

To:

The Honourable Minister Edna Molewa

Minister of Environmental Affairs

Department of Environmental Affairs

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**URGENT**

17 February 2017

Dear Minister Molewa

**JOINT LETTER TO THE MINISTER: PERMISSION TO CONDUCT COMMERCIAL PROSPECTING, MINING, EXPLORATION, PRODUCTION OR RELATED ACTIVITIES INSIDE PROTECTED ENVIRONMENTS: SECTION 48(1)(B) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT: PROTECTED AREAS ACT, 2003**

1. We, the undersigned organisations, write to express our grave concern about, and disappointment in, the recent decision by the Minister of Environmental Affairs to allow mining for commercial purposes inside the Mabola Protected Environment, declared as such under section 28(1) of the National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2013) (NEMPAA).
2. Our concern is not just based on the risks posed by the proposed mining in this particular protected area, but that the decision to allow commercial mining here sets a dangerous precedent for mining in other declared protected areas. Our concern is furthermore aggravated by the manner in which the Minister exercised her discretion.
3. We set out below some of the substantive considerations that the Minister must take into account when making any decision under section 48(1)(b) of NEMPAA.

a. As the Minister will be aware, section 24 of the Constitution of the Republic of South Africa, 1996 entrenches 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."

b. Section 3 of NEMPAA provides as follows:

*In fulfilling the rights contained in section 24 of the Constitution, the State through the organs of state implementing legislation applicable to protected areas must –*

*(a) act as the trustee of protected areas in the Republic; and*

*(b) implement this Act in partnership with the people to achieve the progressive realisation of those rights.*

c. In terms of section 48(4) of NEMPAA, when exercising her discretion under section 48(1)(b) of NEMPAA, the Minister must take into account the interests of local communities and the environmental management principles in section 2 of the National Environmental Management Act, 1998 (Act 107 of 1998) (NEMA) including, amongst others, the following:

- *Section 2(4)(a)(i): the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied.*
- *Section 2(4)(a)(ii): pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied.*
- *Section 2(4)(a)(vi): the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised.*
- *Section 2(4)(a)(vii): a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.*

- *Section 2(4)(e): responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle.*
- *Section 2(4)(o): The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.*
- *Section 2(4)(p): The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.*
- *Section 2(4)(r): Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal habitats including dunes, beaches and estuaries, reefs, wetlands, and similar ecosystems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.*

4. In addition to substantive requirements, including those set out in the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) (PAJA), to which NEMA and the specific environmental management Acts are subject, and administrative law in general, the Minister must also follow the prescripts of procedural fairness when exercising her discretion under section 48(1)(b) of NEMPAA.
5. While section 48 of NEMPAA does not expressly provide a procedure for consultation with interested and affected parties, the requirements of administrative justice as entrenched in section 33 of the Constitution and set out in PAJA apply: the Minister must ensure that adequate notice is given to all interested and affected parties of the nature and purpose of the proposed administrative action, and must allow a reasonable opportunity to make representations.
6. Please also note that a decision under NEMPAA requires the Minister to take into account objectives and considerations unique to NEMPAA, and it is therefore not sufficient to rely on public participation processes undertaken as part of applications for licences, permits or authorisations under other laws.
7. Should the Minister fail to follow these requirements of procedural fairness, the decision will predictably be set aside by a court on review, but to do that requires

extensive resources from interested and affected parties, from the state and from the affected mining company.

8. We therefore request that, in relation to any pending or future applications to allow commercial prospecting, mining, exploration, production or related activities under section 48(1)(b) of NEMPAA in a protected area, the Minister and the Department commit to the following:
  - a. that the Minister gives adequate notice of all proposed decisions to allow commercial prospecting, mining, exploration, production or related activities inside protected environments under section 48(1)(b) of NEMPAA, at least by publication in the Government Gazette, one national newspaper, and one local newspaper;
  - b. that, regardless of any other public participation process that may have taken place in relation to the proposed mining, the Minister provides affected and interested parties at least 60 days to make representations on the proposed decision under section 48(1)(b) of NEMPAA; and
  - c. that the Minister ensures that all interested and affected parties (also having regard to the formal registration of interest below) are notified of her decision, with reasons, immediately after it has been taken, so as to allow such parties the opportunity to challenge that decision in court, as they are entitled to do.
9. Moreover and in any event, the undersigned organisations hereby give notice of our formal registration of interest in all applications to the Minister to exercise her discretion under section 48(1)(b) of NEMPAA, regardless of any other public participation process that may have taken place as part of any applications for licences, permits or authorisations under other laws. We will henceforth regard failure to give the organisations below adequate notice of applications to allow commercial prospecting, mining, exploration, production or related activities inside any protected environment as a failure to comply with PAJA.
10. We furthermore request that the Minister advises the undersigned organisations whether she has received any other applications, or made any other decisions, to allow commercial prospecting, mining, exploration, production or related activities inside protected environments under section 48(1)(b) of NEMPAA.

Kindly acknowledge receipt to this letter, and provide us with the Minister's reply to the requests in paragraphs 8, 9 and 10 above by no later than **Friday, 3 March 2017**. Please also advise us if the Department would like to discuss our request at a meeting with representatives of the undersigned organisations.

Yours sincerely

**ASSOCIATION FOR WATER AND RURAL DEVELOPMENT (AWARD)**

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**BIRDLIFE SOUTH AFRICA**

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**CENTRE FOR ENVIRONMENTAL RIGHTS NPC**

Contact: Melissa Fourie, Executive Director [mfourie@cer.org.za](mailto:mfourie@cer.org.za)

**ENDANGERED WILDLIFE TRUST**

Contact: Yolán Friedmann, Chief Executive Officer [yolant@ewt.org.za](mailto:yolant@ewt.org.za)

**FEDERATION FOR A SUSTAINABLE ENVIRONMENT**

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**GROUNDWORK**

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**MINING & ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA**

Contact: Thelma Nkosi, Steering Committee Chairperson [mejcon.sa@gmail.com](mailto:mejcon.sa@gmail.com)

**WORLDWIDE FUND FOR NATURE SOUTH AFRICA (WWF-SA)**

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