claim as follows: “He cut us short, told us he does not understand about frogs, birds and things, the government could not sterilise any mineral resource, and told the other members to be aware of persons just wanting to maintain their privileged positions, that jobs needed to be created by mining, but [he] would not entertain any discussion on job losses outside the specific area due to the mine. He further stated that he was only interested in the specific mining area and not the impact outside that area”.

The appellants also requested the meeting’s minutes and audio recordings numerous times, but never received them.

Tshiuhandekano visited the area after the first meeting, but again showed bias according to the appellants: “The other members of RMDEC were not present. The decision taken by RMDEC was after the site visit and the information from the site visit was clearly relevant. We were not afforded an opportunity to state our case at that meeting to refute, contradict or dispute the submissions of the Regional Manager”. At the time of this report, the appeal remains undecided, three years after its submission, despite numerous requests to the DMR. It appears that a possible reason for the failure to decide the appeal is that Tshiuhandekano has failed to provide reasons for the decision to grant the mining right, which he is required to do under the MPRDA.

CASE STUDY 33: Xstrata: Verkeerdepan Extension

The Mpumalanga Lakes District Protection Group (MLDPG) objected to a mining right being granted to Xstrata South Africa on farmlands located near Carolina. The proposed site was largely occupied by environmentally sensitive wetlands. However, the MLDPG was not notified of the RMDEC meeting where its objections, and any response to those objections, should have been considered.

CASE STUDY 34: Eyesizwe Coal (Paardeplaats)

Eyesizwe Coal applied for a prospecting right for coal near Belfast in Mpumalanga. The company however did not submit the details of its public participation process to RMDEC (which RMDEC had specifically requested). Both EEPOG and the MTPA objected to the prospecting rights application and these were tabled at four RMDEC meetings. In this case, RMDEC recommended the company’s EMPR should not be approved. However, the Minister did not take into account RMDEC’s recommendations and nevertheless granted the prospecting right.

CASE STUDY 35: Samson Sibande/Cousins Coal

Samson Sibande objected to a prospecting right application in respect of his farm in Belfast. He objected to not having been provided with all the information necessary to make meaningful comments on the application. He had also not been properly consulted by the applicant. The prospecting right should not be granted as the applicant was in contravention of the MPRDA. (It had failed to rehabilitate its former mining operation on his land.)

The regional manager referred Sibande’s objection to RMDEC for consideration. Sibande was called to make oral representations regarding his objections, and he attended the meeting with his attorney from CER.

At the meeting, the chairperson refused to allow the CER attorney to make representations on behalf of Sibande. The chairperson asked Sibande to answer complex legal questions and dismissed Sibande’s objections as “irrelevant”.

Sibande was subsequently refused access to the meeting’s minutes. The DMR granted the prospecting right five months after the RMDEC meeting. Sibande was not notified of this decision by the applicant, RMDEC, or the decision-maker. Sibande was also not provided with reasons for the decision despite numerous requests for the decision-maker to do so. It was only when Sibande initiated court proceedings that he was provided with the record of decision. The record of decision did not contain the minutes of the RMDEC meeting or the various written objections made by Sibande. The grant of the prospecting right and the failure to decide Sibande’s appeal against that grant have been taken on review to the North Gauteng High Court.
2.4 Inadequate compliance monitoring and enforcement

The Constitution, NEMA, the MPRDA, the NWA, and PAJA all provide the statutory framework for responsible environmental management. Strong compliance monitoring and enforcement are vital to ensuring that the obligations of mining companies, and statutory requirements, are met. Under South African law, the DMR and DWS are mandated to ensure environmental compliance of mining operations.

To achieve this legislative imperative, adequate numbers of experienced and qualified officials are needed to administer, consider and make recommendations on environmental authorisation applications. Suitably qualified officials are furthermore required to monitor compliance, and to take predictable and appropriate administrative and criminal enforcement action against transgressors when environmental laws are violated.

Appropriate enforcement action can be achieved by issuing notices and directives to compel compliance, and by undertaking civil and criminal court proceedings. However, from the little information that is made public about the monitoring and enforcement of compliance with environmental laws in the mining sector, the capacity and performance of the DMR and DWS is woefully inadequate — and nowhere more so than in Mpumalanga.

2.4.1 Insufficient investment into compliance monitoring and enforcement capacity

The Department of Mineral Resources

Despite a recently developed narrative by the DMR that environmental compliance and enforcement is a new function that it has had to take over from environmental authorities, the reality is that the DMR has had this mandate and function for decades — at the very least since the MPRDA came into effect.

The DMR has never had a dedicated and adequately staffed compliance and enforcement unit for environmental violations of mines that is sufficiently mandated, trained and experienced to compel compliance (and deter non-compliance). Moreover, the DMR does not publish its environmental compliance monitoring and enforcement results (it has in the past actively resisted disclosing this information to protect share value of mining companies)\(^352\). The glimpses of its enforcement action that we do get shows ineffective results and the absence of any coherent strategy. While this is a complaint about the DMR nationally, it is particularly applicable to the DMR in Mpumalanga.

There are 239 authorised mines in Mpumalanga\(^353\), and an unknown number of unauthorised mines. Add to this the 788 derelict and ownerless mines in Mpumalanga\(^354\), and you have a very large set of operations that need licences.

These licences need to be monitored for compliance. They may also need to be renewed or amended (particularly EMPRs), and would require criminal or administrative enforcement action when violations are detected.

Before December 2014, when the DMR became the competent authority to enforce NEMA for mining, it employed officials who, as far as we could establish, had multiple regulatory functions — some fulfilling all of the functions listed above — licencing, monitoring and enforcement.

In 2009, the Minister of Mineral Resources told Parliament that the DMR had 78 officials “dedicated to environmental protection and monitoring”. While the details are not clear, this presumably included the processing of EMPRs, the approval of financial provision assessments, as well as compliance monitoring and compliance enforcement. In addition, there were 13 vacancies (12 of which had become vacant since June 2009)\(^355\).

Alarmingly, it was also reported that the DMR had no dedicated budget for environmental protection and monitoring\(^356\). By October 2012, the DMR told the Portfolio Committee on Mineral Resources that its enforcement and compliance structure of 114 staff members remained “entirely unfunded”\(^357\).

The number of DMR staff members responsible for assessing compliance with environmental management plans and programmes was 71 in the 2013/2014 financial year and 106 in the 2014/2015 financial year\(^358\). The number of staff members responsible for enforcement action for failure to comply with environmental management plans or programmes was 71 in the 2013/2014 financial year and 115 in the 2014/2015 financial year\(^359\).

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<th>Compliance monitoring</th>
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There was no breakdown per region for these figures, nor any details about the qualifications of these officials. We also do not know if the functions of these officials overlapped. In other words, whether the same 71 officials in 2013/2014 were also responsible for enforcement in that year\(^360\).

For the 2014 Budget, National Treasury reported that R59 million had been allocated to the DMR for implementing NEMA (a mandate that DMR argued had been “transferred” from the DEA to the DMR on 8 December 2014)\(^361\). As mentioned above, the DMR in practice would simply continue with existing responsibilities for the compliance monitoring and enforcement of environmental regulations.
applicable to mining operations — from December 2014 the difference was doing this under NEMA, instead of the MPRDA).

Although CER argued in Parliament that this amount was inadequate\(^{362}\), at least the DMR finally procured service providers to prepare and present training to 30 DMR officials in 2015. In a recent parliamentary response\(^{363}\), the Minister of Mineral Resources stated that 34 environmental mineral resource inspectors (EMRIs) had been designated under the new obligation to enforce NEMA, all of whom had completed specialised compliance and enforcement training\(^{264}\). The reply further stated that another 60 personnel would be trained in 2015/2016, and that all those who successfully completed the course would be designated as EMRIs.

Similar figures were provided in a reply published in September 2015. At the time, 35 inspectors were employed to inspect mines (including five in Mpumalanga), and 30 officials were attending training. A further 30 were to start training in October 2015\(^{365}\). As far as we can tell, at least some of these officials are not dedicated to compliance monitoring and enforcement functions. For example, a number of regional managers have also completed the training. Needless to say, regional managers have many other obligations and duties beyond monitoring environmental compliance and taking enforcement action under NEMA.

In a partial response to a PAIA request submitted by the CER in 2015, it was stated that the DMR had “successfully trained ninety-four EMRI’s during the period 2014/2015”. In addition, the DMR said the Minister had “already designated EMRI officials in the period 2014/2015” and “a further 27 [had been designated in the period 2015/2016 and placed them [sic] across all the nine provinces”\(^{366}\). However, without information about the designations, qualifications and which offices these officials are based in, it is not possible to assess the impact of the training and designations of these numbers on actual capacity to implement NEMA.

Then, in the 2016 Budget for the DMR, the National Treasury recorded that: “Already nine regional managers and an additional 60 officials have been trained on the implementation of the [NEMA EIA] regulations”\(^{367}\).

However, putting even 95 officials, nationally, through a three-week training course does not bode for a robust, effective and legally defensible compliance monitoring and enforcement programme. EMRIs have the mandate and obligation to undertake functions that require years of training for other compliance and enforcement officials, in South Africa and elsewhere. For example, an EMRI is expected to be able to compile a criminal docket for prosecution — a function that few SAPS officials are able to do after two years of training. Environmental prosecutions are complex and involve technical evidence — a situation aggravated by judicial officers with limited knowledge of environmental crimes. In contrast, the environmental management inspector training presented by DEA for prospective EMIIs is a six-month training course, and even DEA management concedes that this training is not yet adequate.

Providing only a handful of DWS compliance and enforcement officials based or working in Mpumalanga — ostensibly tasked with ensuring compliance with all WULs and stopping unauthorised water use in all industries — is a clear indication that DWS has no serious intention of forcing mines in Mpumalanga to comply with the NWA.

Assuming the DMR in Mpumalanga only had to ensure compliance at the 239 operational mines in the province, it is clearly impossible for the existing five designated EMRIs to monitor compliance — and take enforcement action where necessary — with all 239 EMPRs. Tripling that figure would mean that 15 EMRIs would monitor around 16 mines each — a conceivable target if these officials were properly trained, resourced, and dedicated full-time to compliance monitoring and enforcement. Add to this all unauthorised mining activity and these officials would be severely overburdened.

At the national EMI Lekgotla in November 2015, responding to frustration from environmental authorities for the lack of response from the DMR’s EMRIs to their new mandate, a DMR official told gathered EMIs that the DMR has only had this function for a short time (an incorrect assertion, for the reasons set out above), and pleaded for patience and support. For Mpumalanga, however, if the DMR does not radically increase its capacity and performance, it may be too late.

The Department of Water and Sanitation

The DWS has similarly battled significant institutional capacity issues, particularly in compliance monitoring and enforcement. In a parliamentary question from March 2015, the Minister was asked what steps had been taken to ensure the effective functioning of her department’s compliance monitoring and enforcement activities, as well as the substantial vacancies in her CME department\(^{368}\).

The Minister stated that there were 29 technical officials employed “at Compliance Monitoring”, 23 staff members “at Enforcement” and 66 technical officials performing both compliance monitoring and enforcement in DWS regional offices. A further 17 officials had received EMI training from the DEA. It was also reported that the DWS was in the process of amending the NWA to allow for the designation of water management inspectors\(^{369}\).

An April 2015 reply gave slightly different employment figures: 25 filled enforcement posts, 50 vacant enforcement posts, 23 filled dual function posts at regional level (performing both compliance and enforcement functions) and 12 vacant dual function posts at regional level\(^{370}\).
Later that year, the Minister of Water and Sanitation was asked how many Blue Scorpion posts were in her CME department, as well as how many were filled, and what the qualifications were of the officials in those posts. According to the Minister, the department had a total of 177 positions for compliance monitoring and enforcement:

- 42 within the national Chief Directorate: Compliance Monitoring
- 42 within the national Chief Directorate: Enforcement
- 22 dedicated to compliance monitoring in the provincial operations
- 14 dedicated to enforcement in the provincial operations
- 57 performing dual functions (compliance and enforcement) in the provincial operations

Only half of these positions were filled (89 out of 177 posts). In Mpumalanga, there were a total of two filled posts performing both compliance monitoring and enforcement functions.

In 2010, the Minister acknowledged the need for sufficient numbers of adequately trained officials. In a parliamentary reply, she stated "enforcement officers cannot do without the necessary detail, i.e., technical investigations to ascertain the extent of any transgression. This is also essential to ensure that due process is followed to avoid technicalities that could potentially compromise the case." Providing only a handful of DWS compliance and enforcement officials based or working in Mpumalanga — ostensibly tasked with ensuring compliance with all WULs and stopping unauthorised water use in all industries — is a clear indication that DWS has no serious intention of forcing mines in Mpumalanga to comply with the NWA.

### 2.4.2 Inadequate compliance inspection information

Neither the DMR nor the DWS provide adequate information on compliance inspections, nor do they publish any reports detailing the enforcement of compliance with their respective statutes.

In a 2014 budgetary review and recommendation report of the portfolio committee of mineral resources, it was stated that it had been suggested that the DMR and DWA should "demonstrate their commitment to compliance monitoring and enforcement...by publishing their own NECER." Published annually by the DEA, NECER (the National Environmental Compliance and Enforcement Report) provides comprehensive information about compliance monitoring and enforcement activities undertaken by the DEA, all conservation agencies and all provincial environment authorities.

In an April 2015 parliamentary reply, the Minister of Water and Sanitation stated that the DWS would publish a report on compliance and enforcement in October 2015. CER has written to the Minister and the DWS to ask when such a report will be published, but as of March 2016, no such report has yet been published.

In a July 2015 parliamentary reply, the Minister of Mineral Resources stated that the mining sector report on compliance and enforcement would be included in the DEA’s annual NECER. That report was not included in the 2014/15 NECER published in November 2015. CER has written to the Minister and the DMR to ask whether their statistics would be included in the NECER for 2015/16. In April 2016 the Acting Director General responded that the DMR has been "working very hard to make sure that they also have their own independent recording and reporting procedure to ensure compliance and enforcement of the law." This, he said, "is work in progress."

It is apparent from the information we have collected below, that both the DMR and DWS each claim a large number of compliance inspections undertaken in various financial years. Much is not made public, including:

- How many inspections overlap with those undertaken by other departments?
- How many inspections were undertaken in Mpumalanga?
- How long did each inspection take?
- How many DMR officials attended each inspection, and what qualifications did they have?
- How many inspection reports were finalised, and how many violations detected?

#### The Department of Mineral Resources

In the absence of its own environmental compliance and enforcement report, or feeding information into the NECER, information about compliance monitoring and enforcement by DMR is hard to come by. The DMR’s annual reports do not provide any summary of enforcement action carried out during the reporting period. Instead, they provide the number of inspections carried out.

In the 2012/2013 report, the numbers of inspections were as follows:

- 1,751 environmental management plan/programme inspections
- 159 legal compliance inspections
- 504 mining work programme/prospecting work programme inspections
- 285 SLP inspections were conducted

In the 2013/2014 report, it was stated that:

- 1,868 environmental management plans/programme inspections were conducted
- 276 joint compliance inspections (MLA and SLP) were conducted
- 546 mining work programmes/prospecting work programmes inspections (ME) were conducted
- 285 SLP inspections were conducted
“Due to the sensitiveness relating to information and the potential impact it could have on e.g. share prices of listed companies, the Department cannot publicly divulge the names of and specific details in respect of companies involved.”

— Minister of Mineral Resources, 2010
In the 2014/2015 report it is stated that:

- 1 856 environmental authorisation inspections were conducted
- 253 legal compliance inspections were conducted
- 520 mining work programmes/prospecting work programmes inspections were carried out
- 268 SLP inspections were conducted

In a recent parliamentary reply, the following information was given regarding compliance monitoring against environmental management plans or programmes and enforcement in Mpumalanga:

- 290 inspections were carried out in 2013/2014, and 284 in 2014/2015
- 19 “orders” were issued in 2013/2014, and 64 in 2014/2015

No details or supporting evidence of these inspections or “orders” is provided, making it difficult to interrogate the accuracy of these figures, or to ascertain the number of trained and designated officials performing these inspections. According to this data, assuming that there were approximately 239 operational mines, as there are in 2016, it would mean that in 2013/2014 and 2014/2015, just about all authorised mines in Mpumalanga were inspected by DMR officials. That is nearly one mine a day for every day of the year (including weekends and public holidays).

Mining operations are often immense, with vast numbers of licence conditions that need to be checked. Inspecting these operations, writing up inspection reports, and collecting evidence for prosecution, is time-consuming. There is furthermore no information on the methodology used for conducting compliance inspections. For example, are mining companies given advance warning of these inspections? Does the DMR use a list of all licence conditions against which to inspect? And are the findings written up in comprehensive reports?

The DMR has a history of resisting disclosure of any details regarding violations or enforcement action. In 2009, the Minister of Mineral Resources stated there were 215 cases of mines found to be in transgression of their EMPRs in the 2008/2009 financial year. She added that the transgressions covered a wide spectrum, ranging from minor to more significant issues, but merely said her department was “in accordance with the provisions of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002)”.

Similarly, and without providing further details, in July 2010 the Minister said that between 1 January 2008 and 31 July 2010, action had been taken by the DMR against “numerous mines in various provinces of South Africa for a wide variety of transgressions of the MPRDA relating to environmental matters.”

She however added that “due to the sensitiveness relating to information and the potential impact it could have on e.g. share prices of listed companies, the Department cannot publicly divulge the names of and specific details in respect of companies involved. Details relating to each action and subsequent responses by the mining industry involve different lengthy reports and other documents.”

It is not clear where these reports are, but failing to release information that is unquestionably in the public interest to protect companies’ share prices demonstrates the special treatment reserved for the mining industry in South Africa, and illustrates why it is easy for mining companies to get away with environmental violations.

In the 2016 Estimates of National Expenditure published by National Treasury, it is recorded that the DMR “aims to conduct 3 825 environmental management inspections over the medium term, at an estimated cost of R9.7 million in the Mineral Regulation and Administration sub-programme of the Mineral Regulation programme.” The phrase “medium term” makes it unclear what the DMR’s predicted timeframe is for carrying out these inspections, but it is certain that conducting 3825 comprehensive compliance inspections across the country would be a mammoth task, requiring a fleet of EMRIs that the DMR does not have.

**The Department of Water and Sanitation**

As with the DMR, there is very little public information on the compliance monitoring and enforcement action carried out by the DWS.

In 2015, in a written reply to a parliamentary question, the Minister said that 201 inspections were scheduled and conducted nationally across all sectors during the 2014/2015 financial year to assess compliance with the NWA. In Mpumalanga there were said to have been 73 compliance inspections, of which 59 were for the mining sector.

In response to a PAIA request submitted by the CER in June 2015, the DWS indicated that between 1 April 2013 and 31 March 2015, 55 Mpumalanga mines were inspected by the DWS for compliance with the NWA. All these inspections appear to have taken place in 2014/2015. Only two officials ostensibly conducted compliance inspections at these 55 mining operations (by 2016 there were 239 authorised mines in Mpumalanga). Monitoring compliance against WULs for 55 mining sites also requires checking and verifying results at hundreds of monitoring points. As with the DMR, the only conclusion to be drawn is that the inspections could not have been more than superficial.

### 2.4.3 Failure to stop mines without Water Use Licences (WULs) from using water

Section 2.1.2(a) of this report provides an in-depth analysis of the number of mines operating without WULs, both nationally and in Mpumalanga. In addition, many parliamentary responses deal with the number of mines operating without WULs, as well as the DWS’s related enforcement action.
The DWS has a long history of failing to stop illegal water use by mines. In 2010, at a DWA parliamentary briefing on the Blue Scorpions and the setting up of a compliance and enforcement unit, the Committee on regulations stated that “it seemed as if the DWA did not take the Committee seriously”. The same answers that were given years ago were still being given today. They could not understand why mines were permitted to begin operations without water licences. The DWA had to look at the cumulative effect of all the water-use licences that were issued as well as the illegal use of water by mines. They had to put their foot down and tell people that they were not allowed to mine in certain areas. The DWA also had to refuse to grant licences to mines that had transgressed water regulations. It did not make sense to the Committee that mines could continue to use water illegally just because they had the ability to run to the High Court. This meant that the DWA was useless at stopping mines from using water illegally.²⁸⁸

In March 2012, it was stated that three pre-directives and two directives had been issued since March 2011 to mines operating without WULs. None of these were issued in Mpumalanga.²⁸⁹

In March 2013, it was stated that one directive (in the Northern Cape) and no pre-directives had been issued since December 2012 to mines operating without WULs.²⁹⁰

Then, in 2014, it was reported that as of 25 July 2014, 103 mines were operating without valid water use licences. Of those, only 55 had even applied for a WUL. The Minister then said that, nationally:

- 81 investigations were completed
- 23 cases were in the process of being investigated
- 43 notices of intention to issue a directive were issued
- 12 directives were issued
- 6 criminal cases were opened

Of concern is that the Minister added that the actual information could not be furnished because it would “prejudice the outcome of the administrative action and criminal prosecution by the department, which is sub judice according to the National Prosecution Authority”. In a reply received in November 2014, the Minister again invoked this rule by stating that the DWS could not publish the names of mines operating without WULs, as such mines were under investigation and therefore publication would be prejudicial to the administration of justice.²⁹¹

This is an incorrect interpretation of the sub judice rule. South African constitutional law expert, Prof Pierre de Vos, in 2011 wrote: “One of the most irritating phenomena of our political life is the manner in which politicians wrongly invoke the so-called sub judice rule to avoid accountability. Because they do not want to answer difficult questions or deal with politically awkward issues, such politicians invoke a rule that only exists in their imagination”. He concluded that “next time you read that a politician has invoked this rule, please do not believe for one second that the rule is applicable. It will not be applicable. Assume instead that the politician is ducking and diving because he or she is scared; or is trying to avoid being caught out in a lie; or is looking for an excuse to justify a constitutional breach of a duty to show respect for other constitutional institutions like the HRC or the Public Protector”.²⁹²

Given the considerable number of mines detected by the DWS to be operating without WULs, the number of pre-directives and directives issued and the number of criminal cases opened are disturbingly low. They reveal sparse instances of enforcement for this criminal offence.

If the law is not enforced, our regulatory regime is undermined. In addition, there are clearly conflicts between the various competent authorities’ mandates: when the Minister of Mineral Resources was asked why some mines were permitted to begin operating without valid water use licences (and whether the DMR would consider suspending the commencement of mining for mines waiting for their licences to be approved by the DWA), she stated that WULs “are issued in accordance with legislation administered by the Department of Water Affairs and the latter Department is the competent authority to comment in this regard”.

As indicated elsewhere in this report, the DWS does not have the power to suspend mining licences pending compliance with the NWA, whereas non-compliance with the NWA constitutes non-compliance with the MPRDA, and the DMR does have the power to suspend mining licences for such non-compliance.²⁹³ The Minister of Mineral Affairs’s answer makes clear that compliance with water laws is of no interest to the DMR.

2.4.4 Inadequate reactive response to complaints of violations of licences or illegal activity

The DMR and the DWS do not undertake adequate reactive inspections in response to complaints of violations of licences, or illegal activity.

The DMR either ignores complaints of violations, refuses to get involved in any enforcement action despite reports of non-compliance, or even actively resists enforcement action against mining companies in violation.²⁹⁴
The DWS is similarly unreactive. In 2015, the Minister of Water and Sanitation reported on the number of cases being investigated nationwide by the Blue Scorpions in various sectors at the time. She stated that her Department had investigated 103 cases in the first and second quarter of that financial year. Of these, 37 were in the mining sector. However, it appears that none of these investigations pertained to mines in Mpumalanga.

The following cases illustrate both departments’ failure to respond to violations:

CASE STUDY 36: Coal of Africa Ltd (CoAL) – Mooiplaats Colliery

A parliamentary reply from September 2010 clearly illustrates the DWS’s failure to adequately respond to complaints of violations and illegal activity. The question related to Coal of Africa’s Mooiplaats Colliery located outside of Ermelo in Mpumalanga. The company was allegedly operating without: a WUL; authorisations under NEMA for almost all activities; an appropriate closure plan; and an appropriate EIA for closure.

The Minister of Water and Environmental Affairs was asked whether the Green Scorpions or Blue Scorpions had taken any action against the company. She replied that neither the Green Scorpions, nor the Blue Scorpions had taken any action. In addition, no compliance notices or directives had been issued to the mine.

She however added that the Mpumalanga branch of the Green Scorpions had requested Coal of Africa to submit, for verification and possible prosecution, all its environmental mining plans, EIAs, NEMA authorisations and WULAs for their mining operations. She also said “the WULA which had been submitted to my Department lacked important technical information and has been returned to the applicant setting out the requirements and additional information required”.

When asked whether the mine was expected to conduct any type of remediation based on the alleged transgressions, she replied that the discharge had to be discontinued and be accounted for in the WULA. Any other non-compliance would be assessed based according to the information submitted and remediation measures would follow if required and that “unauthorised activities under NEMA may be dealt with under section 24G of NEMA”.

However, according to the Minister of Water and Sanitation in a follow up parliamentary reply dated August 2012, a WULA had been submitted for Mooiplaats Colliery (incorrectly listed as being located in Gauteng), but this application was still “in process” at the time. This means operations were allowed to continue without a valid WUL for nearly a full two years. It seems that Coal of Africa faced no sanctions at all for its multiple transgressions, the least of which should have been suspension of its mining licence.
CASE STUDY 37: Escarpment Environment Protection Group (EEPOG)/Xstrata Chrome (Pty) Ltd (Onverdacht Colliery)

In 2000 or 2001, Xstrata Chrome obtained a mining right under the Minerals Act, 1991 in respect of land the company owned within the jurisdiction of the Highlands Local Municipality in Mpumalanga.

Soon after Xstrata started its activities in 2006, EEPOG addressed a letter to the DME, alerting it to Xstrata having commenced excavations on the land in question, without having conducted any public participation processes in its application for a mining right.

At the time, the neighbouring landowners were unaware that a mining right had been applied for and granted, and were not notified by the company that it was about to commence mining. EEPOG requested the DME to investigate the matter and conduct a site inspection. The DME did not respond to EEPOG’s letter.

Over the course of the next two years, EEPOG addressed more letters to the DME, reiterating its request for the DME to investigate the matter and conduct a site inspection. New allegations were made in the letters written during this period, namely that Xstrata was using water without a water use licence, and conducting mining in contravention of its EMPR. EEPOG in addition alleged that DWAF not only specifically requested more consultation take place with I&APs, but also ordered the mine to stop its workings.

Despite EEPOG’s letters and clear evidence of non-compliance with the MPRDA, the DME did not reply and, as far as EEPOG is aware, no site inspections were conducted in response to its letters.

CASE STUDY 38: Federation for a Sustainable Environment (FSE)/Umsimbithi Mining (Pty) Ltd (Wonderfontein Colliery)

In 2013, the FSE addressed letters to the DMR and the DWA, alleging that Umsimbithi, a coal mining company operating on a farm in Mpumalanga, was conducting its mining activities in contravention of the MPRDA, NEMA, the NWA, and the Town Planning and Townships Ordinance (TPTO).

In the letter to the DWA, FSE alleged that Umsimbithi was using water for mining purposes even though its WUL had been suspended. Under the NWA, a WUL is suspended when an appeal has been lodged against a decision to grant that WUL pending the outcome of such appeal. FSE had lodged an appeal against the DWA’s decision to grant the WUL in 2013. This appeal has to date not been decided.

The FSE also alerted the DWA about the company using water in contravention of the WUL under appeal. FSE in particular alleged that Umsimbithi was conducting mining operations within 500 metres of a wetland, an activity that was explicitly prohibited under the WUL. The DWA failed to respond to FSE’s letter and, to date, it has not conducted a site inspection of the property or taken any other action in response to the allegations.

In its letter to the DMR, FSE alleged that Umsimbithi was not mining in accordance with its EMPR, and was therefore contravening the MPRDA. In addition, Umsimbithi was using the land for mining, whereas it was zoned solely for agriculture in the eMakhazeni Municipality’s Land Use Scheme. The use of land in contravention of a land use scheme is prohibited under the TPTO. Furthermore, the FSE alerted the DMR to Umsimbithi having commenced NEMA listed activities without an environmental authorisation. The DMR did not respond to FSE’s letter, nor to its follow-up letters and has, to date, as far as the FSE is aware, not conducted a site inspection or taken any other action in response to these allegations.

CASE STUDY 39: Federation for a Sustainable Environment (FSE)/Vuna Mining Enterprise (Pty) Ltd (“Vuna”)

FSE was concerned about the lack of financial provision for water treatment costs for Vuna’s opencast coal mine. As an I&AP, FSE wrote to the DWS requesting a copy of the WUL to ascertain Vuna’s obligations under its licence. It particularly wanted to know whether Vuna had been required to put up financial provision for water treatment costs under its WUL.

Financial provision was indeed a condition of the WUL. FSE therefore sought to establish whether Vuna had complied with this, as well as other conditions around monitoring and inspections. It did so by submitting a PAIA request to the DWS.

The requested records pertained to compliance monitoring and inspections. The DWS’s response was that none of these records existed. This indicates that the DWS had not conducted any compliance monitoring or enforcement for the duration of the project.

Following this unsatisfactory response, FSE wrote painstakingly to the DWS and Vuna. It outlined concerns about the predicted water pollution plume for this operation, the absence of any financial provisioning for water treatment, and the failure to conduct any compliance monitoring or enforcement. None of its letters received a response.

[Readers are referred to case study 1, section 2.1.2(c)]
2.4.5 No robust and predictable administrative enforcement

Neither the DMR, nor the DWS issue enough statutory notices directing mining companies to undertake legally required activities, or to stop unlawful activities. These notices are known as “directives” or “orders”. When they are issued, they are often of poor quality and do not withstand a court challenge.

In July 2010, in a written reply to a parliamentary question, the Minister of Water and Environmental Affairs confirmed that her enforcement officers issued directives against mines operating without valid WULs under the NWA, and provided a list of directives issued since July 2009. In Mpumalanga, there were 13 mines operating without water use licences at the time:

- 12 were issued with pre-directives (notices of intention to issue directives, as required by fair administrative action)
- 5 with directives
- none had criminal charges brought against them (operating without a WUL in circumstances where one is required is a criminal offence).

When asked why directives were not automatically issued when the DWA became aware of non-compliance, she replied that it was due to “the variance in technical nature, [the] different processes involved as well as the complexity of each case”.

However, it appears that there is a measure of caution, perhaps even fear, about enforcement action within the DWS, as she added that “it can happen that High Court Orders and civil claims for compensation be lodged against DWA for irresponsible directives and criminal actions”. Unfortunately, that caution or fear simply translates into paralysis, and a failure to compel compliance with the law.

In the 2014/2015 financial year, a total of 244 pre-directives and 55 directives were issued by the DWS. Of these, 30 pre-directives and 18 directives were issued in the mining sector. In Mpumalanga, 56 pre-directives and 6 directives were issued in total for all sectors, including mining.

As at 2015, there were 239 formally operational mines in Mpumalanga, of which 122 were coal mines. Most if not all of these would require WULs for their operations. The DWS is therefore only inspecting a fraction of mining operations in a given year, and taking even less enforcement action.

In August 2015, the DWS responded to a PAIA request submitted by the CER. It indicated that 42 directives and 138 pre-directives had been issued under the NWA to mines, industrial facilities, and water services authorities since April 2013. In Mpumalanga, a total of 30 pre-directives were issued, 22 of which were in the mining sector. In addition, merely 5 directives were issued. A single directive was issued to a mining company.

CASE STUDY 40: Kebble and others v Minister of Water Affairs and Forestry

In Kebble, the Supreme Court of Appeal (SCA) overturned a decision of the High Court that Kebble and other appellants were in contempt of court for failing to ensure compliance with an order of the High Court. The High Court had ordered the appellants to comply with directives issued to them by the Minister of Water Affairs and Forestry. The SCA held that the directives, and therefore the court order, were vague, “unintelligible and incapable of implementation” and that the appellants were therefore not in contempt of court. According to the SCA, the vagueness and unintelligibility of the directives meant that the appellants could not have known precisely what steps they were required to take to comply with them and avoid contempt of the court order requiring such compliance. The SCA held that “an order that a person is in contempt of court, which carries with it criminal sanctions, should be made only where the court order allegedly flouted is clear and capable of enforcement. Where that is not so a court cannot find that a party has deliberately not complied with the order”.

CASE STUDY 41: Escarpment Environment Protection Group (EEPOG)/Xstrata Chrome (Pty) Ltd (Onverdacht Colliery)

Soon after Xstrata Chrome obtained a mining right over land in Mpumalanga in 2000 or 2001, it started excavating. However, Xstrata had not conducted a public participation process during its application for the right, and neighbouring landowners were not aware that it had applied for or been issued with a mining right. EEPOG therefore wrote to the DME, requesting it to investigate the matter and conduct a site inspection.

For the next two years, EEPOG wrote letters to the DME, reiterating this request and including new allegations as they arose. These included Xstrata using water without a WUL and conducting mining in contravention of its EMPR. Using water without a WUL and the failure to comply with an EMPR are offences under the MPRDA. Despite clear evidence of non-compliance with the MPRDA, the DME did not respond to EEPOG’s letters. As far as EEPOG is aware, no directives ordering it to comply with the law were issued under the MPRDA to Xstrata by the DME.

[* Readers are referred to case study 2, section 2.4.4]
**CASE STUDY 42: Federation for a Sustainable Environment (FSE)/Umsimbithi Mining (Pty) Ltd (Wonderfontein Colliery)**

In 2013, the FSE addressed letters to both the DWA and the DMR, alleging that Umsimbithi coal mining company was conducting mining operations in contravention of the MPRDA, NEMA, the NWA, and the Town Planning and Townships Ordinance (TPTO).

Umsimbithi was using water for mining purposes while its WUL had been suspended. It was also using water in contravention of that WUL, because it was conducting mining operations within 500 metres of a wetland (an activity explicitly prohibited in its WUL). The DWA not only failed to respond to FSE’s letter, but it has to date, as far as the FSE is aware, failed to issue a directive ordering the company to cease using water pending the outcome of the appeal, or to comply with the conditions of its WUL.

In FSE’s letter to the DMR, it alleged that Umsimbithi was not mining in accordance with its EMPR, and was therefore in contravention of the MPRDA. It furthermore alleged that Umsimbithi was mining on land that was zoned for agriculture. The FSE also informed the DMR that Umsimbithi had commenced NEMA listed activities without environmental authorisation.

The FSE therefore called upon the DMR to issue Umsimbithi with a directive, ordering it to take remedial steps to bring it into compliance with the MPRDA, NEMA and the TPTO. The DMR, however, did not respond to FSE’s letter and has, to date, as far as the FSE is aware, not issued the company with a directive under the MPRDA.

In November 2015, the Minister of Water and Sanitation stated that 13 cases out of the 296 investigated nationally resulted in criminal charges being laid for noncompliance with the NWA. However, none of these were for mining operations in Mpumalanga.

### 2.4.6 Insufficient criminal court proceedings

Neither Department institutes enough criminal court proceedings. The DMR furthermore does not actively participate in and, in some cases, passively resists criminal prosecution, even in cases where this is clearly the appropriate course of action.

Over the past few years, there have been very few cases of criminal prosecution for mining companies violating environmental laws reported in the media, even though these violations are criminal offences. In Mpumalanga, as far as we are aware, there were only a handful. These include:

- S v Anker Coal and Mineral Holdings SA (Pty)
- S v Golfview Mining (Pty) Ltd
- S v Nkomati Athracite (Pty) Ltd
- S v Vunene Mining (Pty) Ltd
- S v Bosveld Phosphate (2015)

However, most of these cases were initiated by either the affected communities, or by civil society. To our knowledge the DMR did not attempt to assist the NPA, but rather left the DEA and DWS to deal with these matters.

It is also difficult to extract any relevant information from the DMR. For example, in a 2013 parliamentary response, the Minister was questioned about dockets that had been opened with SAPS for criminal contraventions; dockets that had been handed over to the NPA; and guilty verdicts and sentences handed down. The Minister ignored these questions in her response entirely.

In November 2015, the Minister of Water and Sanitation stated that 13 cases out of the 296 investigated nationally resulted in criminal charges being laid for noncompliance with the NWA. However, none of these were for mining operations in Mpumalanga. As in other replies, the Minister furthermore added that “the actual names of the facilities investigated cannot be furnished as it shall prejudice the outcome of the administrative action and criminal prosecution by the Department, which is sub judice according to the National Prosecution Authority”.

In a 2015 parliamentary reply, the Minister said the DWS had opened 67 cases with the SAPS for contraventions of the NWA. Of these, 58 were opened for engaging in water uses without authorisation, and one was opened for not complying with water use authorisations. The highest monetary fine following a conviction for transgressing the NWA was reported to be one million rand and it was also stated that no imprisonment terms have been obtained for such offences. A later 2015 parliamentary reply provides further detail on the 67 cases: since the inception of the NWA (in 1998), six cases have been successfully prosecuted, 56 criminal actions under the Act are currently pending, and five cases were nolle proseque (meaning the NPA declined to prosecute).
On 18 August 2015, in response to a PAIA request submitted by the CER to the DWS, the DWS provided a list of mines, industrial facilities and water services authorities for which criminal dockets had been opened with the SAPS by the DWS for failure to comply with the NWA. The earliest case number on the list is from 2007, and the latest case number is from 2015. There are 56 cases on this list. The bulk of the offences listed are for “use of water otherwise than as permitted under this Act”, or “fail to comply with a directive” [sic].

The list identifies 30 cases in Mpumalanga. The Mpumalanga accused are:

- Nkomati Anthracite
- Goldview Leliefontein Operation
- Vunene Mine
- Joan Botes
- Deon Meyer
- AP Vos
- FS & JC Boerdery
- Mr T Marshall
- Mr Langa
- Grootpan Mine
- Bosveld Phosphate
- Elandsfontein Colliery
- Idwala Colliery
- Hans Merensky
- Eastside mine
- Mr T Siboza (Nkomazi Local Municipality)
- Mr R Ntimane
- Mr FP Van Den Berg
- Foskor Mine
- Wescoal Mine
- Mr Karl Hinteregger
- Kendal Colliery
- Mr H Pretorius – Watchebietjieshok Developers
- Mr Caril Dirker
- Mr Sean Nielson
- Phalaborwa Mining Company
- Mr Terrance Mall
- Mr Verna Blom
- Exxaro: Glisa

These records do not seem to correlate with those of the SAPS. In a briefing to the Portfolio Committee on Water and Sanitation on 2 September 2015, the SAPS stated that there were 20 reported cases in Mpumalanga for contravention of the NWA. The names of the accused and statuses of the cases were reported as:

- Mr Terrance Mall (undetected on 3 July 2013)
- Wescoal Mine (undetected on 12 March 2013)
- Mr Langa (docket withdrawn on 19 September 2011)
- Mr Louis Steyn (undetected on 29 May 2012)
- Mr AP de Vos (docket withdrawn on 28 March 2014)
- Mr T Marshall (docket withdrawn on 5 April 2012)
- Grootpan Mine (docket withdrawn on 7 January 2010)
- Elandsfontein Colliery (undetected)
- Brakfontein (Idwala Colliery) (warrant of arrest issued on 13 November 2012)
- Eastside Mine (undetected on 3 November 2014)
- Mr T Siboza (Nkomazi Local Municipality) (undetected on 30 November 2009)
- Mr R Ntimane (booked out to SPP on 15 December 2011)
- Mr FP Van Den Berg (docket withdrawn on 4 January 2012)
- Mr Karl Hinteregger (docket withdrawn on 8 November 2012)
- Kendal Colliery (booked out to SPP on 12 December 2014)
- Mr H Pretorius – Watchebietjieshok Developers (docket withdrawn on 24 January 2012)
- Mr Caril Dirker (undetected)
- Mr Strydom Shakwane (docket withdrawn on 29 November 2011)
- Mr Verna Blom (docket withdrawn on 31 January 2012)
- Exxaro: Glisa (booked out to SPP on 21 November 2013)

**CASE STUDY 43: Nkomati Anthracite (Pty) Ltd (“Nkomati”)**

When Nkomati unlawfully commenced activities listed in the NEMA Listing Notices without environmental authorisation in 2010, it was served with a pre-compliance notice by the DEA. It had cleared indigenous vegetation, constructed roads, excavated a wetland that was regarded as sacred by the affected community, and discharged effluent into the Komati River.

The mine claimed it had engaged with all relevant government departments (including the DMR and DWA), and that soon after the pre-compliance notice was served on it, it placed its operation on “care and maintenance”. Despite Nkomati’s unlawful commencement of activities also constituting offences under the MPRDA and the NWA, neither the DMR, nor the DWA took any steps to initiate criminal charges against it.

The DEA initiated a criminal charge against Nkomati. This resulted in a plea and sentence agreement. According to this agreement, the court ordered Nkomati to pay a fine of R1 000 000, and a remedial measure of R4 000 000 to the DEA's Environmental Management Inspectorate.
Very few cases of criminal prosecution for mining companies violating environmental laws have been reported in the media, even though these violations are all criminal offences. In Mpumalanga, there have only been a handful of criminal convictions, each initiated and pursued by affected communities or civil society organisations.
CASE STUDY 44: Anchor Coal and Mineral Holdings (Pty) Ltd ("Anchor Coal")

When Anchor Coal applied for a prospecting right, it submitted inaccurate and incorrect information to the DMR about the receiving environment and its proposed environmental mitigation methods. The DMR nevertheless granted Anchor Coal a prospecting right.

Then, during Anchor Coal’s prospecting operations, it unlawfully drilled holes in a riverbed, a riverbank and a wetland, and failed to fill these prospecting holes as required in its EMPR. In response to a complaint by the landowner to the DMR, the DMR issued Anchor Coal with a directive directing it to rehabilitate the prospecting holes. Anchor Coal failed to comply with this directive, but the DMR did not take any further steps against the company.

The DEA initiated criminal proceedings against Anchor Coal for contraventions of NEMA and the MPRDA. The State charged Anchor Coal with: commencing an activity that was likely to result in significant environmental degradation; the failure to comply with a directive under the MPRDA; and providing the DMR with inaccurate and incorrect information.

Anchor Coal entered into a plea and sentence agreement. It was ordered by the court to pay three fines for the three offences it had committed, as well as R144 000 in damages to an affected landowner. The fines (R150 000, R20 000 and R10 000) were all wholly suspended for five years, on condition that Anchor Coal did not commit similar offences. It was also ordered to appoint an independent environmental consultant to draft a rehabilitation report, and to implement the conditions and requirements of this report.

CASE STUDY 45: Golfview Mining (Pty) Ltd (“Golfview”)

Between March 2009 and August 2010, Golfview mined through a wetland, polluted a water resource and failed to rehabilitate its mining operation as required by its EMPR. A criminal charge was laid against the company in 2009. In 2011, following an investigation by the DEA, Golfview was charged with offences under NEMA and the NWA.

In June 2012, Golfview entered into a plea and sentence agreement with the State. Under this agreement, Golfview pleaded guilty to contraventions of NEMA and the NWA. The court ordered the company to pay a fine of R1 million. The payment of this fine was suspended for five years, on condition that an independent environmental consultant be appointed to prepare a rehabilitation report, and that the rehabilitation measures contained in the report were implemented by Golfview.

Golfview was also ordered to pay R1 million to the Water Research Council (WRC), R1 million to the MDEDET’s Environmental Empowerment Services, and R1 million to the MTPA — in instalments, as a remedial measure.

At the time of writing this report, Golfview had failed to pay the independent environmental consultant for the rehabilitation report and, as a result, this report has not been completed. Accordingly, a key condition of the plea and sentence agreement has not been met by Golfview, but, as far as we are aware, no further enforcement has been taken against the company.

CASE STUDY 46: Bosveld Phosphates (Pty) Ltd (“Bosveld Phosphates”)

In December 2013, the water management facilities on the premises of Bosveld Phosphates overflowed. As a result, contaminated water was released into the Selati River. The spill incident caused significant fish die-offs in the Kruger National Park, which is situated downstream from the company’s premises. SANParks reported the spill incident to DWS. However, a second spill incident occurred in March 2014, and SANParks suffered R1.2 million in damages as a result of these two spills.

Despite the incident having been reported to the DWS, it was the DEA that initiated criminal proceedings against Bosveld Phosphates. An investigation led by the DEA resulted in the company being charged with offences under NEMA and the NWA.

Bosveld Phosphates entered into a plea and sentence agreement with the State, pleading guilty to both offences. It was sentenced to fines of R1 million for its contravention of NEMA, and R100 000 for its contravention of the NWA. Both of those fines were suspended for five years on condition that Bosveld Phosphates was not convicted of any more offences under NEMA and the NWA. It was also ordered to pay, as remedial measures, R400 000 to the DEA, R300 000 to the DWS, and R750 000 to SANParks.

However, as the custodian of South Africa’s water resources, the DWS should have taken a stronger lead in instituting criminal proceedings against Bosveld Phosphates. Instead, it appears that this responsibility was once again the burden of the DEA. In a media statement, the DEA said that “quick intervention by the authorities” was “critical”, and acknowledged that the DWS, together with SANParks, “ensured that immediate measures were implemented”. Nevertheless, the criminal prosecution of this matter was “led by the Green Scorpions”. The DWS, along with SANParks and the Limpopo Department of Economic Development Tourism, were said to have “played a key role in advising, supporting and ensuring the emergency measures were implemented” (our emphasis)413.

A week later, the DWS in a media statement confirmed that, following complaints, “the Blue and Green Scorpions from the Department of Environmental
2.5 A culture of secrecy

2.5.1 Lack of access to information

Access to information is a vital component of any functioning constitutional democracy. Transparency is required for affected communities and civil society organisations to understand and exercise their rights. It is also a prerequisite for the State, and mining companies, to be held accountable for their actions and decisions. However, a longstanding culture of secrecy in the mining sector continues to be facilitated by government. Obstructing access to information is a serious violation of not only access to information rights, but also of all other rights for which access to information is required.

Section 32 of the Constitution prescribes that everyone has the right of access to any information that is held by the State, or any information that is held by another person that is required for the exercise or protection of any rights. PAIA was enacted to give effect to this right. PAIA prescribes a formal procedure for requesting information from public and private bodies. The requester utilising PAIA must complete a prescribed form, and pay a request fee for the processing of the request. The public or private body that receives the PAIA request must give access to the record(s) unless there is a legitimate reason for refusing the request. (PAIA sets out specific grounds for refusal of access to records.)

Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and PAIA gives effect to this provision. In addition, the MPRDA states that any administrative process must not only be conducted or taken within a reasonable time, but also in accordance with PAIA and the principles of “lawfulness, reasonableness and procedural fairness”. Needless to say, a decision cannot be procedurally fair if those affected do not have access to information about what is being proposed.

These principles were confirmed by the Bengwenyama case, where the Constitutional Court found that “the consultation process and its result is an integral part of the fairness process”. Under South African mineral law, the consent of landowners and lawful occupiers is no longer required for mining operations to take place on their land. This means that, for the requirements of administrative justice to be met, consultation and access to information take on even more importance.

Despite this, affected parties in mining applications are often left in the dark, and their inputs disregarded. Because the MPRDA fails to make express provision for access to information, the DMR, mining companies, and their consultants, refuse to provide I&APs with even the most basic information, such as: the mining works programme; proposed financial provision for rehabilitation; the application for decision itself; and information relating to the financial and technical capability of a company to responsibly and sustainably conduct the proposed operation. This renders already limited consultation opportunities ineffective.

Rights violations also manifest in the woefully inadequate timeframes for the submission of comments and objections. The consultation process is often little more than a box-ticking exercise, with companies seemingly confident that the granting of their rights is inevitable. When I&APs do comment on applications (often at great expense), they have to rely on the applicant to communicate their concerns to the decision-maker. These are often simply ignored. Comments and Response reports frequently indicate “noted” by the applicant, without any attempt to address the I&AP concern. The DMR and mining companies therefore marginalise communities by failing to implement the principles of administrative justice.

Because licences and compliance data are so hard to access, violations of the law and licence conditions are frequently concealed. In what was a victory for environmental justice advocates in 2014, the Supreme Court of Appeal (in AMSA v VEJA) affirmed the role of civil society in environmental governance, and emphasised how central access to information is to enabling that role. The court found that the world was “becoming increasingly ecologically sensitive” and that citizens in democracies around the world were “growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations”. Recognising that “environmental degradation affects us all”, the court remarked that “one might rightly speak of collaborative corporate governance in relation to the environment (our emphasis)”. The judgment therefore recognised the importance of consultation and “interaction with the public”.

However, the DMR and the DWS both have a poor record of implementing PAIA. (CER has painstakingly documented this failure in a series of publications since 2012, with special reference to Mpumalanga.) Furthermore, neither department has made any effort to implement proactive, voluntary, and systematic disclosure of licences and compliance data with public access (through section 15 of PAIA or
The State’s Facilitation of the Violation of Environmental Rights

CASE STUDY 47: Trollope Mining Services – Elandskloof

Trollope Mining Services applied for a prospecting right in Belfast in Mpumalanga. From December 2006, landowners requested that the mining consultant appointed by the company provide them with access to information. These requests were however refused. The landowners then instructed their attorneys to submit a PAIA request to the DME to obtain this information. The DME only partially granted this request, but did not give any reasons why the rest of the information was not disclosed. The landowners requested that the rest of the information be released. However, the DME did not respond. While an appeal against the grant of the right was ultimately granted, the information that had originally been partially granted had still not been made available to the landowners.

CASE STUDY 48: Federation for a Sustainable Environment (FSE)/Vuna Mining Enterprises (Pty) Ltd (“Vuna”)

Despite WULs being “automatically available documents” under section 15 of PAIA and the DWS’s PAIA manual, DWS initially refused to give FSE the WUL for Coal of Africa’s Vuna colliery. After months of phone calls and letters setting out the law the DWS supplied a copy of the WUL. The significance of the amount of time lost in this delay became fully apparent to FSE much later.

Furnishing financial provision was a condition of the WUL. FSE therefore sought to establish whether Vuna had complied with that, and other conditions.

As an I&AP, the FSE was also entitled to be consulted on any transfer or closure process. (FSE had received confirmation from Vuna that it would be ceasing its operations and that another company, Xstrata, would be continuing with coal washing at their site.) However, FSE never received any notice of these processes. It therefore submitted access to information requests under PAIA to the DMR, asking for information about the future of the open pit. It submitted access to information requests under PAIA to the DWS for information about Vuna’s compliance with various conditions of its WUL, including the financial provision condition.

The DWS’s response to the PAIA request was that none of the records requested existed.

The DMR failed to respond to all four PAIA requests — for records of a closure application; records of a transfer application; the mining right; and the approved EMPR with financial provision information. The requests were therefore deemed to be refused. This necessitated the submission of an internal appeal against those deemed refusals for each request.

After four internal appeals were lodged against the DMR’s deemed refusals, the DMR confirmed by correspondence that Vuna had not submitted a closure application. It granted access to the mining right and to the EMPR, but redacted all information about the financial provisioning for rehabilitation. It was silent about records of a transfer application.

It later emerged, after a diligent media search, that the Vuna colliery had been sold at precisely the time that information about a possible transfer had been sought by FSE. There had been no public participation, despite obligations under PAIA for this to happen. Moreover, less than a year after the Minister of Mineral Resources approved the transfer of rights in the Vuna colliery, the transferee was placed in business rescue. The lack of provisioning for water treatment under the EMPR or WUL could have been addressed when the colliery was transferred. Instead, Coal of Africa was allowed to walk away from an unrehabilitated open cast pit.

[‘Readers are referred to case study 12]
Both the DMR and the DWS allow amendments of environmental licences behind closed doors, and furthermore do not require public participation on transfer of mining rights applications.
area on Sibande’s farm. In the 2011 inspection report, it was stated that Cousins Coal was issued with such a directive.

Sibande then submitted a PAIA request for access to the directive. This request was also ignored by the DMR. He once again submitted an internal appeal against the deemed refusal. The DMR responded to this appeal by advising him that it would not process the appeal as there was “… litigation on this matter.” There is no basis in law for the DMR to refuse to process an appeal on this (incorrect) ground. After much correspondence and many meetings, the DMR agreed that it would conduct a diligent search for the document in question. Thereafter, the Minister of Mineral Resources refused Sibande’s internal appeal on the basis that the directive did not exist or could not be found.

Cousins Coal then applied for a prospecting right on Sibande’s farm. Sibande found out about the application when he found two of the company directors trespassing on his property. They refused to provide Sibande with any documentation relating to their application. He therefore made a PAIA request for copies of Cousins Coal’s prospecting application and its draft EMPR. The PAIA request was ignored by Cousins Coal.

Sibande was eventually provided with a copy of the draft EMPR a year later, when RMDEC — which was considering the prospecting right application — instructed Cousins Coal to provide him with a copy of this document. Sibande finally saw the application, for the first time after three years, when he launched court proceedings against the DMR’s decision to grant Cousins Coal a prospecting right on his farm.

[*Readers are referred to case study 8]

Neither the DMR nor the DWS has made any effort to make licences and compliance data publicly and systematically available, nor to require or even encourage mining companies to disclose this information directly to the public.

2.5.2 Behind-closed-doors amendments and transfers

Both the DMR and the DWS allow behind-closed-doors amendments of WULs, mining rights and EMPRs, and furthermore do not ensure or allow public participation on transfer of rights applications. Moreover, neither department adequately assesses environmental liability at point of transfer. This means that the financial capacity of the transferee is often not adequately considered, facilitating a dire trend in South Africa of transferees going insolvent shortly after approval of the transfer of rights and environmental liabilities.

CASE STUDY 50: Federation for a Sustainable Environment (FSE)/Vuna Mining Enterprise (Pty) Ltd (“Vuna”)

While it is unclear whether the WUL held by Vuna — for which DWS failed to carry out compliance enforcement action — was transferred to the new owner of the colliery (now in business rescue), it is clear from the NWA that no public participation is prescribed for the transfer of a WUL. FSE argues that this is a violation of the right to just administrative action under PAJA.

While the MPRDA renders itself expressly subject to PAJA, and notwithstanding mining right transfers — and EMRPR amendments — being subject to ministerial consent and constituting administrative action, the DMR does not require an applicant for the transfer of a mining right, or transfer of environmental liabilities under an EMPR, to conduct a public participation process.

This case is clearly one where the violation of FSE’s right to just administrative action has engendered the violation of a host of other rights, and left a significant environmental liability with a company in business rescue, whereas the company that operated the pit, and profited from mining it (Coal of Africa), has walked away without any consequence for its breaches of the law.

[*Readers are referred to case study 8 and case study 12]

2.5.3 The lack of transparency at RMDEC in Mpumalanga

RMDEC in Mpumalanga, chaired by the DMR’s Mpumalanga regional manager, does not hold public hearings, nor does it give open access to its proceedings to I&APs who have objected to applications. Moreover, neither the minutes of its proceedings, nor its decisions, are routinely made public or even available to affected parties. The delays in accessing this information (if access is ever achieved) further threaten affected parties’ ability to exercise and realise their rights.
For the past six years, the attorneys at CER, and before that, others, including communities, environmental justice organisations, and conservation organisations working in Mpumalanga, have battled to improve the transparency, accountability and environmental compliance of mining in Mpumalanga. In section 2, we provided detailed evidence of the many ways in which the DMR and DWS — who have the mandate and responsibility to allow mining and water use only when the resulting pollution and environmental degradation would not be unacceptable — have failed in those duties.

We have chosen to focus on Mpumalanga for its enormous environmental and hydrological wealth and importance, but these failures are not limited to Mpumalanga. Our recommendations therefore apply beyond the province.

3.1 Remove responsibility for the environmental regulation of mines from the DMR, and let mining be governed by environmental authorities — as is the case for all other industries

Under the Constitution, mining is the exclusive competence of the national executive, and the DMR is responsible for the sustainable development of mineral resources. However, the DMR has always been responsible — first under the MPRDA, and now under NEMA — for regulating the environmental impacts of mining. Note, in this regard, that under the Constitution the environment is a shared competency between national and provincial government. This leaves provinces in a legally uncertain position concerning the degradation caused by mining.

But over and above the inherent conflict of the two mandates given to the DMR and the legal complexities caused by the One Environmental System, this report powerfully demonstrates how unlikely it is that the DMR will ever:

- invest in adequate regulatory capacity;
- work with environment and water authorities, with appropriate regard for their respective mandates;
- make the tough decisions required to declare certain areas off-limits to mining, and to refuse to grant rights in sensitive areas;
- support a strong compliance monitoring and enforcement programme that punishes offenders;
- be transparent about violations of environmental regulations and enforcement action taken, especially when such reports puts it at odds with the mining industry.

Environment authorities, though not perfect, at least have a clear mandate. They have far more existing capacity, and decades of experience regulating the environmental impacts of all kinds of industries (including important aspects of the mining industry until December 2014). In 2013, during the public hearings for the proposed MPRDA Amendment Bill, we argued before the Mineral Resources Portfolio Committee that environment authorities were better placed to issue and ensure compliance with environmental authorisations for mining activities. We said the DMR’s new NEMA obligations would result in a duplication of mandates and that, to implement NEMA, a significant amount of additional work would need to be undertaken to ensure effective and efficient environmental management.

The three years that have passed since then have revealed a weak response from the DMR regarding its “new” functions under NEMA.

Based on the evidence cited in this report, we repeat our contention: the DMR cannot adequately regulate and mitigate negative environmental impacts, while at the same time having to encourage and promote mineral development. Instead, the environment authorities — with their existing and appropriate mandates, incentives and experience — should be responsible for ensuring sustainable development in South Africa.

We therefore reiterate our recommendation to the Portfolio Committee in 2013 that the Minister of Environmental Affairs and the Members of provincial Executive Councils responsible for the environment should be the only authorities responsible for the issuing, compliance monitoring compliance and enforcement of environmental authorisations — as they do for all other industries. These authorities should furthermore be responsible for deciding appeals against decisions under NEMA.

3.2 Give legal protection to areas in which mining would be too harmful, giving priority to strategic water source areas

Due to the crisis in compliance monitoring and enforcement, and the continued inappropriate granting of prospecting and mining rights in sensitive areas, legal protection must imperatively be given to the most environmentally significant areas, where no prospecting or mining should ever take place. This is already a national commitment under the Outcome 10 Delivery Agreement published in 2010, and is also a feature of the Mining & Biodiversity Guideline agreed to between government and the mining industry in 2013.

Since the Minister of Mineral Resources and the DMR have granted prospecting and mining rights in parts of Mpumalanga that already have legal protection in place through declarations under NEMPAA, it is clear that only the highest level of protection will suffice. Ideally, the protection of these areas should be entrenched through multiple declarations under different legislation, including at least:

- section 24(2A) of NEMA, which provides the Minister of Environmental Affairs with the powers to prohibit or restrict the granting of environmental authorisations...
by the competent authority — in this case the DMR — for a listed or specified activity, like prospecting and mining, in a specified geographical area. These powers may be used if it is necessary to “ensure the protection of the environment, the conservation of resources or sustainable development”. Section 24(2A) is to be used in accordance with a “risk averse and cautious approach”. The Minister of Environmental Affairs may publish a no-go area under this section for such a period and on such conditions deemed necessary; and
• section 49 of the MPRDA, which provides the Minister of Mineral Resources with the powers to prohibit or restrict the granting of any reconnaissance permission, prospecting right, mining right or mining permit in respect of land identified by the Minister for such period and on such terms and conditions as the Minister may determine. The Minister may do so having regard to the national interest. Water and food security fall squarely within this ambit.

In a 2012 CER report, we identified the absence of similar powers for the Minister of Water Affairs to “declare surface and groundwater protection zones and groundwater recharge zones, with associated limitations on authorisation of water use in these zones” as a priority for law reform. Such powers would enable the Minister to provide legal protection for strategic water source areas. While the DWS has apparently been working on an amendment bill for the NWA, we have not yet seen any draft proposals in the public domain, so we do not know whether this vital recommendation has been adopted.

Importantly, apart from preserving environmentally and hydrologically significant areas, legal protection would provide government departments, mining companies and prospective investors with legal certainty. It would mean industry would not be able to apply for rights in these areas, saving it the considerable expense of doing so. Civil society and conservation authorities would also be spared the costly and time-consuming effort of opposing the granting of rights in inappropriate areas. It would also free up capacity in the DMR and the DWS.

Apart from preserving environmentally and hydrologically significant areas, legal protection would provide government departments, mining companies and prospective investors with legal certainty, and enable them to avoid incurring wasted costs on applications that should not be lodged or considered.

In preparing the Mining and Biodiversity Guideline, large industry stakeholders, including the Chamber of Mines, agreed on the need for such legal certainty, and the benefits to industry of such an approach. Furthermore, no-go areas under the MPRDA and/or NEMA arguably provide a less cumbersome and more flexible tool than the declaration of “protected areas” under NEMPAA in circumstances where the potential impacts of mining are the largest management priority or objective.

3.3 Commit to licensing decisions that are informed by science, that are responsive to the views and concerns of environment authorities and affected communities, and that take into account the compliance history of mining companies

In this report, we have demonstrated how ill-informed and poor quality licensing decisions are not only facilitating the violation of rights in Mpumalanga, but also threatening water and food security beyond the province. Assuming the DMR for the time being remains the authority for granting environmental authorisations for prospecting and mining, fixing this will require:

• prioritising investment into sufficient numbers of appropriately qualified and experienced staff working in inter-disciplinary teams, with access to expert support, in both the DMR and the DWS in Mpumalanga;
• compliance monitoring of all mining operations undertaken by companies applying for new rights to ensure that, as required by the MPRDA, rights are not granted to applicants in violation of the law;
• improved data collection and processing to ensure that the compliance history of mining companies are known to licensing authorities before rights are granted;
• upfront consultation by the DMR with environment, water and agriculture authorities upon receipt of new applications, with no applications being accepted for processing when those authorities flag major concerns (which may require amendment of sections 16 and 22 of the MPRDA). This could and should take place through the RMDEC structure, which means that those authorities must all be represented on RMDEC, and present when recommendations are made and decisions are taken;
• far more rigorous assessment of the nature and scope of public participation undertaken by mining companies, with I&AP comments and responses communicated directly to the licencing authority rather than through the applicant. The processing of new rights applications must be suspended when authorities are alerted to affected communities’ concerns not having been addressed in applications.
Furthermore, the broken system for processing appeals by the Minister of Mineral Resources and the Water Tribunal must be fixed. Without operational appeal routes, communities and civil society organisations have no option but to take the onerous and expensive path of challenging poor decisions in court.

3.4 Enforce the law through adequate investment in compliance monitoring and enforcement capacity; institute a comprehensive compliance monitoring and enforcement programme; implement a proper administrative penalty system; and ensure transparent reporting of results

Lack of enforcement undermines and perverts the regulatory regime. This means the few companies who do comply are prejudiced, while those considering compliance are discouraged from doing so. Failure to enforce legislation distorts the will and intention of parliament. This erodes not only the regulatory regime, but also our constitutional democracy.

Fixing the DMR and DWS’ broken compliance monitoring and enforcement systems in Mpumalanga — again assuming the DMR remains responsible for this function for the time being — will take at least the following to achieve:

1. Compliance monitoring and enforcement of water and environmental laws must become a political and management priority within the DMR and the DWS. It is also vital for there to be a national champion for CME in the national departments, to drive and support the roll-out of effective programmes.

2. Many more trained and appropriately qualified compliance monitoring and enforcement officials who are designated with the necessary powers to fulfil this function.

In this regard, it is important to understand that an “appropriate” qualification is different for different functions. For example, an official responsible for compliance inspections requires good technical knowledge that may include chemical engineering, geology, hydrology, or environmental science; an official responsible for criminal investigations requires a background in criminal law and proceedings, and investigation skills (such as those required by SAPS detectives); an official responsible for civil enforcement requires a qualification in constitutional, administrative and environmental law and litigation.

Both the DWS and the DMR have ostensibly decided to design and implement their own training courses for compliance and enforcement. This is despite the training requirement for their officials being very similar to the training that was painstakingly developed by the DEA at great expense. Currently the DWS CME officials receive no formal training from that Department, and training is done on the job. We also know that the DMR course for EMRIs is only a three-week basic training course. It is objectively not possible to provide adequate training to officials in three weeks, and then expect them to exercise this function effectively and efficiently.

3. A proper compliance and enforcement strategy and policy, coupled with clear operating procedures for compliance monitoring and enforcement.

4. Real and meaningful collaboration with the Environmental Management Inspectorate, the SAPS and the NPA. Historically, there has been poor collaboration between environment authorities and the DMR in particular, and much work needs to be done to repair these important relationships. This collaboration must be driven and supported by the top echelons in the DWS and DMR. It will improve the formal and informal working relationships that have developed between the Environmental Management Inspectorate, the SAPS and the NPA. The practice of reporting complaints of violations to SAPS, or even handing over files to the NPA for prosecution and “hoping for the best”, is one that was proven to be totally ineffective by environment authorities more than a decade ago.

5. Proper public reporting of compliance monitoring and enforcement activities.

6. Increasing criminal penalties for environmental violations, particularly in the NWA, and prioritising the development and implementation of a proper administrative penalty system for environmental and water violations. Deter others from committing similar offences by instituting meaningful monetary penalties that adequately punish corporate entities which violate the law. These are an essential enforcement tool in any regulatory system. Internationally, there is a well-established and growing trend away from criminal penalties, which are quicker and simpler than court proceedings, could reduce the burden of time and worry placed on businesses under threat of prosecution, while allowing regulators to restrict prosecution to the most serious cases, where the stigma of a criminal prosecution is required.

— Hampton Report: Reducing administrative burdens: effective inspection and enforcement for UK Government, 2005
Environment authorities have already started to explore how administrative penalties could improve compliance with environmental laws, and the DMR and the DWS should grab the opportunity to benefit from this work.

### 3.5 Elevate the legal status of communities affected by mining

The current MPRDA provisions dealing with communities and mining have not been effective in protecting — or advancing the social and economic welfare of — communities from the detrimental environmental impacts of mining. Affected communities are frequently already vulnerable. This failure is at least partly attributable to mining-affected communities not having a strong enough legal status for their rights and custodianship of the environment, on which their livelihoods depend, to be respected. There is no requirement under the MPRDA for prospecting or mining right applicants to obtain the consent of affected communities for a right to be granted, even though that mining will take place on land on which they reside or depend.

Mining is a short-lived bounty of economic opportunities. But access to the benefits of mining is determined by factors that include existing capital, access to resources, skills training or education, and — in many instances — political connections. Communities witness the arrival of mining and experience the hope of opportunity and the promise of development. They experience an influx of people, a change in social dynamics, increased tensions, and the degradation of their natural home — of water, vegetation, air, and agricultural livelihoods. They experience unsolicited interventions and change. Perhaps some see limited financial gain, but then experience the sudden cessation of mining activities, and the abandonment and decay created by the mine. Many experience the damaged state of their natural home and livelihood forever altered.

Community-based organisations, civil society organisations and legal academics have called for free prior and informed consent (FPIC) by affected communities to be a prerequisite for mining. The rationale of the FPIC principle is that communities should have the right to determine their own destinies — which may or may not include mining. FPIC would also give communities better leverage to negotiate favourable and fair conditions to mining on their land.

The Legal Resources Centre (LRC) argued, in its submission on the 2013 MPRDA Amendment Bill to the Portfolio Committee on Mineral Resources, that the inclusion of the FPIC principle would effectively be a form of reparation to communities who historically did not have a right meaningfully to negotiate with government and mining companies over mining on their land — a right that was enjoyed by the white population before the promulgation of the MPRDA. The LRC contended that the progressive realisation of substantive equality between all population groups in South Africa, a constitutional objective, should be promoted in the MPRDA.

In the same submission, the LRC articulated the case for FPIC in the context of communities holding rights in communal land. Its argument was that the MPRDA is not congruent with customary law and may therefore be unlawful. FPIC for the disposal of any rights in communal land, therefore including mining rights, is a fundamental principle of customary law — which is recognised as a source of law on par with legislation, subject to the Constitution. Without FPIC, the MPRDA deprives communities of their customary rights, and is unlawful for that reason.

The Interim Protection of Informal Land Rights Act, 1996 (IPILRA) also provides that no person may be deprived of any informal right to land, such as a right in communal property, without his or her consent. The MPRDA is therefore also not in line with IPILRA.

This is also articulated by Prof Tracy Humby of the Wits School of Law. She argues that “the Bill is not appropriately cross-referenced with the statutory instruments designed to deal with the restitution of land rights or the protection of legally-insecure tenure or the recognition of tribal authority. A consultation cut-off date of 30 days ...in contexts where there are deeply entrenched and contested conflicts over land and tribal authority, a legislative mandate to complete consultations within 30 days is a dereliction of Parliament’s duty to realise the transformative vision of the Constitution and ensure long term social stability”. Humby further cautions that, “the [proposed] amendments to the consultation provisions perpetuate South Africa’s status as a laggard when it comes to the protection of the rights of communities governed by customary law. States such as Peru and Bolivia are doing far more to protect their indigenous peoples through constitutional-level guarantees of their detailed rights to consultation, as well as entrenching the requirement of consent (or at least the possibility of withholding consent). In this way they were attempting to address the serious, and at times explosive and violent hostilities that have faced many of their mining projects. South Africa, with its experience of Marikana (not just a wage dispute) and the simmering of conflicts amongst the Makopane, the Bengwenyama, the Bakgatala and even the Bafokeng would be well-advised to heed these developments.”

It is therefore recommended that the MPRDA be reformed to require the FPIC of communities for the granting of prospecting and mining rights. The distinction drawn in the MPRDA between communities occupying communal land by custom, law or agreement, and other vulnerable communities, must also be abolished to ensure that all impoverished communities are afforded the right to meaningful negotiation with government and mining companies regarding prospecting and mining rights on their land.
Such an approach will also be in line with the principle of environmental management in South Africa, according to which:

“[t]he participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured”.

3.6 Ensure that communities and other I&APs are given opportunities to participate in WULA processes for mining

I&APs are not always given opportunities to participate in WULA processes for mining. Under the NWA, the Minister of Water and Sanitation has a discretion to direct a WUL applicant to conduct a public participation process. The Minister very rarely exercises this discretion. Moreover, the discretionary public participation procedure prescribed in the NWA does not give an applicant and the responsible authority much guidance on how public participation should be conducted.

As the NWA does not make provision for public participation for every WULA, its approach to public participation is clearly not in line with the national environmental management principle relating to public participation in environmental decision-making referred to in 3.4.1 above.

The NWA’s approach to public participation is also not in line with PAJA. The granting of a WUL is administrative action. Under PAJA, all administrative action affecting the rights of any person or the public must be procedurally fair. What is procedurally fair would depend on the circumstances of each case, but ordinarily administrative action would be fair if some form of public participation is conducted before the granting of a WUL (unless there is good reason to depart from this requirement). As there would be no good reason for departing from a form of public participation for WULAs, the granting of a WUL without prior public consultation may well be a procedurally unfair administrative action, and therefore unlawful.

It is therefore recommended that the NWA be reformed to make explicit provision for the right of I&APs to participate in every WULA process. It is further recommended that the NWA be reformulated to reflect the more comprehensive approach to public participation prescribed in the Environmental Impact Assessment (EIA) Regulations, 2014. Such amendments will help align the NWA with the national environmental management principle that all I&APs should be given an opportunity to participate in environmental decision-making.
3.7 Adopt a new, transparent approach to disclosure of information around mining

Access to information is essential for the exercise of the constitutional right to an environment not harmful to health or well-being, and to have the environment protected. Transparency is required for affected communities and civil society organisations to understand and exercise their rights. It is equally required for the State and mining companies to be held accountable for their actions and decisions.

The culture of secrecy plaguing the mining industry is facilitated and perpetuated by the DMR in particular. Mining companies, their consultants, and the DMR refuse to provide I&APs with even the most basic information. I&APs are then expected to comment on applications without the very information on which they must comment.

This violates both the right of access to information and the right to fair administrative action, and must imperatively be halted. Yet the DMR and mining companies often rely on the MPRDA failing to make express provision for access to information — the rights enshrined in the Constitution and PAIA notwithstanding.

PAIA is even used as a tool by some public and private bodies to avoid disclosure. In both the public and the private sector, there are repeated instances of entities using PAIA to resist and slow down access to information. In the mining sector, PAIA is frequently implemented in such a way that providing access to information is not the default position. This not only creates a heavy burden on both the State and those seeking information, but also hampers civil society’s ability to assist the State in monitoring compliance and enforcing environmental laws. It is in the State’s interests to make information widely, publicly and voluntarily available. Where this information is held by and pertains to private bodies, it is also in the State’s interests for the burden of doing so to be borne by those private bodies.

This stance was supported by the Supreme Court of Appeal in the AMSA v VEJA judgment, which acknowledged the important watchdog role of civil society. As illustrated by this report, this role becomes all the more important in the context of a monumental State capacity crisis.

It is for this reason that the CER has been campaigning for voluntary and proactive disclosure by parties holding environmental information. Access to information must be the default position.

The CER calls for mandatory disclosure of all authorisations, approvals, permits and licences required to lawfully conduct operations. These should always be in the public domain as minimum legal requirements, and should include: all environmental authorisations; EMPRs; any independent assessments of financial provision for rehabilitation and environmental liability; closure plans; audit reports; and all compliance monitoring reports. These should all also be made available, to anyone on request, for inspection and copying at the site of the activities, as well as on the authorisation holder’s website.

3.8 Conclusion

Water, biodiversity, air and soil are essential to life. Prioritising profit from short-term financial gains to the detriment of a healthy environment, water resources, and the health and well-being of the people of Mpumalanga does not make economic, social or environmental sense. And yet, facilitated by poor governance, this is what mining companies and their investors and financiers have done in Mpumalanga.

The time has come to acknowledge the truth of the matter: the lauded economic development and job creation mining supposedly brings to local people does not in fact result in development capabilities of mining affected communities, and it is out-weighted by the costs to the environment, water security, and human health and well-being.

The state must stop holding members of the public at arm’s length from mining applications, thereby excluding them from participating in decisions with direct and detrimental consequences to the quality of their lives.

It is zero hour for Mpumalanga. A dramatic change in the way mining and its impacts on the environment, water and people are regulated is needed — in Mpumalanga, and in South Africa. Implementation of the recommendations of this report would be a significant start to such a transformation.
5. Ibid.
7. Ibid.
8. In addition, because the DMR does not publish the outcome of applications, other regulatory authorities, commenting authorities and I&APs frequently do not know whether applications for mining rights and prospecting rights are granted or refused.
10. Ibid.
11. See section 5(3)(d) of the MPRDA.
12. Note that until the Constitutional Court decision of Maccsand on 12 April 2012, neither the DMR nor mining companies – represented by the Chamber of Mines – argued that the MPRDA overrode the mandate of local authorities in relation to mining (Maccsand (Pty) Ltd v City of Cape Town & others CCT 103/11 [2012] ZACC 7).
13. See section 2(b) of the MPRDA.
14. See section 2(h) of the MPRDA.
15. See section 3(3) of the MPRDA.
17. See for example GG 39287 GN 986 of 2015.
19. See section 50A(2) of NEMA.
20. See section 2(4)(p) of NEMA.
21. See section 2(3) of NEMA.
22 See section 2(4)(a)(ii) of NEMA

23 While the NWA requires the sustainable use of water, and the MPRDA refers to the sustainable development of minerals, it is NEMA that provides the statutory definition of this principle. Under this Act, sustainable development means "the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations"

24 Fuel Retailers Association of South Africa versus the Director General of Environmental Management, the Department of Agriculture, Conservation and Environment, Mpumalanga: Province and Others 2007(6) SA4 (CC) (Fuel Retailers Case)


28 See http://www.sourcewatch.org/index.php/Category:Proposed_coal_plants_in_South_Africa


30 See http://www.idc.co.za/home/mpumalanga/mpumalanga-regional-director.html; accessed on 17 December 2016

31 Greenpeace, December 2008. The True Cost of Coal, by Dr Erika Bjureby, Mareike Britten, Irish Cheng, Marta Kaźmierska, Ernest Mezak, Victor Munnik, Jayashree Nandi, Sara Pennington, Emily Rochon, Nina Schulz, Nabiha Shahab, Julien Vincent and Meng Wei

32 Ibid.

33 Ibid.


35 The average annual rainfall is 495mm, while the global average is 1033mm. Source: Institute for Security Studies, September 2014. Parched Prospects, by Steve Hedden and Jakkie Cilliers, p. 2. [Available online: https://www.issafrica.org/uploads/AF11_15Sep2014.pdf; last accessed on 15 December 2015]


38 Ibid, p. 14

39 Mari Roleen la Grange, 2011. The rate and projected impact of development, with emphasis on mining, on biodiversity in the Mpumalanga Province, South Africa. Submitted in partial fulfilment of the requirements for the BSc (Hons) degree in the Department of Plant Science, University of Pretoria


41 Mari Roleen la Grange, 2011. The rate and projected impact of development, with emphasis on mining, on biodiversity in the Mpumalanga Province, South Africa. Submitted in partial fulfilment of the requirements for the BSc (Hons) degree in the Department of Plant Science, University of Pretoria


46 The catchment is spread over an area of 54 570km². [Source: CSIR. State of Rivers Report: Crocodile Sabie-Sand and Olifants Rivers]. See www.csir.co.za

47 CSIR. State of Rivers Report: Crocodile Sabie-Sand and Olifants Rivers. See www.csir.co.za


49 Ibid.

50 CSIR. State of Rivers Report: Crocodile, Sabie-Sand and Olifants Rivers. See www.csir.co.za


53 See NWA (Act 36 of 1998), Part 3

54 Government Gazette, No. 37999, 19 September 2014

55 The Blyde River Catchment


58 Ibid.

59 Ibid.

60 GN 151 in GG 29657 of 23 February 2007 (amended by Government Notice 324 in GG 37596 of 29 April 2014)

61 GN 256 in GG 38600 of 31 March 2015

62 Pelusios sinuatus

63 The demise of the Nile crocodile (Crocodylus niloticus) as a keystone species for aquatic ecosystem conservation in South Africa: The case of the Olifants River, by Peter J. Ashton. [Available online: http://researchspace.csir.co.za/dspace/bitstream/10204/4121/1/Ashton_2010.pdf; last accessed on 17 December 2015]

64 Report of the Auditor-General to Parliament on a Performance Audit of the Rehabilitation of abandoned mines at the DME, Oct 2009

65 Ibid.


67 See http://cer.org.za/hot-topics/acid-mine-drainage


70 Ibid.

71 Ibid.

72 Ibid.

73 Ibid, p. 2

74 North Gauteng High Court, Case No. 35672/12

75 According to the community’s legal representatives, “no public announcement has been made to the residents, no question and answer session has been held, no tests results have been made available, no spokesperson or official has been identified in order to direct questions to, no information has been made available on what methods were used to render the tap water fit for consumption, and no information has been made available on what efforts have been made to upgrade the water treatment plant”.


77 Ibid.

78 The oldest known coal fire is in Australia, which has been burning for more than 2000 years.

79 Airborne particulates are a form of dust pollution and those with aerodynamic diameters equal to 10 micrometres or less are known as PM10. Those with aerodynamic diameters of 2.5 micrometres or less are known as PM2.5.

80 Fund for Research into Industrial Development and Growth and Equity Study, 2004

81 NEM: Air Quality Act (Act 39 of 2004)

82 HPA AQMP, p. 19

83 Highveld Priority Area Air Quality Management Plan, 2011. See Table 1E, p. 19


86 HPA AQMP p. 23

87 HPA AQMP p. 147

88 Maccsand (Pty) Ltd v City of Cape Town & others CCT 103/11 [2012] ZACC 7

89 In accordance with section 11(2) of NEMA

90 Mine Health and Safety Act (No. 29 of 1996)

91 Bureau for Food and Agricultural Production (BFAP), 2012. Evaluating the Impact of Coal Mining on Agriculture in the Delmas, Ogies and Leandra Districts – with

92 Ibid.
93 Ibid.
94 Ibid.


97 Ibid.

99 Media statement by the Bench Marks Foundation, 19 August 2014. Coal mining in South Africa is threatening food security


102 Ibid.
103 National Policy on Food and Nutrition: Published as GNR 637 in GG 37915 on 22 August 2014

104 This policy was adopted by the Department of Social Development and the Department of Agriculture, Forestry and Fisheries, approved by cabinet, and gazetted in 2014

105 GN no. 38545, notice 210 of 2015, Government Gazette, 13 March 2015


107 MTPA, 2014. Mpumalanga Biodiversity Sector Plan


109 Mining and Biodiversity Guideline, 2013. Mainstreaming biodiversity into the mining sector. Developed by the Departments of Environmental Affairs and Mineral Resources.

110 This Committee includes representatives from the Departments of Agriculture, Forestry and Fisheries, Rural Development and Land Reform, Environmental Affairs and Mineral Resources. See http://www.parliament.gov.za/live/content.php?Item_ID=215&CommitteeID=123

111 See https://pmg.org.za/daily-schedule/263/


114 Ibid.
115 Ibid.
116 Ibid.


121 Ibid.
122 Ibid.


126 Ibid.

127 Ibid.


129 See http://www.statssa.gov.za/

130 See section 1.1 of this report

131 See section 1.2 of this report


137 By April 2014, it was reported the Olifants River and Water Affairs Development Project (ORWRDP) was in Phase 2 of its development: See https://pmg.org.za/committee-meeting/13286

138 See http://pmg.org.za/committee-meeting/13286

139 IOL, 11 February 2016. Industry must deliver on promises – Bristow, by Dineo Faku [Available online: http://www.iol.co.za/business/companies/industry-must-deliver-on-promises---bristow-1982787; last accessed on 9 March 2016]

140 Ibid.

141 Between Friday evenings at 18:00 to Sunday mornings at 6:00


146 Ibid.

147 Ibid.

148 Ibid.


150 ATHA Yzermyn Coal Project (AYCP), 2013. Biodiversity Impact Assessment


153 Center for Climate and Energy Solutions. See http://www.c2es.org/energy/source/coal


155 Ibid.


158 Ibid.


160 Ibid.


162 Ibid.


164 Letter from the Minister of Environmental Affairs, Buyelwa Sonjica, to the CER dated 18 September 2010.

165 Ibid.

166 Ibid.
Sub-output 3.4.2 of Outcome 10


Sub-output 3.4


NPAES (National Protected Area Expansion Strategy)

NEMBA (National Environmental Management Act: Biodiversity Act, 2004)

FEPA (Freshwater Ecosystem Priority Area)


Parliamentary Question No. 3052, date of publication in internal question paper: 2 November 2012 (internal question paper no. 38)

Note that, under section 9(b) of NEMPAA, mining is already prohibited in World Heritage Sites.


MTPA, 2014. Mpumalanga Biodiversity Sector Plan, p. 20


Under section 5(1) of the MPRDA, “[a] prospecting right, mining right, exploration right or production right granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967 (Act No. 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such right relates.”

GN R768 in GG 33511 of 31 August 2010

GN R160 in GG 34057 of 28 February 2011 as amended by GN R287 in GG 34171 of 31 March 2011


Ibid.

The FEPA project was a collaboration between SANBI, the CSIR, the DWA, the WRC, the DEA, WWF-SA, SANParks and SAIAB

SANBI online: see http://bgis.sanbi.org/nfepa/SWSAmap.asp

http://www.birdlife.org.za/conservation/important-bird-areas

MTPA, Mpumalanga Biodiversity Sector Plan Handbook, 2014

See NEMPAA section 17

See s.48(1)


Ibid.

Ibid.

Ibid.

Portions 6 and 23 of the farm Groenvlei 353 JT and portion 12 of the farm Lakenvlei 355 JT in the Magisterial District of Belfast in Mpumalanga Province


Ibid.

Ibid.

Ibid.

Ibid.

Ibid.


Portions 6 and 23 of the farm Groenvlei 353 JT and portion 12 of the farm Lakenvlei 355 JT in the Magisterial District of Belfast in Mpumalanga Province

Letter from the MTPA to the DMR Regional Manager dated 19 March 2013

IBA SA016
214 At least three internal appeals were launched against the grant of the right, none of which were ever decided by the DMR. Accordingly, in December 2015, civil society organisations, EEPOG and BirdLife South Africa launched proceedings in the North Gauteng High Court, asking the Court to compel the Minister of Mineral Resources to decide two of the internal appeals and, in the absence of fulfilment of that order, granting those organisations the right to return to court for the setting aside of deemed refusals of the appeals and reviewing and setting aside the grant of the mining right.


216 See http://whc.unesco.org/en/tentativelists/

217 Affidavit by Louis Loock in the counter-application by MTPA to Barberton Mines’ application


219 Ibid.

220 Ibid.

221 Ibid.


223 See Regulation 2(1)

224 Regulation 2(2)(a)

225 Regulation 2(2)(d)

226 Regulation 2(2)(e)

227 Regulation 2(2)(f)


230 See section 43(9)

231 https://pmg.org.za/committee-meeting/11369

232 DMR Excel spreadsheet: D1 2016


234 Section 17(1) and (2) and Section 23(1) and (2)

235 The Dolla van Rensburg Trust, members of the Van Rensburg Family and Kleinbegin Boerdery

236 Mining and Litigation Review: Fact Sheet

237 See section 43 of the MPRDA

238 See section 41(2) of the MPRDA

239 See section 24N

240 Final financial provision regulations under NEMA were gazetted on 20 November 2015

241 This guideline “serves as a guide to the interpretation and application of the provision of the MPRDA, 2002 (Act 28 of 2002) and its Regulations, specifically as they relate to financial provision for the mining industry. This document is an official guideline in terms of regulation 54(1) promulgated in terms of the MPRDA, 2002 (Act 28 of 2002) and serves the specific objectives stated above”. In the absence of expert assessment, mining companies must use this guideline to calculate financial provision.


244 WWF-SA, August 2012. Financial Provisions for Rehabilitation and Closure in South African Mining

245 2009 Auditor-General Report

246 Ibid.

247 Ibid.

248 Ibid.


251 T. Humby, School of Law, University of the Witwatersrand, South Africa. Facilitating dereliction? How the South African legal regulatory framework enables mining companies to circumvent closure duties. [Available online: http://www.academia.edu/8621292/Facilitating_dereliction_How_the_South_African_regulatory_framework_enables_mining_companies_to_circumvent_closure_duties; last accessed on 27 March 2016]

252 Exxaro: Arnot Coal EMPR
253 Ibid.
254 Ibid.
255 Ibid.
256 Ibid.
257 Nkomati Athracite EMPR
258 Ibid.
259 Ibid.
260 CER letter to the DMR dated 1 October 2013 (FSE – Vuna Colliery)
261 National Water Act, No. 36 of 1998
262 CER Mining & Litigation Review: T. Humby
263 And the Department of Water Affairs before 2014
264 And the Department of Water Affairs before 2014
265 National Assembly, Question No. 60. Date of publication in internal question paper: 08 June 2009 (Internal Question Paper No. 1)
266 National Assembly, Question No. 1528. Date of publication in internal question paper: 9 October 2009 (Internal Question Paper No. 20)
267 Question No. 1602, 08 June 2010
268 National Assembly, Question No. 347. Date of publication in internal question paper: 18 February 2011 (Internal Question Paper No. 02)
269 National Assembly, Question No. 3327 (Annexure 1). Date of publication in internal question paper: 28 October 2011 (Internal Question Paper No. 35)
270 National Assembly, Question No. 468. Date of publication in internal question paper: 2 March 2012 (Internal Question Paper No. 06)
271 National Assembly, Question No. 1716. Date of publication in internal question paper: 19 Sept 2014 (Internal Question Paper No. 17)
274 Ibid.
275 National Assembly, Question No. 105. Date of publication in internal question paper: 10 March 2015 (Internal Question Paper No. 6)
276 National Assembly, Question No. 2363. Date of publication in internal question paper: 09 July 2015 (Internal Question Paper No. 22)
278 Sections 23(6) and 25(1)(d) of the MPRDA prescribe that a mining right is subject to any relevant law. Non-compliance with the NWA constitutes non-compliance these sections of the MPRDA and arguably grounds for suspension of the mining right.
279 CER Mining & Litigation Review. T. Humby
280 Section 27(1), NWA
281 Section 27(2), NWA
282 Water Use Licences are just word salads – 5 September 2013 – The Citizen. (Available online: http://citizen.co.za/37117/frack2q/; last accessed on 8 March 2016)
283 Carin Bosman WUL presentation.pdf
284 Carin Bosman WUL presentation.pdf
285 Section 30(1)
286 Exxaro Coal (Pty) Ltd: North Block Complex. Water Use Licence: 26 September 2014
287 Umsimbithi Coal Mine (Pty) Ltd. Water Use Licence: 27 November 2012
288 SAFM interview with WWF’s Christine Colvin by Xolani Gwala on 6 July 2012
289 See section 41(4) of the NWA
290 CER Mining Litigation Review, T. Humby
291 CER Mining Litigation Review, T. Humby; Escarpment Environment Protection Group and others v Department of Water Affairs and others (unreported, case no. 4535/11, High Court of South Africa, Gauteng Division, Pretoria)
292 Section 40(1)
293 Regulation 7(2)
294 CER Mining & Litigation Review: Fact Sheet: Umcebo Mining (Pty) Ltd (Klippan)
295 CER Mining & Litigation Review: Fact Sheet: Xstrata-Verkeerdepan Extension
296 CER Mining & Litigation Review: Fact Sheet: Eyesizwe Coal (Zoekop, Blyvooruitzicht)
297 See http://www.ecoleges.co.za/NEMA-Listed-Activities.asp
298 Memo on mining in sensitive areas, by Angela Andrews (LRC)
299 MTPA Mpumalanga Biodiversity Sector Plan, 2014
300 MTPA Mpumalanga Biodiversity Sector Plan, 2014
301 MTPA Mpumalanga Biodiversity Sector Plan, 2014
302 Mining and Biodiversity Guideline, 2013
303 CER Mining & Litigation Review: Fact Sheet: Eyesizwe Coal (Zoekop, Blyvooruitzicht)
304 CER Mining & Litigation Review: Fact Sheet: Benicon Bankfontein

Section 43(7)

Section 146(3)

Section 146(5)

Section 148(1)(f)

Section 148(2)(b)

Escarpment Environment Protection Group & Wonderfontein Environmental Committee v Department of Water Affairs & Exarro Coal (Pty) Ltd (unreported, WT 03/08/2010)

Escarpment Environment Protection Group & Langkloof Environmental Committee v Department of Water Affairs & WER Mining (unreported, WT 25/11/2009)

Escarpment Environment Protection Group & Wonderfontein Environmental Committee v Department of Water Affairs & Xstrata Mining (unreported, WT 24/11/2009)

CER Mining & Litigation Review. T. Humby

Ibid.

Escarpment Environment Protection Group & another v Department of Water Affairs & others 2013 JDR 2700 (GNP) [Case numbers A665/11, 4535/11; A666/11, 4333/12; A667/11, 4334/12]

Ibid.

Ibid.

National Assembly, Question No. 2280. Date of publication in internal question paper: 12 August 2012 (Internal Question Paper No. 27)

National Assembly, Question No. 2280 (Annexure C). Date of publication in internal question paper: 12 August 2012 (Internal Question Paper No. 27)

Section 150(1)

National Assembly, Question No. 2280. Date of publication in internal question paper: 12 August 2012 (Internal Question Paper No. 27)

CER BLOG: Looks like the environment may need a legal team, 7 December 2012

GN 615 appearing in GG 36568, 14 June 2013. [Available at: http://www.gpwonline.co.za/Gazettes/Gazettes/36568_14-6_WaterAffCV01.pdf; last accessed on 8 March 2016]


GN R888 appearing in GG 36798, 30 August 2013

Escarpment Environmental Protection Group and Wonderfontein Community Association v Minister of the Department of Water and Sanitation and others (High Court, Gauteng Division, Pretoria) (Case no. 22661/15)


NEMA 43(2)

GN R993 in GG 38303 of 8 December 2014

Regulation 4(1)

Regulations 4 and 5

Regulation 6

DMR, 2 June 2015: Briefing of select committee on land and mineral resources on performance of, and challenges experienced with public consultation through the regional offices. [Available online: http://slideplayer.com/slide/5291016/; last accessed on 8 March 2016]

Ibid.


See Regulation 39(2) of the MPRDA Regulations

Section 39(4)(b)(i) (now repealed)

Section 10(2)

Section 23(1)(d)

MTPA letter to CER dated 27 January 2016

MPRDA Regulations: GN R527 in GG 26275 dated 23 April 2004. Commencement date: 23 April 2004

See 39(3)(c)

Mpumalanga Tourism and Parks Agency Act (Act 5 of 2005)

SA Airlink (Pty) Ltd v Mpumalanga Tourism and Parks Agency and Others (01011/12) [2012] ZAGPJHC 143; 2013 (3) SA 112 (GSJ) (22 August 2012)

MTPA letter to CER dated 27 January 2016

Ibid.

Internal appeal by the Escarpment Environment Protection Group to the Minister of Mineral Resources against the decision of the Department of Mineral Resources:
to grant a mining right to William Patrick Bower (Pty) Ltd; to approve its EMPR; and request for suspension of the mining right (March 2013)

350 CER Mining & Litigation Review: Fact Sheet: Xstrata – Verkeerdepan

351 CER Mining & Litigation Review: Fact Sheet: Eyesizwe Coal (Paardeplaats)

352 National Assembly, Question No. 2022. Date of publication in internal question paper: 30 July 2010 (Internal Question Paper No. 18)

353 2016 DMR spreadsheet supplied by the DMR: D1 2016

354 Briefing of the parliamentary portfolio committee on mineral resources: Progress in dealing with derelict and ownerless mines, November 2014. [Available online: https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=0ahUKEwj7q3yqvAj4AhWJ7xQKHFgAbwQFghCMAc&url=http%3A%2F%2Fmg-assets.s3-eu-west-1.amazonaws.com%2F141112derelict.ppt&usg=AFQjCNFR2s5FnkQgnp5FM1bZiXicdYI4Q&sig2=B5q3B-C1jLMYs53C54Ogw&bvm=bv.108194040,bs.d.ZWU; last accessed 4 January 2016]

355 National Assembly Question No. 1797, Internal Question Paper Number 22, 16 October 2009

356 Portfolio Committee submission: September 2013: Environment Authorities are more appropriately placed to consider, issue and ensure compliance with environmental authorisations for mining activities

357 DMR’s 2011/2012 Annual Report, 17 October 2012: CER submission to portfolio committee, p. 4

358 MF email to James Lorimer: 20 July 2015

359 Ibid.

360 Ibid.


362 Ibid.

363 National Assembly, Question for written reply No. 2377. Date of publication in internal question paper: unknown (Internal Question Paper No. NW2741)

364 This total figure included 7 regional managers, 1 director, 8 deputy directors and 18 assistant directors

365 Question No. NW3501, dated 21 September 2015. [Available online: https://pmg.org.za/committee-question/1032/; last accessed on 27 March 2016]

366 CER PAIA request to the DMR: CER-2015-DMR-0004


368 National Assembly, Question No. 1035. Date of publication in internal question paper: 20 March 2015 (Internal Question Paper No. 8)

369 Ibid.

370 National Assembly, Question No. 1269. Date of publication in internal question paper: 17 April 2015 (Internal Question Paper No.10)

371 National Assembly, Question No. 4253. Date of publication in internal question paper: 30 November 2015 (Internal Question Paper No. 51)

372 Both these officials held B.Sc. degrees. While graduate qualifications are obviously important, it is also important to note that a general science degree on its own, particularly in the absence of intensive and extensive practical experience, is not adequate qualification for doing compliance monitoring and enforcement. Enforcement, in particular, is largely a criminal investigative and legal function that requires a comprehensive civil and criminal law background.

373 National Assembly, Question No.1998. Date of publication in internal question paper: 30 July 2019 (Internal Question Paper No. 18)


375 National Assembly, Question No. 1595. Date of publication in internal question paper: 30 April 2015


377 Letter from Acting Director General, DMR to CER, 29 March 2016, received 14 April 2016

378 Department of Mineral Resources, Annual Report 2012/2013 at p. 53

379 Department of Mineral Resources, Annual Report, 2013/2014 at p. 68

380 Department of Mineral Resources, Annual Report 2014/2015 at p. 44

381 National Assembly, Question No. 2371. Date of publication in internal question paper: unknown (Internal Question Paper No. NW2735E)

382 National Assembly, Question No. 1797. Date of publication in internal question paper: 16 October 2009 (Internal Question Paper No. 22)

383 National Assembly, Question No. 2022. Date of publication in internal question paper: 30 July 2010 (Internal Question Paper No. 18)

384 Ibid.

ENDNOTES

386 National Assembly, Question No. 1267. Date of publication in internal question paper: 17 April 2015 (Internal Question Paper No. 10)

387 2016 DMR spreadsheet supplied by the DMR: D1 2016

388 DWA briefing on Blue Scorpions and the setting up of a compliance enforcement unit, 10 August 2010. [Available online: https://pmg.org.za/committee-meeting/11821/; last accessed 4 February 2010]

389 National Assembly, Question No. 468. Date of publication in internal question paper: 2 March 2012 (Internal Question Paper No. 06). [Available online: https://www.dwa.gov.za/communications/Q&A/2012/NA%20468.pdf; last accessed on 27 March 2016]

390 National Assembly, Question No. 302. Date of publication in internal question paper: 1 March 2013. [Available online: https://www.dwa.gov.za/communications/Q&A/2013/NA%20302.pdf; last accessed on 27 March 2016]

391 National Assembly, Question No. 1716. Date of publication in internal question paper: 19 September 2014 (Internal Question paper No. 17)


394 National Assembly, Question No. 2022. Date of publication in internal question paper: 30 July 2010 (Internal Question Paper No. 18)


396 Question No. 2484, 03 September 2010

397 National Assembly, Question No. 2114. Date of publication in internal question paper: 17 August 2012. [Available online: https://www.dwa.gov.za/communications/Q&A/2012/NA%202114.pdf; last accessed on 27 March 2016]

398 National Assembly, Question No. 1998. Date of publication in internal question paper: 30 July 2010 (Internal Question Paper No. 18)

399 Ibid.

400 Ibid.

401 Question No. 1268, Date of publication in Internal Paper: 17 April 2015 (Internal Question Paper No.10)

402 DWS response to CER PAIA request. CER 2015DWA0006

403 Kebble and others v Minister of Water Affairs and Forestry [2007] SCA 111 (RSA)

404 Ibid.


408 National Assembly, Question No. 1300. Date of publication in internal question paper: 31 may 2013 (Internal Question Paper No. 19)


410 Question No.1594, Date of Publication in Internal Question Paper: 17 April 2015 (Internal Question Paper No. 10)


412 Briefing to the Portfolio Committee on Water and Sanitation, 2 September 2015: Criminal cases reported at SAPS

413 DEA press release dated 6 August 2015. [Available online: https://www.environment.gov.za/mediarelease/bosveldphosphateptyltd_foundguilty; last accessed on 27 March 2016]

414 Briefing to the Portfolio Committee on Water and Sanitation, 2 September 2015: Criminal cases reported at SAPS


416 Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance (69/2014) [2014] ZASC A 184 (26 November 2014)

Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga


Determining the required number of compliance and enforcement officials must be done in the context of a needs assessment, but at this stage any increase in capacity is better than nothing. The DWS has been hard hit by a freezing of posts that came into effect after the Cabinet decision to bring the sanitation function from the Department of Human Settlements into the DWS. There is a point of decline beyond which recruitment becomes even harder than usual, and the Minister of Water & Sanitation has to do urgent work to rebuild the profile of her department in the jobs market.

Neither the DMR, nor the DWA prepare criminal dockets of sufficient quality to withstand the burden of proof required for successful criminal prosecution.

In April 2015, the Minister of Water and Sanitation said her department had opened a total of 67 cases with the SAPS for contravening the NWA. Of these, 58 were opened for engaging in water uses without authorisation, while one was opened for not complying with water use authorisations. In Mpumalanga, only 9 criminal cases were for the mining sector.

The Minister could not however provide any details on how many criminal dockets were handed over to the NPA in the 2013/2014 and 2014/2015 periods, but said the relevant department to answer the question was the SAPS.

In addition, the Minister could not provide any details on the number of criminal dockets the NPA declined to prosecute for transgressions of the NWA, nor how many convictions were secured, but rather referred the question to the NPA.

This duty to process WULAs has not been assigned to any catchment management authority under the NWA.

Makhanya NO and another v Goede Wellington Boerdery (Pty) Ltd [2012] ZASCA 205 (30 November 2012) at para 27 and Escarpment Environment Protection Group and another v Department of Water Affairs and others (unreported, case nos. 4535/11, 4333/12 and 4334/12, High Court of the Republic of South Africa, Gauteng Division, Pretoria, judgment handed down on 18 November 2013) at para 20

The right to procedurally fair administrative action is also a constitutional right. See section 33 of the Constitution.

Sections 3 and 4 of PAJA

Chapter 6 of the EIA Regulations, 2014

Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance (69/2014) [2014] ZASCA 184 (26 November 2014)

See 2014 EIA Regulations 26(h)

See http://cer.org.za/full-disclosure/enforcing-the-law

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The Centre for Environmental rights is a non-profit, environmental rights law clinic that helps communities to defend their Constitutional right to a healthy environment. Our attorneys use the law to strengthen the voices of communities affected by environmental injustice, pollution and mining, and to hold both companies and the state to account for environmental degradation. We advocate and litigate for transparency, accountability and compliance with environmental laws.

The Centre for Environmental Right is a non-profit company with registration number 2009/020736/08.

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