



Centre for
Environmental Rights
Advancing Environmental Rights in South Africa

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Our Ref: CER3.1/MF

1 February 2011

Dear Minister Shabangu

REQUEST TO THE MINISTER OF MINERAL RESOURCES TO EXERCISE HER DISCRETION UNDER S.49 OF THE MINERALS AND PETROLEUM RESOURCES DEVELOPMENT ACT TO PROHIBIT AND RESTRICT PROSPECTING AND MINING IN AREAS OF CRITICAL BIODIVERSITY AND HYDROLOGICAL VALUE AND SENSITIVITY

You will recall that, on 19 July 2010, the Centre for Environmental Rights, representing a coalition of eight non-government organisations in the environmental and environmental justice sector, wrote to

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Centre for Environmental Rights is a company incorporated under S.21 of the Companies Act, 1973 (2009/020736/08), NPO Ref 075-863, PBO No. 930032226 and a Law Clinic registered with the Law Society of the Cape of Good Hope

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you and the Minister of Water and Environmental Affairs, congratulating both Ministers on the establishment of a joint task team on mining in sensitive areas.

In our letter, we also offered to submit to you a list of geographical areas of the most critical biodiversity and hydrological value and/or sensitivity in South Africa, for the purpose of public consultation towards a declaration of these areas as prohibited or restricted for commercial prospecting and mining under s.49 of the Minerals and Petroleum Resources Development Act, 2002 (Act 28 of 2002) (MPRDA). We stated that this list would be based on extensive scientific research, mapping and other work undertaken by provincial conservation authorities, the Departments of Environmental Affairs and Water Affairs, the South African National Biodiversity Institute (SANBI) and the CSIR, and consulted and agreed between key civil society stakeholders.

After extensive consultation amongst various non-government organisations, we are now in a position to provide you with such a list, which we attach in the form of a formal proposal on behalf of thirteen non-government and civil society organisations. We believe that protecting areas of such critical value through a prohibition on prospecting and mining is in the national interest and in compliance with a wide range of legislative imperatives, including the Constitution of the Republic of South Africa. We further believe such a declaration will promote the sustainable development of the nation's mineral resources, and assist our country in mitigating and adapting to the impacts of climate change.

We have also noted that, since our letter of 19 July 2010:

- government has committed itself to the identification of “national areas... for restricted mineral development” in the Outcome 10 Delivery Agreement of September 2010; and
- there have been calls from the mining industry for the clear identification of environmentally sensitive areas in which mining should not be allowed, in order to avoid fruitless investment by mining companies in such areas.¹

We understand that making a declaration under s.49 of the MPRDA is a complex matter, and as non-government organisations we are prepared to engage with the Ministry and the Department of Mineral Resources on the attached proposal. We trust that you will in any event seek the advice of SANBI, who is best placed to provide independent counsel on this particular matter.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per:



On behalf of the following NGOs and CSOs, in alphabetical order:

BirdLife South Africa (www.birdlife.org.za)

Centre for Applied Legal Studies (<http://web.wits.ac.za/Academic/CLM/LAW/CALS>)

Centre for Environmental Rights (www.cer.org.za)

Earthlife Africa Johannesburg (www.earthlife.org.za)

Endangered Wildlife Trust (www.ewt.org.za)

Environmental Monitoring Group (www.emg.org.za)

Federation for a Sustainable Environment (www.fse.org.za)

Game Rangers Association of Africa (www.gameranger.org)

National Association of Conservancies/Stewardship of SA (www.nacsa.org.za)

South Durban Community Environmental Alliance (www.sdcea.co.za)

Wilderness Foundation (www.wildernessfoundation.co.za)

¹ See, for example, “More clarity needed on SA mining rules” in MiningMX 28 October 2010, available at <http://www.miningmx.com/news/energy/more-clarity-needed-on-sa-mining-rules.htm>

Wildlife and Environment Society of South Africa (www.wessa.org.za)
WWF South Africa (www.wwf.org.za)

Proposal to Minister of Mineral Resources to exercise her discretion under s.49 of the Minerals and Petroleum Resources Development Act, 2002 to prohibit or restrict the granting reconnaissance, prospecting and mining rights and permits



Barberton Mountainlands (Photo: Mervyn Lotter)

BirdLife South Africa (www.birdlife.org.za)
Centre for Applied Legal Studies (<http://web.wits.ac.za/Academic/CLM/LAW/CALS>)
Centre for Environmental Rights (www.cer.org.za)
Earthlife Africa Johannesburg (www.earthlife.org.za)
Endangered Wildlife Trust (www.ewt.org.za)
Environmental Monitoring Group (www.emg.org.za)
Federation for a Sustainable Environment (www.fse.org.za)
Game Rangers Association of Africa (www.gameranger.org)
National Association of Conservancies/Stewardship of SA (www.nacsa.org.za)
South Durban Community Environmental Alliance (www.sdcea.co.za)
Wilderness Foundation (www.wildernessfoundation.co.za)
Wildlife and Environment Society of South Africa (www.wessa.org.za)
WWF South Africa (www.wwf.org.za)

1. Purpose

This is a formal application by thirteen non-government and civil society organisations to the Minister of Mineral Resources to exercise her discretion under s.49 of the Minerals and Petroleum Resources Development Act, 2002 (Act 28 of 2002) (MPRDA), having regard to the national interest and the need to promote the sustainable development of the nation's mineral resources, to:

- prohibit the granting of any reconnaissance permission, prospecting right, mining right or mining permit in respect of certain areas of critical biodiversity, conservation and hydrological importance; and

- impose restrictions on the granting of any reconnaissance permission, prospecting right, mining right or mining permit in respect of other areas of biodiversity, conservation and hydrological importance,

for an indefinite period until the circumstances which caused the Minister so to prohibit or restrict no longer exist.

2. Background

The exploitation of mineral resources is a key tenet of the South African economy. However, the nature of mining (both underground and surface mining) is such that it has both significant direct and indirect impacts on the biophysical environment. This includes impacts on soil, water resources (both groundwater and surface water), geological stability, aquatic and marine biodiversity, terrestrial biodiversity, and air quality. All of these elements are essential for human health and wellbeing, and it is therefore of the utmost importance that the detrimental impacts of mining – evidence of which is becoming more visible every day, such as in the case of acid mine drainage on the Witwatersrand – are appropriately controlled and mitigated.

In addition, mining contributes both directly and indirectly to climate change, and has been identified as a key sector in climate change adaptation and mitigation in the most recent National Climate Change Response Strategy 2010 currently out for comment.² This Strategy describes the threats of climate change to both water resources and terrestrial and marine biodiversity, and recommends interventions that include the following:

- encouraging and facilitating the building of partnerships to enable effective management of areas not under formal protection and investment in the expansion of key protected areas (which were not originally designed with climate change trends in mind) in line with the most robust knowledge of climate change impacts;³
- ensuring that protected area planning and expansion strategies benefit from an eco-system approach and focus to ensure that threatened biomes, landscapes and species are given special protection and that conditions are established that will minimise the risks of species extinction;⁴
- implementing integrated water resource management including protecting and restoring natural systems;⁵ and
- vigorously enforcing compliance with water quality standards to ensure that our water remains fit for use, and that clean water is available for blending to dilute pollutants. Contamination by salts, excessive nutrients, heavy metals and other pollutants must be restricted.⁶

In September 2010, national government launched the so-called Outcome 10 Delivery Agreement, a “negotiated charter which reflects the commitment of the key partners involved in the direct delivery process to working together”. This charter recorded the following:

“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.”

² For example: “Certain mining operations, especially large-scale open-caste mines, reduce natural carbon-sequestration capacity and may also result in increased water stress due to water use and/or pollution.” (p.18)

³ P.22

⁴ P.22

⁵ P.9

⁶ P.10

The Delivery Agreement committed government to the following results and targets (sub-output 3.4):

“National areas negotiated and published by 2015 identified for restricted mineral development:

- *Monitoring and enforcement of mining activities (ongoing)*
- *Comparison of ‘environmentally sensitive areas’ and ‘mineral development priority areas’ by December 2012*
- *Public and stakeholder consultation by June 2013*
- *Gazette restricted mineral development areas in terms of s.49 of the MPRDA by April 2014”*

As civil society organisations, we welcome this commitment by government, and hereby provide input as early as possible in the process described in the Outcome 10 Delivery Agreement into the identification of areas in which prospecting and mining should be either prohibited or made subject to restrictions.

However, we also call on government to accelerate the process outlined in the Outcome 10 Delivery Agreement. We believe that, based on existing research and consultation, it is possible and necessary to start a public consultation process far earlier than 2013, and we are of the view that the proposal contained in this submission is an excellent, well-motivated starting point for such public consultation. We also believe that our nation cannot afford any further loss of areas of the most critical biodiversity and hydrological value and/or sensitivity, and therefore regard this matter as urgent.

3. Legal context

Below we briefly set out the legal context for this proposal.

3.1. The Constitution

S.24 of the Constitution of the Republic of South Africa, 1996 provides that everyone has the right (a) to the environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

S.27(1)(b) of the Constitution also guarantees everyone sufficient food and water, which should be interpreted to mean edible food and potable water; mining in inappropriate areas poses direct threats to drinking water and food production.

S.41(1)(h)(iv) of the Constitution requires all organs of state to cooperate with one another in mutual trust and good faith by coordinating their actions and legislation with one another. This requires organs of state like the Departments of Mineral Resources, Water Affairs and Environmental Affairs to ensure that the implementation of their respective legislation is coordinated, and that their respective legislative mandates can be fulfilled in line with the Constitution.

3.2. The National Environmental Management Act and specific environmental management acts

NEMA establishes principles for decision-making on matters affecting the environment. These principles apply to all organs of state that may significantly affect the environment and “shall apply alongside all other appropriate and relevant considerations, including the State’s responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination”.⁷ The principles serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of

⁷ S.2(1)(a)

the environment,⁸ and guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.⁹

NEMA prescribes that “sustainable development” requires consideration of factors that include the following:

- (i) that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;
- (iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;
- (v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
- (vi) that 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;
- (vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
- (viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.¹⁰

Importantly for this proposal, s.2(4)(r) of NEMA provides that “sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.”

Two of the specific environmental management Acts promulgated under NEMA's framework are the National Environmental Management: Biodiversity Act, 10 of 2004 (Biodiversity Act), and the National Environmental Management: Protected Areas Act, 57 of 2004 (Protected Areas Act). Tools in both these acts will be referred to in this proposal.

3.3. The National Water Act

The National Water Act, 1998 (Act 36 of 1998) (NWA) states its purpose to be “to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors -

- (a) meeting the basic human needs of present and future generations;
- (b) promoting equitable access to water;
- (c) redressing the results of past racial and gender discrimination;
- (d) promoting the efficient, sustainable and beneficial use of water in the public interest;
- (e) facilitating social and economic development;
- (f) providing for growing demand for water use;

⁸ S.2(1)(c)

⁹ S.2(1)(e)

¹⁰ S.2(4)(a)

- (g) protecting aquatic and associated ecosystems and their biological diversity;
- (h) reducing and preventing pollution and degradation of water resources;
- (i) meeting international obligations;
- (j) promoting dam safety;
- (k) managing floods and droughts.”¹¹

It also states that government is the “public trustee of the nation’s water resources” who must “ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.”¹²

The National Water Act also prioritises the determination and protection of the “reserve”, which consists of the “basic human needs reserve” and the “ecological reserve”. “Reserve” is defined in s.1 of the National Water Act as “the quantity and quality of water required (a) to satisfy basic human needs by securing a basic water supply, as prescribed under the Water Services Act, 1997 (Act No. 108 of 1997), for people who are now or who will, in the reasonably near future, be (i) relying upon; (ii) taking water from; or (iii) being supplied from, the relevant water resource; and (b) to protect aquatic ecosystems in order to secure ecologically sustainable development and use of the relevant water resource”.

3.4. The Minerals and Petroleum Resources Development Act 28 of 2002

The MPRDA states that its object is “to make provision for equitable access to and sustainable development of the nation’s mineral and petroleum resources”. It also states in its preamble that it is “the State’s obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development”. It further states that it should “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”.¹³

S.3(3) of the MPRDA provides that “the Minister must ensure the sustainable development of South Africa’s mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.”

S.37(1) of the MPRDA provides that the environmental management principles listed in s.2 of NEMA must guide the interpretation, administration and implementation of the environmental requirements of the MPRDA, and also makes those principles applicable to all prospecting and mining operations. S.37(2) states even more explicitly that “any prospecting or mining operation must be conducted in accordance with generally accepted principles of sustainable development by integrating social, economic and environmental factors into the planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.”

The MPRDA itself recognises that there are certain areas that are not appropriate for prospecting and mining activities, even if there may be exploitable mineral resources in such areas. This includes, subject to the Minister’s national interest discretion described in s.48(2), residential areas, public roads and railways and cemeteries.¹⁴

S.49(1) gives a specific discretion to the Minister to, “after inviting representations from relevant stakeholders, from time to time by notice in the Gazette, having regard to the national interest and the need to promote the sustainable development of the nation’s mineral resources, prohibit or restrict the granting of any reconnaissance permission, prospecting right, mining right or mining permit in respect

¹¹ S.2

¹² S.3(1)

¹³ S.2(h)

¹⁴ S.48(1)

of land identified by the Minister for such period and on such terms and conditions as the Minister may determine.” S.49(2) excludes existing rights from such a declaration. S.49(3) allows the Minister to lift a restriction or prohibition “if the circumstances which caused the Minister so to prohibit or restrict no longer exist”, or to amend the period, term or condition applicable to any prohibition or restriction“ if the circumstances which caused the Minister so to prohibit or restrict have changed”.

Insofar as the interpretation of s.49(1) goes, “sustainable development” is defined in s.1 of the MPRDA as “the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that mineral and petroleum resources development serves present and future generations”; this definition must also be read with the factors listed in s.2(4)(a) of NEMA. Similarly, any interpretation of the phrase “national interest” is subject to the factors listed in s.2(4)(a) of NEMA.

3.5. Existing prohibitions on commercial prospecting and mining

As the Minister will be aware, there are already areas where commercial prospecting and mining are prohibited by legislation. These include the following:



Sterkfontein Caves, Cradle of Humankind World Heritage Site, Gauteng



Mapungubwe World Heritage Site, Limpopo

- 3.5.1. **World Heritage Areas**,¹⁵ such as the Mapungubwe World Heritage Area in Limpopo and the Cradle of Humankind World Heritage Area in Gauteng. In terms of s.48(1)(c) as read with s.9(b) of NEMPAA, commercial prospecting and mining are prohibited in declared World Heritage Sites.

The preamble to the World Heritage Convention Act, 1999 (Act 49 of 1999) records that:

- “the cultural heritage and the natural heritage are among the priceless and irreplaceable possessions, not only of the Republic, but of humankind as a whole”; and
- “the loss, through deterioration, disappearance or damage through inappropriate development of any of these most prized possessions, constitutes an impoverishment of the heritage of all the peoples of the world and, in particular, the people of South Africa”.

¹⁵ Declared in terms of the World Heritage Convention Act, 1999 (Act 49 of 1999)



Marakele National Park, Limpopo (Photo: John Wesson)

- 3.5.2. **Special nature reserves, national parks or nature reserves** declared in terms of the National Environmental Management: Protected Areas Act, 2003,¹⁶ such as the Kruger National Park, Limpopo and the Marakele National Park, Waterberg, Limpopo. In terms of s.48(1) of NEMPAA, commercial prospecting and mining are prohibited in these areas. Nature reserves include nature reserves managed by provincial authorities.

S.17 of the Protected Areas Act records the following purposes of declaring protected areas, including marine protected areas. These purposes include the protection of ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes in a system of protected areas; to preserve the ecological integrity of those areas; to protect areas representative of all ecosystems, habitats and species naturally occurring in South Africa; to protect South Africa's threatened or rare species; to protect an area which is vulnerable or ecologically sensitive; to assist in ensuring the sustained supply of environmental goods and services; to provide for the sustainable use of natural and biological resources; to create or augment destinations for nature-based tourism; to manage the interrelationship between natural environmental biodiversity, human settlement and economic development; generally, to contribute to human, social, cultural, spiritual and economic development; or to rehabilitate and restore degraded ecosystems and promote the recovery of endangered and vulnerable species.

As mentioned above, the 2010 Green Paper on South Africa's Climate Change Response identifies an effective, expanded protected areas system as a key tenet of South Africa's response to climate change.

- 3.5.3. **Marine protected areas** declared under s.43 of the Marine Living Resources Act,¹⁷ 1998 such as the Table Mountain Marine Protected Area and the Dwesa-Cebe

¹⁶ Act 57 of 2003.

¹⁷ Act 18 of 1998

Marine Protected Area. In terms of s.14(1) as read with s.48 of NEMPAA, commercial prospecting and mining are prohibited in marine protected areas.

The most recent State of the Environment Report states that: “Despite the progress already made to safeguard South Africa’s coastline, the urgent need remains to protect offshore habitats, especially in the light of the impacts of offshore fishing and mining activities on the marine environment.”¹⁸

In addition to the purposes of declaring protected areas as set out in the Protected Areas Act, which also apply to marine protected areas, the designation, establishment and management of marine protected areas is an important instrument to safeguard biodiversity and the integrity of ecological processes in the coastal and marine environment. The 2010 Green Paper on South Africa’s Climate Change Response currently out for comment mentions that “[c]limatic changes will almost certainly disturb marine ecosystems, making them more susceptible to invasive species from lower latitudes, so that warmer water species are likely to become more abundant with an overall decline in cold water indigenous species.” It also highlights the likely impacts of climate change on the fisheries sector, and emphasises the urgent need for research in this field.



Table Mountain Marine Protected Area, Western Cape
(Photo: Africa Geographic)



Dwesa-Cebe Marine Protected Area, Eastern Cape

- 3.5.4. **Specially protected forest areas** such as the Wolkberg Wilderness in Limpopo, **forest nature reserves and forest wilderness areas** declared in terms of the National Forests Act, 1998. In terms of s.48(1)(c) as read with s.9(d) of NEMPAA, commercial prospecting and mining are prohibited in these areas.

Above we have listed areas in which commercial prospecting and mining are already prohibited by legislation. We have done so for two reasons. Firstly, we do so to illustrate that the legislature has already recognised that certain geographical areas should be off-limits to such activities.

Secondly, we do so because there have been a number of instances in which prospecting and mining rights have been granted in these areas despite the existing statutory prohibition, typically as a result of false information submitted to the Department of Mineral Resources (DMR). This leads to the unfortunate situation of forcing interested and affected parties, including donor-funded non-government organisations, to approach a court to set aside an inappropriate and unlawful decision, resulting in significant legal costs being incurred unnecessarily by organisations that can ill afford such costs. This situation must be addressed through improved screening and verification methods, and criminal prosecution of applicants who make false or misleading statements to the DMR in their applications.

¹⁸ <http://soer.deat.gov.za/587.html>

4. Proposed prohibition

Against this background, it is proposed that prospecting and mining be prohibited in the areas listed below, without conditions and for such period until the prohibition may be lifted within the requirements of s.49(3)(a).

- 4.1. **Mountain catchment areas** declared in terms of the Mountain Catchment Areas Act, 1970 (Act 63 of 1970), such as the Amatholes in the Eastern Cape;
- 4.2. **Ramsar Sites**, or sites recognised under the Ramsar Convention on Wetlands 1971, such as Barberspan near Delareyville, Blekbospruit near Springs, the Verlorenvlei north of Lamberts Bay, Kosi Bay and the Turtle Beaches/Coral Reefs of Tongaland south of Kosi Bay in KwaZulu-Natal, the Nylsvlei Ramsar Reserve in Limpopo;



Nylsvlei Ramsar Reserve, Limpopo (Photo: John Wesson)

The Ramsar Convention is an intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. The wise use of wetlands is defined as "the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development". "Wise use" therefore has at its heart the conservation and sustainable use of wetlands and their resources, for the benefit of humankind.¹⁹

¹⁹ www.ramsar.org



Wakkerstroom Montane Grassland (Photo: Mervyn Lotter)

- 4.3. **Recognised endangered and critically endangered ecosystems**, such as Wakkerstroom-Luneberg, Mpumalanga; Chrissiesmeer, Mpumalanga; Ngoye Scarp Forest, KwaZulu-Natal; Dullstroom, Mpumalanga; Mananga Cycad Sanctuary, Mpumalanga; Umtamvuna coastal grassland, KwaZulu-Natal; Last fragments of Blesbokspruit Highveld Grasslands, Gauteng; and Kogelberg, Western Cape.

Since 2006, at the request of the Department of Environmental Affairs, SANBI, in consultation with provincial conservation authorities, has led broad public consultation for the first phase of scientifically rigorous identification of endangered and critically endangered ecosystems in the terrestrial environment. The purpose of these lists is to reduce the rate of extinction of endangered and critically endangered ecosystems and species and to preserve witness sites of exceptionally high conservation value. This information is readily available for implementation of a prohibition in terms of s.49 of the MPRDA.



Chrissiesmeer, Mpumalanga (Photo: Ursula Francke)

5. Proposed restrictions

Below we propose restrictions for prospecting and mining in areas of biodiversity and hydrological importance not included in the proposal for prohibitions above.

Note that this section is based on the assumption that the Minerals and Petroleum Resources Development Amendment Act, 2008 (Act 49 of 2008) will not come into effect in its current form. We continue our call that Act 49 of 2008 be brought into effect as promulgated and assented to by the President. The application of Chapter 5 of the National Environmental Management Act, 1998 (NEMA),²⁰ the 2010 EIA Regulations and the Listing Notices published under the 2010 EIA Regulations will address many of the issues that the restrictions in this section attempt to address.

However, should Act 49 of 2008 be brought into effect or repromulgated in an amended form, to the extent that the restrictions proposed below are not captured in NEMA and the EIA regulations published thereunder, we ask that the restrictions below still be considered for implementation, either by inclusion in further legislative amendments or by way of a guideline for the implementation of the MPRDA and/or NEMA, where appropriate.

5.1. Geographical areas to which restrictions must apply

It is proposed that the restrictions described in 5.2 below apply to the geographical areas listed below. For clarity, the geographical areas below are not proposed for complete prohibition for prospecting and mining. Instead, we propose a set of procedural restrictions aimed at improving the quality of decision-making on applications for prospecting and mining rights in these areas:

²⁰ Act 107 of 1998



Magaliesberg Protected Environment (Photo: John Wesson)



Groot Marico Eye (Photo: Bridget Corrigan)

- 5.1.1. Protected environments declared under NEMPAA, such as the Magaliesberg Protected Environment;²¹
- 5.1.2. Focus Areas for protected area expansion identified in the National Protected Areas Expansion Strategy,²² such as parts of the Richtersveld and parts of the Pondoland coast;
- 5.1.3. Priority areas for protected area expansion identified in Provincial Protected Areas Expansion Strategies;
- 5.1.4. Focus Areas for Marine Protected Areas expansion identified in the Offshore Marine Protected Areas project, such as the Agulhas Bank;
- 5.1.5. Critical biodiversity areas as identified in systematic biodiversity plans adopted by the competent authority or in bioregional plans, such as the Kamiesberg Mountain, Northern Cape;
- 5.1.6. Areas identified in an approved Biodiversity Management Plan for ecosystems or species under s.43 of the Biodiversity Act;
- 5.1.7. National freshwater ecosystem priority areas,²³ such as the Groot Marico, the last remaining freeflowing river in the Northwest; and the headwaters of the Umngeni Vlei; and
- 5.1.8. Estuarine functional zones.²⁴

5.2. Proposed restrictions

The following restrictions are proposed for all areas listed in 5.1. above:

- 5.2.1. All documents submitted to the DMR by the applicant for prospecting or mining right or permit must be made available to the public, including prospecting and mining works programmes.²⁵

²¹ In terms of s.48(b) of NEMPAA, no commercial prospecting or mining may be undertaken in a protected environment without the written permission of the Minister and the Cabinet member responsible for minerals and energy affairs.

²² <http://bgis.sanbi.org/protectedareas/NPAESinfo.asp>. This Strategy is defined in the NEMA 2010 EIA Regulations Listing Notice 3 as "South Africa's national strategy for expansion of the protected area network, led by the Department of Environmental Affairs and developed in collaboration with national and provincial conservation authorities. The NPAES sets targets for protected area expansion, provides maps of the most important areas for protected area expansion, and makes recommendations on mechanisms for protected area expansion. Focus areas for protected area expansion are identified in the NPAES. They are large, intact, unfragmented areas of high importance for land-based protected area expansion, suitable for the creation or expansion of large protected areas."

²³ As listed and defined in the National Freshwater Ecosystem Priority Areas Project, available at <http://cogis.qsens.net/csir/national-freshwater-ecosystem-priority-areas-nfepa-project>.

²⁴ As defined in the National Estuaries Layer, available from the South African National Biodiversity Institute's BGIS website (<http://bgis.sanbi.org>).

²⁵ Currently, the general practice amongst most applicants for prospecting and mining rights is only to provide copies of the documents that form part of the environmental impact assessment, and then only in draft form:

- 5.2.2. Notice of the application, the publication of key documents in the environmental impact assessment and notice of public meetings must be published in two national newspapers and a local newspaper.²⁶
- 5.2.3. At least 30 days' notice, excluding public holidays, must be given of all public meetings in the environmental impact assessment process.²⁷
- 5.2.4. Public meetings must be held in at least:
 - 5.2.4.1. the town closest to the proposed mining site; and
 - 5.2.4.2. the closest of the following capital cities: Johannesburg, Cape Town, Port Elizabeth and Durban.²⁸
- 5.2.5. Interested and affected parties notified must include at least the non-government organisations on whose behalf this document has been prepared.²⁹
- 5.2.6. All Scoping Reports, Environmental Impact Reports, Environmental Management Plans (EMPs) and Environmental Management Programmes (EMPRs) must explicitly consider cumulative impacts of the proposed prospecting or mining (current threats to biodiversity and water resources, as well as negative trends influencing the proposed area) and induced/secondary negative implications for hydrological, land use, heritage and tourism resources.³⁰
- 5.2.7. All Scoping Reports, Environmental Impact Reports, EMPs and EMPRs must be submitted for independent peer review by a nationally respected professional in the field of environmental assessment to ensure quality of work.³¹
- 5.2.8. A period of at least 60 days must be allowed for initial objections and comments on all key documents in the environmental impact assessment.³²
- 5.2.9. The Regional Mining Development and Environment Committee (RMDEC), if convened under s.10(2) of the MPRDA, must hold public hearings to allow all objectors to state their case in public before making a recommendation to the Minister.³³

draft scoping reports, draft EIA reports and draft EMPs. Occasionally, not even these documents are made available.

²⁶ This proposed restriction attempts to address the omissions in the current requirements for notification in the MPRDA Regulations, which we regard as flawed and non-compliant with the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).

²⁷ See note 26 above. There are currently no timeframes for notice of public meetings in the MPRDA or MPRDA Regulations. This proposed restriction recognises the fact that there are interested and affected parties in the geographical areas listed in this section who are employed full-time, or may not reside in close proximity to the proposed sites, and who may require time to make arrangements to attend public meetings.

²⁸ See note 26 above. There are currently no requirements regarding the venues for public meetings in the MPRDA or MPRDA Regulations. This proposed restriction recognises the fact that there are interested and affected parties in the geographical areas listed in this section who may not reside in close proximity to the proposed sites.

²⁹ The work of the organisations submitting this proposal covers significant areas of the country. These organisations are also well-networked with many smaller community and civil society organisations across the country. Having said that, including these organisations as interested and affected parties does not eliminate an applicant's duty to notify all interested and affected parties.

³⁰ Considering cumulative impacts is a fundamental requirement for sustainable development. The impact of the lack of consideration of cumulative impacts is clearly visible in Mpumalanga, where prospecting and mining rights applications have been accepted for approximately 53% of the province.

³¹ There is currently no requirement for peer review of these reports in the MPRDA or MPRDA Regulations. This is an important mechanism to ensure accuracy and quality of expert reports on which the DMR will rely when it makes a decision on a prospecting or mining right application, which is essential when it comes to making decisions on whether or not to allow prospecting or mining in sensitive areas.

³² Sensitive areas require more investigation and more and more comprehensive specialist studies, which take time to procure, complete or review.

³³ Public hearings before RMDEC will ensure better recommendations by RMDEC and greater transparency by allowing a comprehensive airing of issues, and will also allow the veracity of representations made to RMDEC to be tested. Public hearings is a well-established mechanism in international jurisdictions to promote transparency and accountability.

- 5.2.10. Minutes of RMDEC meetings and RMDEC recommendations to the Minister must be made available to interested and affected parties.³⁴
- 5.2.11. The objections and comments of statutory authorities (specifically including the Department of Environmental Affairs, the Department of Water Affairs, provincial environment departments, the Department of Agriculture, provincial agriculture departments, the South African Heritage Resources Agency and provincial heritage agencies) must be attached to the RMDEC recommendation to the Minister, i.e. the decision-maker must have sight of these comments when making a decision.³⁵
- 5.2.12. Decisions to approve or not approve prospecting and mining rights in terms of s.17 and 23 of the MPRDA must be made at the head office of DMR, and not at regional level.³⁶
- 5.2.13. In those cases where prospecting or mining right is approved in a restricted area:
 - 5.2.13.1. The financial provision for remediation of environmental damage provided by the right or permit holder in terms of s.41 of the MPRDA must be approved by the Department of Environmental Affairs or the provincial environment department, and the Department of Water Affairs where appropriate;
 - 5.2.13.2. The Environmental Management Plan or Programme must be approved by the Department of Environmental Affairs or the provincial environment department, and the Department of Water Affairs where appropriate;
 - 5.2.13.3. Any offset proposed by the right or permit holder must be approved by the Department of Environmental Affairs or the provincial environment department or agency responsible for biodiversity conservation, and the Department of Water Affairs where appropriate;
 - 5.2.13.4. The right or permit must be identified and prioritised for compliance monitoring by authorities, and compliance monitoring reports made available to interested and affected parties on a monthly basis. In addition, independent audits of compliance must be done at the rights holder's expense on a quarterly basis, and audit reports made available to interested and affected parties. Where non-compliance is detected, operations must cease with immediate effect until non-compliance, and any damage caused by non-compliance, has been remedied.³⁷
- 5.2.14. Where prospecting or mining is proposed in a national freshwater ecosystem priority area³⁸ the specialist studies conducted in the environmental impact assessment must include a specialist study on hydrology and aquatic biodiversity.

³⁴ See note 33 above. Currently, the public has no access to the minutes of RMDEC meetings (assuming that such minutes are even kept) or recommendations made to the Minister by RMDEC, undermining the transparency of decision-making around mining and prospecting.

³⁵ Currently, it is sometimes difficult for the public to assess whether the decision-maker had sight of or had taken into account representations made by other authorities pursuant to s.40 consultation.

³⁶ This proposed restriction will ensure a consistent approach to sensitive areas across the country.

³⁷ Currently, we see very little (if any) evidence of monitoring of compliance with EMPs or EMPRs, and/or enforcement in cases of non-compliance in any prospecting or mining operations, not to mention where such activities are authorised in sensitive areas. Without comprehensive compliance monitoring and transparency of such compliance reports, there is little incentive for the rights holder to comply with the requirements of the EMP or EMPR.

³⁸ <http://cogis.qsens.net/csir/national-freshwater-ecosystem-priority-areas-nfepa-project>