

DEPARTMENT OF MINERAL RESOURCES

Appeal by:

EARTHLIFE AFRICA JOHANNESBURG	FIRST APPELLANT
BIRDLIFE SOUTH AFRICA	SECOND APPELLANT
MINING AND ENVIRONMENTAL JUSTICE NETWORK OF SOUTH AFRICA	THIRD APPELLANT
ENDANGERED WILDLIFE TRUST	FOURTH APPELLANT
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	FIFTH APPELLANT
GROUNDWORK	SIXTH APPELLANT
ASSOCIATION FOR WATER AND RURAL DEVELOPMENT	SEVENTH APPELLANT
BENCH MARKS FOUNDATION	EIGHTH APPELLANT

Concerning the approval of the Environmental Management Programme for Atha-Africa Ventures (Pty) Ltd's proposed Yzermyn Mine by the Mpumalanga Regional Manager

Directed to:

DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES

**APPELLANTS' RESPONDING STATEMENT, IN TERMS OF REGULATION 74(8) OF THE
MINERAL AND PETROLEUM RESOURCES DEVELOPMENT REGULATIONS, 2004, TO
ATHA-AFRICA VENTURES (PTY) LTD'S REPLYING SUBMISSION**

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Introduction

1. The appellants submitted their Statement of Grounds of Appeal on 13 October 2016.
2. On 13 June 2019 the appellants received by email from the DMR the reasons for the Mpumalanga Regional Manager of the Department of Mineral Resources’ (Regional Manager) (DMR) decision to approve the Environmental Management Programme (EMPR) (the EMPR ROD). On 15 July 2019 the appellants timeously submitted their Responding Statement, in terms of regulation 74(8) of the Mineral and Petroleum Resources Development Regulations, 2004 (MPRD Regulations) to the EMPR ROD.
3. On 8 August 2019 the appellants received, by email from the DMR, Atha-Africa Ventures (Pty) Ltd’s (Atha) Replying Submission to their Statement of Grounds of Appeal (Atha’s Replying Submission). Same was under cover of a letter from the DMR affording the appellants an opportunity to comment thereon within 21 days.
4. This document constitutes the appellants’ Responding Statement, in terms of regulation 74(8) of the MPRD Regulations, to Atha’s Replying Submission. This Responding Statement is submitted timeously, within 21 days of 8 August 2019.¹
5. The purpose of this Responding Statement is twofold. It is first to deal with certain aspects arising from Atha’s Replying Submission, in particular:

- 5.1. The nature of this appeal and its place in the EMPR application-procedure;

¹ ‘Day’ is defined in section 1 of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) to mean ‘[i]n this Act, unless the context indicates otherwise- ... a calendar day excluding a Saturday, Sunday or public holiday and when any particular number of days are prescribed for the performance of any act, those days must be reckoned by excluding the first and including the last day’. Furthermore, ‘this Act’ is defined in section 1 of the MPRDA to ‘[include] the regulations’, and therefore necessarily includes the 21-day time period prescribed in regulation 74(8) of the MPRD Regulations.

- 5.2. Documentation relied on by the appellants in this appeal;
 - 5.3. A new (sixth) ground of appeal by the appellants regarding the Approved EMPR's authorisation of a discard dump;
 - 5.4. The critical, sensitive and vulnerable ecosystems impacted by the proposed mine (in supplementation of the appellants' second and fourth grounds of appeal);
 - 5.5. The impacts of the proposed mine on water resources and biodiversity and the lack of appropriate mitigation measures (in supplementation of the appellants' first ground of appeal); and
 - 5.6. *Ad hominem* statements in Atha's Replying Submission.
6. The second purpose of this Responding Statement is to place before the DMR: DG a specialist 'Review of the Yzermyn Financial Provision'. The specialist review, which was prepared by GCS Water and Environmental Consultants and completed today (9 September 2019), is attached marked 'T' ('the GCS financial provision review'). Given that the GCS financial provision review was only completed today, the appellants were not in a position to place it before the decision-maker before now. The appellants rely on the GCS financial provision review as an integral part of their appeal.

Part A: The nature of this appeal and its place in the EMPR application-procedure

7. An appeal, such as the present appeal, to the Director-General of the DMR (DMR: DG) under regulation 74(8) of the MPRD Regulations against a Regional Manager's decision to approve an EMPR in terms of section 39(4) of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) is an appeal in the **wide sense**.
8. In determining this wide appeal, the DMR: DG's decision will supersede that of the Regional Manager, and the DMR: DG's decision on appeal will **in essence constitute a decision in terms of the now-repealed, but still presently applicable, section 39(4) of the MPRDA to approve or reject an EMPR**. The DG is required, in making such a decision, to take all into account **all relevant considerations, including new information placed before him for the first time on appeal**.
9. The question that is therefore the subject-matter of this appeal is whether or not the DG should, in light of all relevant information placed before him, approve or reject Atha's EMPR in terms of

section 39(4) of the MPRDA, and not how the Regional Manager performed his duty in making that decision.

10. We also submit further regarding the legal nature of the present appeal that it is important to note that the appellants² had a **right** to bring an *'internal appeal'* of the Regional Manager's approval of Atha's EMPR.³ The MPRDA and MPRD Regulations envisage that the application-procedure, as Atha calls it, for the approval of an EMPR under section 39(4) of the MPRDA includes a right on the part of persons, as described in section 96(1) of the MPRDA, to internally appeal an administrative decision.
11. When that right is exercised, and an appeal is brought, the law requires that the DMR, in the present appeal the DMR: DG, reconsider the application (including all information raised on appeal). In other words, the law envisages that, if the appeal remedy is exercised, the application will be reconsidered on appeal. This is not an extraordinary happening, nor a disruption of the application-procedure. To the contrary, in enacting the internal appeal right, the MPRDA and MPRD Regulations convey that an appeal, if brought, is an important part of the application-procedure and indeed of mineral regulation.
12. In this legal context, Atha's submissions regarding the appellants' participation or non-participation in the public participation process conducted in respect of Atha's application for a mining right⁴ are not relevant to the present appeal and must be disregarded.
13. For example, it is not relevant whether or not *'most of the Appellants now before the Director-General did not participate at all in the application-procedure under the MPRDA'*.⁵ It was for Atha to place before the Regional Manager all the relevant scientific and other information required for its application for the approval of its EMPR under section 39(4). (Indeed, as is apparent from the appellants' Statement of Grounds of Appeal, and will be addressed further below, the appellants submit that Atha failed to do that, and furthermore that the information that was put up by Atha requires the refusal of the EMPR.)

² This right is available to 'any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of the [MPRDA]'. All of the appellants are civil society organisations acting in the public interest to protect and realise the Constitutional rights of the people of South Africa. Each of the appellants has a clear right to appeal.

³ See section 96(1) of the MPRDA, as well as the title of section 96

⁴ See paragraphs 32.2, 32.3, 34 and 35 Atha's Replying Submission

⁵ Paragraph 32.2 of Atha's Replying Submission

14. The appellants were entitled to participate in the public participation process conducted in respect of Atha's application for a mining right, or choose not to exercise that right; and additionally were entitled to exercise their right to appeal the Regional Manager's approval of Atha's EMPR, or choose not to exercise that right. That some of the appellants chose to exercise the later right and not the former right is immaterial. The appellants are resource-constrained non-profit civil society organisations,⁶ each working simultaneously on various matters. They are not able to be all places at all times.

Part B: Documentation relied on by the appellants in this appeal

15. In the present appeal, Atha continued with separate legislative application-procedures for environmental authorisation under the National Environmental Management Act 107 of 1998 (NEMA) and a water-use licence under the National Water Act 36 of 1998 (NWA) after the application-procedure for the approval of its EMPR under the MPRDA was finally submitted (although not yet decided).⁷

16. Pursuant to those further application-procedures under NEMA and the NWA, Atha and/or its Environmental Assessment Practitioner (EAP) commissioned further specialist studies pertaining to the environmental impacts of the proposed mine, which studies were not submitted to the DMR for purposes of the MPRDA application-procedure. These studies include:

16.1. the August 2014 revision of the February 2014 Delta H groundwater assessment (the August 2014 Delta H groundwater assessment), which was attached to the appellants' Statement of Grounds of Appeal as Annexure M. In any event, Atha itself confirms that there were no changes to the substance of the report by virtue of the August 2014 revision (see paragraph of 248 of Atha's Replying Submission);

16.2. the 'Wetland Ecological Assessment as part of the Environmental Assessment and Authorisation Process for the proposed Yzermine Coal Mining Project' by Scientific Aquatic Services CC (SAS) dated June, August 2014 (the SAS 2014 report), which was attached to the appellants' Statement of Grounds of Appeal as Annexure Q; and

⁶ See paragraphs 2 to 10 of the appellants' Statement of Grounds of Appeal

⁷ See paragraph 7 of Atha's Replying Submission

- 16.3. A revised version, being the final version, of the aforesaid SAS 'Wetland Ecological Assessment' dated May 2015 (the SAS 2015 report) and attached marked 'U' (which can be considered to have replaced Annexure Q).
17. Atha's EAP also drafted an amended ESIA/ESMP dated January 2015, which is the Final version of the ESIA/ESMP for purposes of all current application-procedures (and thus the appellants call this 'the Final ESIA/ESMP'). The cover page of the Final ESIA/ESMP was attached, for reference, to the appellants' Statement of Grounds of Appeal as Annexure N. Due to the significance of this report as the **Final** ESIA/ESMP prepared in respect of the proposed mine, the full report is attached marked '**N1**'.
18. The CER on behalf of the appellants commissioned three specialist reviews of Atha's environmental impact assessment documents for purposes of their various legal challenges of the proposed Yzermyn mine, being:
- 18.1. The report '*Review of Environmental Impact Assessment Report & Environmental Management Programme, and Environmental Authorisation, for Yzermyn underground coal project*' dated 17 August 2016 by Susie Brownlie (the Brownlie review) which is Annexure O to the appellants' Statement of Grounds of Appeal;
- 18.2. The report by Ingrid Dennis '*Review of the groundwater documentation related to the proposed Yzermyn Colliery*' dated August 2016 (the Dennis review) which is Annexure P to the appellants' Statement of Grounds of Appeal; and
- 18.3. The report by GCS Water and Environmental Consultants '*IWULA [integrated WUL application], IWUL [integrated WUL] and Specialist Studies Review of the proposed Yzermyn Colliery Mpumalanga*' originally dated 18 November 2016 and revised 1 December 2017 (the GCS review), which is attached marked '**V**'.
19. The Brownlie review, the Dennis review and the GCS review are integral parts of this appeal.
20. In this factual context and considering that this is a wide appeal, it is apparent that Atha's Replying Submission contains certain materially incorrect submissions, namely:
- 20.1. The appellants were not being 'opportunistic' by relying in their Statement of Grounds of Appeal on '*information and evidence that later became available to the decision-makers in the other application-procedures under other statutes*', as Atha asserts in paragraph 10 of its Replying Submission. The present appeal is a wide appeal and therefore it is competent

for the appellants to place before the DMR: DG any information relevant to his decision-making regarding Atha's EMPR. The SAS 2015 report is a specialist wetland ecological assessment and contains findings of, amongst others, SAS's baseline assessment of the wetland resources in the proposed mine area and its impact assessment of the proposed mining on the wetlands. It is patently relevant to this appeal.

20.2. It is also not correct that the Brownlie and Dennis reviews are based on the 'wrong documents', as Atha submits in paragraphs 242.2 and 248 of its Replying Submission. The Brownlie and Dennis reviews, as well as the GCS review, are independent specialist reviews of the environmental impact assessments commissioned by Atha for the proposed Yzermyn project and provide an independent critique of, notably and amongst others, the NSS biodiversity report, the WSP groundwater assessment, the Delta H report, and the SAS 2014 and 2015 reports. Independent peer review is an internationally-recognised methodology for ascertaining and enhancing scientific accuracy. These review reports are patently relevant to this appeal.

20.3. It is also not correct that the appellants' grounds of appeal are '*premised upon the wrong reports and therefore misconceived*', as asserted by Atha in paragraphs 41, 46, 50 and 61 of its Replying Submission. In their grounds of appeal, the appellants rely on the totality of scientific information available regarding the proposed Yzermyn mine and relevant to the DMR: DG's decision-making regarding Atha's EMPR.

Part C: New (sixth) ground of appeal: the EMPR authorises a discard dump

21. Atha effected amendments to the Yzermyn project, first, during the course of the MPRDA application-procedure for the approval of its EMPR, and second, during the separate legislative application-procedures for environmental authorisation (under NEMA) and a water-use licence (under the NWA).⁸

22. As regards the second category of amendments, Atha submits that:

'the application-procedure before the DMR in terms of the MPRDA was (and still is) premised on the surface infrastructure for the Yzermyn Project to include a discard dump as well as a washing plant (which, in the course of the application-procedure under NEMA and the NWA were excluded) and is premised on a larger surface infrastructure area (which, in the course of the application-procedure under NEMA and the NWA was reduced

⁸ See paragraph 8 of Atha's Replying Submission

to avoid and/or minimise the anticipated impacts on water resources as well as wetlands in the immediate vicinity of the Yzermyn Project): in this regard it is to be noted that, from an environmental perspective, the decisions by the DMR were thus taken on the basis of a worst case scenario and that, upon the scope and ambit of the Yzermyn Project that crystallised from the application-procedures under NEMA and the NWA, the anticipated environmental consequences and impacts of the Yzermyn Project will be much less (both in quantity, in quality and in degree) than the consequences and impacts upon which the positive decisions of the DMR (with regard to the Mining Right as well as the EMP) were premised.

*The outcome as summarised in paragraph 8 above is with respect **in line with the precautionary principle of Environmental Law:** the positive decisions of the DMR were taken on the basis of a worst case scenario.'* (paragraphs 8 and 9 of Atha's Replying Submission; my emphasis)

23. We respectfully submit that the latter submissions by Atha are not correct.

23.1. The appellants agree with Atha that, in the present appeal, the DMR: DG is being called on to decide whether or not to approve Atha's EMPR entitled 'Final Environmental and Social Impact Assessment Report and Environmental Programme' (version 2), submitted March 2014 (which the appellants in their Statement of Grounds of Appeal call 'the Approved Report', and the cover page of which is Annexure B thereto, and Atha in its Replying Submission calls the 'EMP'). This version of the EMPR **includes a discard dump and washing plant, as well as a larger surface infrastructure area.** If the DMR: DG approves this EMPR on appeal (confirms the EMPR), the DG will be authorising a design or scope of the Yzermyn project that the environmental authorities⁹ in the NEMA application-procedure and the DWS in the NWA application-procedure **specifically and explicitly disallowed.**

23.2. The Final ESIA/ESMP Report (Annexure N1) states the following regarding the discard dump:

'The proposed discard dump (residue stockpile) was removed from the surface layout, in order to allow for the best environmental option to become the preferred alternative. The negative impacts associated with the proposed discard dump (residue stockpile) is therefore eliminated.

*For completeness, these impacts are mentioned in the following paragraph: **There was the potential that the co-disposal discard dump (residue stockpile) would have allowed seepage to the groundwater, leading to contaminated baseflow contributing to the watercourses in the area. Note the groundwater study was refined [this refined groundwater study is the February 2014 Delta H groundwater***

⁹ The DEA and the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs

assessment] and indicated that seepage is still going to occur from the discard facility, even with a high density composite liner in place. The volume of contaminated water and the speed at which it will flow to the receiving water courses were however reduced and contaminated water should not reach the water course during life of mine, after which rehabilitation at closure will remove the major driver of the pollution plume and further dilution from rainfall will reduce the impact of the plume. (As the proposed discard dump (residue stockpile) is no longer part of the preferred alternative, these impacts will not occur due to this development.)' (p. vi; my emphasis)

- 23.3. In other words, the March 2014 EMPR is premised on the Yzermyn project **including a discard dump** which Atha's groundwater specialist has found will **unavoidably** cause seepage of contaminants into the groundwater, leading to contaminated baseflow entering the watercourses in the area and surely also contamination of the regional groundwater.
- 23.4. In these circumstances, the appellants cannot see how the DMR: DG's confirmation of the March 2014 EMPR (including this environmentally destructive discard dump) is in line with the precautionary principle of environmental law, as submitted by Atha. Indeed, if the DMR: DG dismisses the appellants' appeal and confirms the EMPR, the DG will be approving groundwater contamination that Atha's own groundwater specialist has found to be unmitigatable. The DG will be approving what Atha terms the '**worst-case scenario**'.
- 23.5. Reference is made to paragraphs 52 and 53 of the appellants' Statement of Grounds of Appeal where the appellants quote the now-repealed, but still applicable, sections 39(3)(d)(i) and (ii) and 39(4)(a)(i) of the MPRDA and regulation 50(e) of the MPRD Regulations. The appellants' sixth ground of appeal is that the March 2014 'Approved' EMPR falls foul of these legal provisions by virtue of authorising a discard dump which Atha's groundwater specialist has found would cause unmitigatable pollution and environmental degradation.¹⁰ **The appellants submit that on this ground alone their appeal should be upheld.**

¹⁰ The appellants submit that the March 2014 'Approved' EMPR's inclusion/authorisation of the discard dump is **not cured** by the environmental authorities and DWS's disallowing of the discard dump for purposes of the environmental authorisation under NEMA and the water-use licence under the NWA, respectively. These are separate authorisations in terms of separate legislation, and the unacceptable scope of one such authorisation cannot be cured simply by that scope being prohibited by another authorisation.

Part D: The critical, sensitive and vulnerable ecosystems impacted by the proposed mine (in supplementation of the appellants' second and fourth grounds of appeal)

24. In supplementation of the appellants' second and fourth grounds of appeal, and in response to Atha's Replying Submissions, the appellants state the following:

D.1. Longstanding investment by all three spheres of government and various statutory and other conservation bodies in the environmental protection and conservation of the area that Atha proposes to mine

25. While Atha may suffer economic loss if the DMR: DG decides, in this appeal, to reject the EMPR because *'all expenditure and efforts to date (including those in respect of the separate application-procedures under other statutes) become fruitless or wasted'*¹¹, **significant expenditure and work by all three spheres of government (national, provincial and local) and various statutory and other conservation bodies will be wasted and/or compromised if the DMR: DG confirms the approval of the EMPR (i.e. dismisses this appeal)**, namely:

25.1. In 2006 the **Mpumalanga Provincial Government's Mpumalanga Biodiversity Conservation Plan** (MBCP) classified the area as an "Irreplaceable Critical Biodiversity Area" from an aquatic perspective and "Irreplaceable", "Highly Significant" or "Important & Necessary" Critical Biodiversity Areas from a terrestrial perspective (see attached figures marked 'W' and 'X', respectively). The MBCP has been updated periodically, and was renamed the **Mpumalanga Biodiversity Sector Plan** (MBSP). In 2013 the Mpumalanga Provincial Government's MBSP still classified the area as "*Irreplaceable Critical Biodiversity Areas*" and "*Optimal Critical Biodiversity Areas*" (see attached figure marked 'Y').¹²

25.2. In 2008 the multi-stakeholder **Grasslands Programme**, which included the South African National Biodiversity Institute (SANBI), was established to protect South Africa's grasslands. The Programme was financed through an \$8.3 million investment from the Global Environment Facility, managed by the United Nations Development Programme. One of the focus areas of the project was the Wakkerstroom Wet Grasslands Area, in which the proposed mine area is situated.

¹¹ Paragraph 30 of Atha's Replying Submission, read with the various preceding paragraphs in which Atha sets out its expenditure on the proposed Yzermyn project

¹² See paragraph 15.6 of the appellants' Statement of Grounds of Appeal

- 25.3. The proposed mine area was identified as a priority area for inclusion as a protected area in the **national government's** March 2009 **National Protected Area Expansion Strategy**¹³ and the **Mpumalanga provincial government's** July 2009 **Mpumalanga Protected Area Expansion Strategy**¹⁴ (see attached figures marked 'Z' and 'AA', respectively).
- 25.4. The relevant **District Municipality's** (Gert Sibande District Municipality's) April 2009 and November 2014 **Spatial Development Frameworks** recognised the area's high ecological importance and high conservation value. The relevant **Local Municipality's** (Dr Pixley Ka Isaka Seme Local Municipality's) November 2010 **Spatial Development Framework** classified the area as a '*sensitive natural area*'. On 21 February 2012, the relevant MEC published by notice in the Mpumalanga Gazette an **Environmental Management Framework for the Local Municipality** in terms of NEMA, in terms of which the proposed mine area falls within a "*Zone 1: Conservation*" Environmental Management Zone.
- 25.5. On 8 July 2010, the Minister of Water and Environmental Affairs and nine MECs responsible for environmental affairs in the Gauteng, North West, Eastern Cape, Mpumalanga, Limpopo, Northern Cape, Free State, Kwazulu-Natal and Western Cape provinces, signed the **Grasslands Declaration** committing government to the conservation of grasslands biodiversity.
- 25.6. On 31 August 2010, the Minister of Mineral Resources imposed a moratorium on the granting of all prospecting rights in South Africa¹⁵. The moratorium was extended on 28 February 2011 for one month until 31 March 2011, **except for Mpumalanga** in respect of which the moratorium was extended to 30 September 2011¹⁶. At the time of the extension of the moratorium in February 2011, the Minister was quoted as telling 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.*" According to the Minister, the biggest challenge in Mpumalanga was **environmental matters, "issues of ecology"**. "*You find sensitive areas where rights have been granted,*" she was quoted as saying. "*We intend to address that matter, hence we are not going to*

¹³ Available at: <https://cer.org.za/wp-content/uploads/2010/05/National-Protected-Areas-Expansion-Strategy-2008.pdf>

¹⁴ Available at: <https://cer.org.za/wp-content/uploads/2010/05/Mpumalanga-Protected-Areas-Expansion-Strategy-2009.pdf>

¹⁵ GN R768 in GG 33511 of 31 August 2010

¹⁶ GN R160 in GG34057 of 28 February 2011 as amended by GN R287 in GG 34171 of 31 March 2011

*lift the moratorium, so as to make sure that we respond to the challenges of nature. Unfortunately rights were granted, but we'll have to address those issues.”*¹⁷ On 31 May 2012 the Minister signed off on the DMR's Annual Report for 2011/12. The Minister 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.**” The prospecting right that Atha ‘purchased’ would have been one of the 41 rights to which the Minister was referring.

25.7. On 9 December 2011 the then Minister of Water and Environmental Affairs published in terms of the National Environmental Management: **Biodiversity Act** 10 of 2004 a **National List of Ecosystems that are Threatened and in Need of Protection**¹⁸. The proposed mine area is located in the **Wakkerstroom/Luneburg Grasslands ‘Endangered Ecosystem’** in terms of that list (see attached figure marked ‘**BB**’).¹⁹

25.8. In August 2011 the Water Research Commission, the Council for Scientific and Industrial Research (CSIR), SANBI, the Department of Water Affairs (DWA) and the Department of Environmental Affairs (DEA) published the **Atlas of National Freshwater Ecosystem Priority Areas in South Africa** (the NFEPA Atlas). The proposed mine area is a B-ecological-category (i.e. largely natural) River Freshwater Ecosystem Priority Area (FEPA) and 6 wetland FEPAs (of A/B ecological category, i.e. natural or largely natural) occur in close proximity to proposed mine (some within 1km of underground mine area) (see attached figure marked ‘**CC**’).

25.9. In March 2013, the CSIR completed the **Strategic Water Source Areas Report** for WWF-SA. The proposed mine area was identified as comprising part of the Enkangala Drakensberg Strategic Water Source Area (see attached figure marked ‘**DD**’), and thus as being part of the 8% of South Africa’s land area that provides 50% of our surface water run-off.

¹⁷ <https://www.iol.co.za/business-report/economy/mine-rights-moratorium-to-be-lifted-1023216>

¹⁸ GN 1002 in GG 34809 dated 9 December 2011; available at: <https://cer.org.za/wp-content/uploads/2004/09/National-List- -full.pdf>

¹⁹ See paragraph 15.3 of the appellants’ Statement of Grounds of Appeal

- 25.10. On 22 May 2013 the “**Mining and Biodiversity Guideline: Mainstreaming Biodiversity into the Mining Sector**” was published by the DEA, the DMR, the Chamber of Mines, the South African Mining and Biodiversity Forum and SANBI. The proposed mine area is identified in the Mining and Biodiversity Guideline as a Category B area, having the “*Highest biodiversity importance*” and being at the “*Highest Risk for mining*” (see attached figure marked ‘EE’).²⁰
- 25.11. In August 2013 the then **Minister of Water and Environmental Affairs** published the **National Water Resource Strategy** (June 2013; 2nd Edition) (NWRS)²¹ in terms of section 5(4)(b) of the National Water Act 36 of 1998 (NWA).²² The ‘Water Resource Protection’ Chapter of the NWRS (Chapter 5) recognises government’s research on National Freshwater Ecosystem Priority Areas (see paragraph 25.8 above) and Strategic Water Source Areas (see paragraph 25.9 above) as important water resource protection measures.
- 25.12. On 22 January 2014 the Mpumalanga MEC for Agriculture, Rural Development, Land and Environmental Affairs declared the proposed underground mine area as part of the **Mabola Protected Environment** in terms of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA) (see attached figure marked ‘FF’).²³
- 25.13. In July 2018 the Water Research Commission, CSIR and a groundwater consulting company called Delta H published a further report on South Africa’s Strategic Water Source Areas.²⁴ This report is the product of a 3-year project funded primarily by the Water Research Commission. Prior to its finalisation, the report was reviewed by a project reference group which included scientific experts, senior planners and policy makers within the DEA, Department of Water and Sanitation, SANBI, the CSIR, the Water Research Commission and SANParks, as well as representatives from WWF-SA, amongst others. In

²⁰ See paragraph 15.5 of the appellants’ Statement of Grounds of Appeal; available at https://www.environment.gov.za/sites/default/files/legislations/miningbiodiversity_guidelines2013_0.pdf

²¹ Available at: <http://www.dwa.gov.za/documents/Other/Strategic%20Plan/NWRS2-Final-email-version.pdf>

²² Government Notice No. 845 in Government Gazette No. 36736 dated 16 August 2013

²³ See paragraph 15.2 of the appellants’ Statement of Grounds of Appeal

²⁴ Entitled “Identification, Delineation and Importance of the Strategic Water Source Areas of South Africa, Lesotho and Swaziland for Surface Water and Groundwater” and available at: <http://www.wrc.org.za/mdocs-posts/identification-delineation-and-importance-of-the-strategic-water-source-areas-of-south-africa-lesotho-and-swaziland-for-surface-water-and-groundwater/>

terms of that report, the **entire proposed mine area now falls within the Enkangala Drakensberg Strategic Water Source Area** (see attached figure marked 'GG').

26. In paragraph 16 of its Replying Submission Atha explains that during **2011** (indeed, this was on **17 November 2011**) the shareholding of Bunengi Mining Services (Pty) Ltd (Bunengi), the holder of a prospecting right in respect of, amongst others, the proposed Yzermyn mine area, was acquired by Turvil Investments (Pty) Ltd, a company in the Atha Group which subsequently changed its name to Atha-Africa Ventures (Pty) Ltd. It is apparent from correspondence dated **June 2011** between Allan Bullock representing Bunengi and Angus Burns of WWF-SA, attached marked 'HH', that very shortly before the Atha Group in effect purchased the prospecting right, Bunengi was specifically informed that an application for a mining right in that area would likely be met with strong resistance by interest groups and might well be rejected by virtue of the strategic environmental status of the area. Amongst other things, Angus Burns informed Allan Bullock that the mine area is a '*crucial water production area*', falls within the '*National and Provincial Protected Area expansion zones*' and indeed had '*recently been assessed as part of the Stewardship initiative in the area and have all been proposed for protected area declaration*', is adjacent to the Kwamandhlangampisi Protected Environment, is located in areas classified as '*Irreplaceable, Highly Significant, and Important and Necessary*' in the Mpumalanga Biodiversity Conservation Plan, is '*located in endangered and vulnerable threatened ecosystems (in terms of [the Biodiversity Act])*' .
27. Commercial investment projects carry risk. For this reason investors undertake due-diligence and other investigations of their investment opportunities. Had Atha undertaken proper due-diligence prior to 'purchasing' the prospecting right in late-2011, it would surely have been made aware of the South African government and others' substantial work (and resources invested), since 2006, to protect and conserve the area. Thus, it is not justifiable for Atha to claim, as it does, that its investment in the proposed Yzermyn mine predated the recognition of the area as environmentally important.²⁵ Any financial loss that Atha would suffer if the DMR: DG rejects the EMPR, as he should do in accordance with the South African government's **14 years of investment in protecting and conserving the recognised environmental infrastructure in the area**, would be a consequence of Atha's inadequate due-diligence investigations into the environmental status of the area and/or failure to heed that environmental status.

²⁵ See, for example, paragraph 79.2 of Atha's Replying Submission

D.2. The legal relevance of this legislation, policy and research to a decision to approve or reject Atha's EMPR

28. Paragraph 25 above explains in detail the steps that the State has taken, through legislation, policy and research, to conserve and protect the area from unsuitable development. While none of these instruments prohibit mining in Atha's proposed mine area (except, in the case of NEMPAA, the permission of the Ministers of Environmental Affairs and Mineral Resources is required for the mine to proceed in the Mabola Protected Environment²⁶), they **militate against the approval of the EMPR** in circumstances in which Atha's proposed mining activity will unacceptably negatively impact the environment.

29. In elaboration of paragraph 25 above, those policy documents state the following as regards the **implications** of their classification and/or recognition of the area:

29.1. Mpumalanga Biodiversity Sector Plan (MBSP)²⁷: The MBSP Handbook (2014) provides that the MBSP *"is a spatial tool that forms part of a broader set of national biodiversity planning tools and initiatives that are provided for in national legislation and policy. It comprises a set of maps of biodiversity priority areas accompanied by contextual information and land-use guidelines that make the most recent and best quality biodiversity information available for use in **land-use and development planning, environmental assessment and regulation, and natural resource management.**"* (p. 1; my emphasis). In his foreword to the MBSP Handbook the MEC, at that time, stated that: *"**The realisation is that Critical Biodiversity Areas should remain in a natural state and be managed appropriately in order to meet our commitments to sustainable development and a healthy environment for all. Our natural environment offers us a suite of natural solutions in the face of unemployment, rising poverty and climate change. The Mpumalanga Provincial Government is committed to ensure that the MBSP is implemented by provincial departments and municipalities.**"* (p. x; my emphasis). The MBSP is therefore an Mpumalanga-provincial policy document comprising high quality biodiversity information and identifying biodiversity conservation priorities ('Critical Biodiversity Areas') for purposes of environmental assessment and regulation decisions, i.e. precisely decisions like the DMR: DG's current decision to approve or reject Atha's EMPR on appeal.

²⁶ At present, Atha does not have this permission, and therefore may not mine in the Mabola Protected Environment

²⁷ In elaboration of paragraph 25.1 above

29.2. Local sphere of government²⁸: The relevant Local Municipality's Spatial Development Framework (SDF) provides that '*sensitive natural areas*', which the proposed mine area is identified as being, '*should be considered as protected and development proposed in the area should be directed by the different environmentally sensitive aspects as described in the environmental section of the SDF...*' (p. 172). The environmental section of the SDF states, in respect of the proposed mine area, that:

29.2.1. Operational mines pose a significant threat to underground water quality (p. 71);

29.2.2. "*The spreading of coal mining activities in the Wakkerstroom area is of concern as this area is of high conservation value to the extensive wetlands found there. **Mining would seriously threaten the integrity of the wetlands and other habitats***" (p. 76-77; my emphasis);

29.2.3. "*The **high value of properly functioning ecosystems particularly in terms of water services provides an economic justification for their protection and restoration***" (pp.79-80; my emphasis);

29.2.4. "*One of the key regulating ecosystem services provided by [the] grasslands area [is] associated with the water environment given the areas importance at the headwater of three major [Water Management areas]... Numerous wetlands ...are centres of biodiversity, act as carbon sinks and are paramount to the hydrological functioning of drainage systems. **The services provide water security for the area and also play a critical role as a "water factory" area with national importance for water security...***" (pp.79-80; my emphasis);

29.2.5. "*The available evidence and observation of the situation in other mining areas indicates a **high risk of significant unmitigated cumulative impacts from intensive mining***" (pp.79-80; my emphasis); and

29.2.6. "*The consideration of land use changes ideally needs to take climate change implications into account given the importance of the ecosystem services that natural habitats provide in both mitigating and adapting to the impacts of climate change. In essence, natural vegetation is the optimum from a greenhouse gas emissions perspective followed by forestry (which has potentially negative*

²⁸ In elaboration of paragraph 25.4 above

biodiversity and water use implications), agriculture (which can result in relatively low emissions if well managed) and mining (which essentially extracts concentrated carbon in the form of coal from the earth for burning and release into the atmosphere while also releasing methane gas embedded in the coal seam which has a global warming potential that is roughly 20 times greater than that of carbon dioxide per volume). In addition, while management practices have a significant potential to reduce emissions for agriculture, their potential in the case of coal mining is low given current technologies.” (p. 81)

29.3. The relevant District Municipality’s 2014 Spatial Development Framework states that:

29.3.1. “[O]wing to their crucial role in maintaining the ecological integrity in the area” and in “hydrological management, flood attenuation and water quality maintenance”, the grasslands and wetlands in the Wakkerstroom region “have a high conservation value and should be protected at all cost” (p. 112);

29.3.2. “[H]ence, to ensure the optimal protection and sustainable utilisation of the District’s natural environmental resources and areas of high biodiversity value, the SDF proposes that the environmental heritage and conservation areas, biodiversity hotspots and ecological corridors should be treated as a special Biodiversity Management Zone to be actively protected, managed and enhanced, so as to ensure that these are not **degraded by mining**, forestry, agricultural and human settlement activities” (p. 113; my emphasis); and

29.3.3. The “sensitive upper catchments and wetlands of the Wakkerstroom area” should be “legally protected” (p. 113).

29.4. The proposed mine area is classified as a “Zone 1: Conservation” Environmental Management Zones in terms of the Local Municipality’s 2012 Environmental Management Framework (EMF). In terms of the EMF, “Mining, dumping, dredging and prospecting” is an “undesirable type of activity” and should “**not [be] allowed at all**” in a Zone 1: Conservation area (p. 88).

29.5. In summary, the spatial development and environmental management policy documentation of the relevant local spheres of government, at local and district level, regard the area as comprising vitally important ecological, particularly hydrological, infrastructure and seek the protection of those environmental resources and ecosystem

services, stressing that mining is an undesirable activity that would very likely degrade the area and would not provide economic justification given the valuable ecological infrastructure.

29.6. Biodiversity Act: Endangered Ecosystem²⁹: In terms of section 52(2)(b) of the Biodiversity Act, ‘*endangered ecosystems*’ are ‘*ecosystems that have undergone degradation of ecological structure, function or composition as a result of human intervention, although they are not critically endangered ecosystems*’ [i.e. ‘*endangered ecosystems*’ are the second highest category of threatened ecosystems]. The DEA’s promulgated List of Ecosystems that are Threatened and in Need of Protection states that ‘*[t]he purpose of listing threatened ecosystems is primarily to reduce the rate of ecosystem and species extinction. This includes preventing further degradation and loss of structure, function and composition of threatened ecosystems. The purpose of listing protected ecosystems is primarily to preserve witness sites of exceptionally high conservation value. For both threatened and protected ecosystems, the purpose includes enabling or facilitating proactive management of these ecosystems*’ (p. 9). Thus, the listing of the proposed mine area as an ‘*endangered ecosystem*’ constitutes a DEA policy expression, in terms of our national legislation specifically directed at the management and conservation of South Africa’s biodiversity (the Biodiversity Act), that **environmental management decision-making about this area should take into account the endangered status of this ecosystem.**

29.7. National Water Resource Strategy (NWRS):³⁰ The NWRS is a statutorily prescribed policy instrument that, in terms of the preamble to Part 1 of Chapter 2 of the NWA, ‘*provides the framework for the protection, use, development, conservation, management and control of water resources for the country as a whole. It also provides the framework within which water will be managed at regional or catchment level, in defined water management areas*’. The NWA prescribes that **the water resources of the Republic “must be protected, used, developed, conserved, managed and controlled in accordance with the national water resource strategy”** (section 5(3)). As stated above, the NWRS recognises the government’s National Freshwater Ecosystem Priority Area (NFEPA) research (which, in

²⁹ In elaboration of paragraph 25.7

³⁰ In elaboration of paragraph 25.11 above

short, found that the proposed mine area is a NFEPA³¹) as an important water resource protection measure:

29.7.1. *“...to support the health and sustainability of water ecosystems and thus the provision of water-related ecosystem services, a certain proportion of water ecosystems need to be maintained in **good ecological condition**”;*

29.7.2. *“It is best to identify these water ecosystems systematically and proactively, in the most efficient configuration, based on the **best available science**”;*

29.7.3. *“South Africa has done this in the form of maps of National Freshwater Ecosystem Priority Areas (NFEPAs), which identify **strategic spatial priorities for conserving water ecosystems and supporting the sustainable use of water resources**”;*

29.7.4. *“NFEPA maps and their supporting documents ... provide a single, nationally consistent information source for incorporating water ecosystem goals into planning and **decision-making processes**.” (p. 37-8; my emphasis)*

29.8. The NWRS also recognises South Africa’s Strategic Water Source Areas (SWSAs)³², including the mine area in question, as being **vital for water security**:

29.8.1. *‘Strategic Water Source Areas supply a disproportionately high amount of the country’s mean annual runoff in relation to their surface area. These areas make up 8% of the land area across South Africa, Lesotho and Swaziland, but provide 50% of the water in these countries.’ (p. 42)*

29.8.2. *‘These areas form the **foundational ecological infrastructure on which a great deal of built infrastructure for water services depends**. They are thus **strategic national assets that are vital for water security, and need to be acknowledged as such at the highest level across all sectors. Appropriate management of Strategic Water Source Areas, can produce significant returns in terms of water quality and quantity**. Investing in Strategic Water Source Areas is also an important mechanism for longterm adaptation to the effects on climate change on water provision growth and development.’ (p. 42; my emphasis)*

³¹ See paragraph 25.8 above

³² In elaboration of paragraph 25.9 above

29.9. In summary regarding the NWRS, this national-government, statutorily-required policy document states that the NFEPA Atlas is based on the best available science and should be incorporated into decision-making processes about water resources. It further states that SWSAs should be acknowledged and appropriately managed at the highest level across all sectors as strategic national assets that are vital for water security. Furthermore, the NWA expressly **requires** that South Africa's water resources be protected, used, developed, conserved, managed and controlled in accordance with the NWRS.

29.10. July 2018 Strategic Water Source Areas report³³: The July 2018 Strategic Water Source Areas Report by the Water Research Commission, CSIR and groundwater consulting company Delta H found that the entire proposed mine area falls within the Enkangala Drakensberg Strategic Water Source Area. This research was conducted in terms of section 3(1)(a) of the Water Research Act No. 34 of 1971, and is thus statutorily-undertaken research. The Report 'recommendations' provide that:

29.10.1. *'The protection and restoration of Strategic Water Source Areas (SWSAs) is of direct benefit to all downstream users and this dependence **needs to be considered in decisions relating to these primarily headwater catchments**'* (p. xi). This must necessarily include the DMR: DG's current decision to approve or reject Atha's EMPR on appeal;

29.10.2. *'Activities such as mining or shale gas extraction must be regulated to ensure they **do not damage or destroy any aquifer.**'* (p. xii)

29.10.3. There must be co-operative governance on SWSAs between all government agencies that have a role in land management planning and the regulation of land use and land-use practices, **including the DMR** (p. xiii).

29.11. Mining and Biodiversity Guideline³⁴: As stated above, the proposed mine area is a Category B area, having the "Highest biodiversity importance" and being at the "Highest Risk for mining". The significance of the biodiversity features in a Category B area is that:

³³ In elaboration of paragraph 25.13 above

³⁴ In elaboration of paragraph 25.10 above

29.11.1. If the existence of the biodiversity features is confirmed in an EIA, *“the likelihood of a fatal flaw for new mining projects is very high because of the significance of the ... ecosystem services”*;

29.11.2. Category B areas *“are viewed as necessary to ensure the protection of biodiversity, environmental sustainability, and human well-being”*; and

29.11.3. *“An EIA ...should fully take into account the environmental sensitivity of the area, the overall environmental and socio-economic costs and benefits of mining, as well as the potential strategic importance of the minerals to the country. Authorisations may well not be granted. If granted, the authorisation may set limits on allowed activities and impacts, and may specify biodiversity offsets...”*
(p. 29 of the Mining and Biodiversity Guideline)

29.12. Mabola Protected Environment³⁵: As stated above, Atha may not mine in the Mabola Protected Environment without the permission of the Ministers of Environmental Affairs and Mineral Resources in terms of section 48(1)(b) of NEMPAA. This is a separate authorisation process to the present appeal, however the MEC’s decision to declare the Mabola Protected Environment is still highly relevant to the DMR: DG’s decision whether to approve or reject Atha’s EMPR on appeal. The declaration of the Mabola Protected Environment constituted a decision by the MEC to afford the proposed underground mine area the legal protection of a Protected Environment in terms of NEMPAA and thereby to seek to protect and conserve the area’s ecological infrastructure.

30. It is clear from the preceding discussion that the area in which the coal mine would be situated is unlike other areas in which coal mines might be situated. It falls within an area which has been recognised in policy documentation of the relevant local government, the Mpumalanga provincial government, and national government departments responsible for environment, water and indeed the DMR as well, as requiring protection.

31. In *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil and Another* [2006] 2 All SA 17 (SCA) the Supreme Court of Appeal confirmed that:

“The adoption of policy guidelines by state organs to assist decision makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible. This is particularly so where the decision is a complex one requiring the balancing of

³⁵ In elaboration of paragraph 25.12 above

*a range of competing interests or considerations, as well as specific expertise on the part of a decision-maker... **Once it is established that the policy is compatible with the enabling legislation, as here, the only limitation to its application in a particular case is that it must not be applied rigidly and inflexibly, and that those affected by it should be aware of it. An affected party would then have to demonstrate that there is something exceptional in his or her case that warrants a departure from the policy***" (para 19; my emphasis).

32. In this instance, where the impacts of the mine will negatively impact on water resources and biodiversity in the mine area³⁶, it is submitted that the DMR: DG, as an organ of state, is duty-bound to take into account the status of the mine area as an area which all three spheres of government consider is as being inappropriate for development of an underground coal mine. It is respectfully submitted that it would not be reasonable for the DMR: DG to dismiss without good reason this extensive, relevant body of legally-mandated and scientifically-robust government policy. Indeed, there are no exceptional considerations in the public interest which warrant a departure from this body of government policy.

33. We also submit that the DMR: DG's application of this body of government policy to **reject** the EMPR is in accordance with:

33.1. The object in section 2(h) of the MPRDA to *'give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an **orderly and ecologically sustainable manner while promoting justifiable social and economic development***' (my emphasis). Indeed, unorderedly decision-making and legal and policy uncertainty arise when an extensive body of relevant government policy is unjustifiably departed from in decision-making.

33.2. The Minister of Mineral Resources' obligation, as the custodian of South Africa's mineral resources, to *'ensure the sustainable development of South Africa's mineral ... resources **within a framework of national environmental policy, norms and standards while promoting economic and social development***' (section 3(3) of the MPRDA).

34. In concluding this section, the appellants would like to draw out an additional important finding of the July 2018 Strategic Water Source Area (SWSA) Report.³⁷ That Report investigated the spatial overlap between the SWSAs and coal fields *'as areas where there is a potential for mining to increase acid mine drainage and affect all downstream water-users and ecosystems'* (p. 155). The Report included the following findings (pp. 128-130):

³⁶ See the appellants' first and second grounds of appeal and Part E below

³⁷ See paragraph 25.13 above

34.1. 'South Africa has 19 coalfields within the Karoo super group strata with the total recoverable reserves estimated at 55 333 Mt or about 50 years of coal supply. ...[T]here are substantial coal reserves in areas that do not overlap with SWSAs at all. **The second most extensive overlap between the coals fields and SWSAs is the Enkangala Grasslands at nearly 42% ... The Enkangala Grasslands has already been identified as a critical water-energy conflict area (Colvin et al., 2011).'**' (my emphasis);

34.2. 'Nationally, the total area of the overlap between the coalfields and the SWSAs is about 10 007 km² which is equivalent to **just 8% of the total area of the coalfields. there is potentially a large amount of coal that could be mined instead of extending the existing mines, or opening new mines, in those SWSAs which have been significantly affected already or could be adversely affected by further mining.'** (my emphasis); and

34.3. In particular, the extent of overlap between the Enkangala Drakensberg SWSA and the Utrecht coalfield, within which Atha intends to mine, is **only 15.5%** (Table 49).

35. In short, these findings make it clear that there is no justifiable reason to mine for coal in a SWSA (because only 8% of South Africa's coalfields fall within SWSAs – 92% of coalfields do not!) and furthermore there is no justifiable reason to mine for coal in the Enkangala Drakensberg SWSA (because only 15.5% of the Utrecht coalfield falls within this SWSA – 84.5% of this coalfield does not!). The appellants reiterate their submissions above (see paragraphs 26 and 27 above) about Atha's apparent failure to do proper due-diligence.

Part E: The impacts of the proposed mine on water resources and biodiversity and the lack of appropriate mitigation measures (in supplementation of the appellants' first ground of appeal)

36. The appellants submit the GCS review (Annexure V hereto) in supplementation of their first ground of appeal.

Part F: Ad hominem statements in Atha's Replying Submission

37. Atha's Replying Submission regrettably contains a number of *ad hominem* statements about the appellants and the CER (the appellants' attorneys of record). The appellants have, for the convenience of the decision-maker, rather engaged in this Responding Statement with facts and submissions pertaining to this appeal and not irrelevant personal attacks. Suffice to state that all such *ad hominem* statements about the appellants and the CER must be taken as denied.

Part G: New (seventh) ground of appeal: Atha has made inadequate financial provision for the rehabilitation or management of negative environmental impacts

38. The now-repealed section 41(1) of the MPRDA, which was and still is applicable to the approval of Atha's EMPR in terms of section 39(4) of the MPRDA, provided:

*'An applicant for a ... mining right ... must, before the Minister [or his delegate] approves the ... environmental management programme in terms of section 39(4), **make the prescribed financial provision for the rehabilitation or management of negative environmental impacts.**'* (my emphasis)

39. The now-repealed, but likewise still-applicable, section 41(3) of the MPRDA provided that, *'[t]he holder of a ... mining right ... must annually assess his or her environmental liability and increase his or her financial provision to the satisfaction of the Minister.'*

40. Regulation 54 of the MPRDA Regulations, which dealt with the quantum of financial provision, required that:

"54(1) The quantum of the financial provision as determined in a guideline document published by the Department from time to time, include a detailed itemisation of all actual costs required for-

(a) premature closure regarding-

*(i) **the rehabilitation of the surface of the area;***

(ii) the prevention and management of pollution of the atmosphere; and

*(iii) **the prevention and management of pollution of water and the soil;** and*

(iv) the prevention of leakage of water and minerals between subsurface formations and the surface.

(b) decommissioning and final closure of the operation; and

*(c) **post closure management of residual and latent environmental impacts.**"* (my emphasis).

41. An itemised calculation of the closure-cost estimate of the proposed mine appears on pages 535 and 536 of the March 2014 Approved EMPR. In purported fulfilment of the requirements of section 41(1) of the MPRDA, Atha provided a financial provision guarantee to the DMR on 4 June 2015 in an amount of R5,758,000.00, through Lombard Insurance Company Limited. This equates to the amount reflected in the closure-cost estimate in the March 2014 Approved EMPR.

42. The CER, on behalf of the appellants, commissioned GCS Water and Environmental Consultants to review Atha's financial provision. The GCS financial provision review report is Annexure T hereto.

43. The GCS financial provision review found that:

43.1. **Atha has not made financial provision for the treatment of post-closure decant.** It is stated in the commentary on the closure-cost estimate in the Approved EMPR that, in respect of Water Management, “[t]he Master Rate developed by the DMR [and provided in the Guideline] is considered to be over-conservative and too generic to be applied in the case of Yzermyn where the predictive modelling suggests that mine decant will not occur” (p. 534).

43.2. That stance is entirely at odds with:

43.2.1. The Delta H report, which found that: ‘decant from the underground mine voids via the adit and/or unsealed exploration boreholes in the vicinity are likely to occur’ (p. 68).

43.2.2. The SAS 2015 report, which indicates that:

“The potential for post-closure decant of water from the underground mine void via the adit and/or unsealed exploration boreholes (Delta H, 2014) is of particular concern, as this will have a long term effect on surface water quality of not only on the wetlands within the study area, but also on aquatic resources within the greater catchment with special mention of the Assegai River. Should it be considered economically feasible to treat the decant water post-closure until water quality stabilizes, which could take many decades, to pre-mining water quality standards in such a way as to support the post closure land use, which is envisaged to be protected wilderness, the project would be considered feasible, although the impacts on the wetland resources would remain high³⁸.” (p. 105)

43.3. It is evident that Atha failed – crucially – to include the costs of water treatment in the calculation of its financial provision. The inclusion of water treatment costs was a requirement of the then applicable MPRDA Regulations.

43.4. **Atha has not made financial provision for the rehabilitation or loss of wetlands affected by its mining operations.**

43.5. GCS estimated the closure and post-closure costs of water treatment and wetland rehabilitation and offsetting for the proposed Yzermyn mine as follows (NOTE: these values are the total costs concerned with the following relevant dates/events in the Life of

³⁸ The SAS 2014 report found that ‘the impacts on the wetland resources would remain **extremely high**’ (my emphasis)

Mine (LoM): 2020 (mine construction), 2037 (end of LoM), 2082 (commencement of decant treatment) and 2102 (end of water treatment):

Table 5-3. GCS cost estimates for Closure and Post-Closure costs for Yzermyn

Year	Projected Total Cost/R of closure for 10 years
2020	R34 671 496.64
2037	R82 907 778.81
2082	R264 082 734.74
2102	R594 105 303.35

44. It short, GCS found that Atha's financial provision of approximately R5,7 million is woefully inadequate for the rehabilitation and management of negative environmental impacts of the mine.

45. Section 41(1) of the MPRDA requires that an applicant for a mining right make the prescribed financial provision **before** the Minister or his delegate, in the present case the Regional Manager in the first instance and now the DMR: DG on appeal, approves the EMPR in terms of section 39(4). On account of the severe inadequacy of Atha's financial provision, it can in no way be said that Atha has made the prescribed financial provision within the meaning of section 41(1). Therefore, the Regional Manager's approval of Atha's March 2014 EMPR was unlawful and in violation of section 41(1). This unlawfulness requires that the DG reject Atha's March 2014 EMPR and uphold the appellants' appeal. **The appellants submit that on this ground alone their appeal should be upheld.**

Relief

46. In the premises the appellants persist in their appeal, and request that the DG: DMR set aside the Regional Manager's approval of Atha's EMPR for its proposed Yzermyn mine.

SIGNED AND DATED AT CAPE TOWN THIS 9TH DAY OF SEPTEMBER 2019.



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