



Western Cape
Government

Environmental Affairs and
Development Planning

MINISTRY OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND
DEVELOPMENT PLANNING

M 3/6/5

Mr L van Zyl
Mystic Pearl 133 (Pty) Ltd
Postnet Suite 1
Private Bag x 22
TYGER VALLEY
7536

Dear Mr van Zyl

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE ADMINISTRATIVE FINE ISSUED FOR THE UNLAWFUL CONSTRUCTION OF STRUCTURES WITHIN 32M OF A WATERCOURSE ON FARM 220, SANDOWN ESTATE, GANSBAAI

The appeal lodged on your behalf against the quantum of the Section 24G fine issued by the Department of Environmental Affairs and Development Planning, has reference.

After careful consideration of your appeal, as well as supporting documentation received, I have decided to dismiss your appeal and confirm the fine of **R 250 000.00 (Two hundred and fifty thousand Rand)**.

In terms of section 24G(4) of the NEMA you are hereby informed that in order for the competent authority to process your application further, the administrative fine of R 250 000.00 (Two hundred and fifty thousand Rand) must be paid.

Payment may be made by cash, cheque or electronic transfer as follows:

Cash Payment:

The amount may be paid at the cashier's office of the Department of Environmental Affairs and Development Planning, ground floor Utilitas Building, 1 Dorp Street, Cape Town from Mondays to Fridays between 8h30 and 12h30. The following allocations must be given to the cashier when making the payment:

809 Utilitas Building, Cape Town, 8001 Private Bag X9186, Cape Town, 8000
tel: +27 21 483 3721 fax: +27 21 483 4174 www.westerncape.gov.za/eadp

Reference No: **S24G00208**

Item: section 24G Administrative fine

Company/ Individual Name:

ID No:

Cheque Payment:

The cheque must be crossed and made payable to the Department and may either be deposited at the aforementioned cash office under the allocations mentioned above or deposited directly in the bank account. (See bank details below)

Electronic Transfer

An electronic transfer may be made to the following account:

Name of Bank:	NEDBANK
Name of Account:	Provincial Government of the Western Cape Department of Environmental Affairs and Development Planning
Account Type:	Current Account
Account Number	1452 045 003
Branch Name:	NEDBANK CORPORATE
Branch Code:	145 209
Reference No.:	S24G00208

You are hereby requested to forward a copy of the proof of payment (e.g. receipt, deposit slip, electronic transfer confirmation) to the Sub-directorate: Rectification for the attention of Shafeeq Mallick (Tel: (021) 483 8339, Fax: (021) 483 4033 and Email: shafeeq.mallick@westerncape.gov.za and quote the abovementioned reference number to ensure that the case officer can acknowledge the payment of the administrative fine.

The administrative fine must be paid within **60 days** from the date of this letter. If no such payment is received within the abovementioned timeframe, the competent authority will proceed with the law enforcement action.

Please take note that the administrative fine is not an authorisation of the unlawful commencement of the listed activities according to the NEMA. Consideration of your application will only commence upon the payment of the administrative fine.

REASONS FOR THE DECISION:

The following are the reasons for dismissing your appeal and confirming the original R250 000,00 quantum of the administrative fine issued by the Delegated Authority:

The Delegated Authority was correct in imposing an Administrative Fine as section 24G(4) of the NEMA requires the applicant, that has commenced with an activity without an authorisation, in the rectification process of the unlawful activity, to pay an administrative fine which may not exceed R 5 Million Rand.

An administrative fine calculator, which was developed by the National Department of Environmental Affairs, was used as a guide to determine an administrative fine. The calculator is based on the following indexes:

- o Social Benefit Index (exclusively for the benefit of organs of state)
- o Socio-Economic Impact Index;
- o Biodiversity Impact Index;
- o Sense of Place &/or Heritage Impact Index; and
- o Pollution Impact Index.

According to the national Department of Environmental Affairs, the Social Benefit index is used exclusively for organs of state who try to positively contribute to their service delivery mandates. Ratings are provided by the EAP and these together with the EIR and specialists reports are considered when determining an appropriate fine. The limited impacts caused by the activity resulted in a fine being imposed that is a small percentage of the current maximum fine amount of R5 million.

The S24G fine calculator is a guide that is not rigidly applied and is used in order to reduce the maximum section 24G fine amount of R5 million to an appropriate fine based on applicable impacts resulting from the unlawful commencement activity/ies on the receiving environment. The determination of a fine is based on the assessment undertaken for the section 24G application and the significance of impacts of the activity/ies on the environment. Each section 24G administrative fine is determined on its own merit and is dependent on the information provided in the application. The section 24G fine is not a criminal sanction and the section 24G process is distinct and not punitive in nature.

I have confirmed the decision-maker's R250 000-00 administrative fine determined by the fine calculator as a guide mentioned above, inter alia taking into account the Plotz judgment, indicating that a decision-maker, informed by policy guidelines, must exercise his discretion with an open mind. Considering all the above-mentioned documentation, I am of opinion that the construction of the bridge structures impacted on the environment. The appellant, however, constructed the bridge structures without environmental authorisation and must therefore pay the administrative fine of R250 000-00 as required in terms of section 24G(4) of the NEMA.

The section 24G calculator distinguishes between the following two categories of offenders:

- o Category 1 offenders are companies, parastatals and government departments.
- o Category 2 offenders are individual persons.

The calculation of the administrative fine is also based on the fact that the appellant in this matter is a Category 1 offender and I am satisfied that the correct category of the appellant was applied in the calculation of the fine.

I agree with the reasons stated in the decision-maker's fine letter dated 9 November 2017.

The argument that the unauthorised activities were regarded as an operational necessity with respect to the farming and clearance of invasive vegetation does not preclude you from obtaining the necessary authorisations prior to commencement.

The removal of alien vegetation is a requirement in terms of the *Conservation of Agricultural Resources Act, 1983 (Act No. 43 of 1983)*.

As indicated by the Environmental Assessment Practitioner ("EAP"), appointed by your, "the project includes activities (originally) listed in terms of the National Environment Management Act (NEMA) (No. 107 of 1998) (as amended), i.e. activities 1, 2, 4 and 6 of GN R386 (2006 EIA Regulations, Government Gazette No. R386 of 21 April 2006), published in terms of NEMA. The proposed project triggers no listed activities in terms of the 2010 EIA Regulations and triggers the following listed activities in terms of the 2014 EIA Regulations: Activities 12, 17 and 19 of GN R983 and Activities 12 and 14 of GN R985. Accordingly, the proposed project will require authorisation from the competent environmental authority..."

The delegated competent authority's power to determine an administrative fine under section 24G(2) is predicated upon receipt of an application for rectification by a person who has committed an offence in terms of section 4F(2) of NEMA. You appointed an EAP to submit such Section 24G application. Confirmation of receipt of the Environmental Impact Report ("EIR") was addressed to

you. At no point during the process did you indicate that the EAP was not authorised to or submitted the finalised EIR without his knowledge or authorisation.

You opted to follow the Section 24G process, which is voluntary. He had the option to make representations after being issued a Pre-Compliance Notice as to why the activities are not listed.

The construction of bridge structures cannot be seen as like for like replacement as the structures were not built on the exact same footprint as the previous bridge structures and is therefore seen as an offense in terms of section 24F of the *National Environmental Management Act (107 OF 1998)* ("NEMA"). Even though it may prove beneficial in the long term, you undertook the activities without the requisite environmental authorisation.

CapeNature highlighted the fact that the upper Uilkraals Estuary where the activities have taken place, is classified as a Critical Biodiversity Area.

The vegetation type is mapped as Cape Lowlands Freshwater Wetland and the area has also been mapped as a wetland according to the Freshwater Ecosystem Priority Area mapping. Overall, the Uilkraal Estuary is also considered of high conservation and ecological importance and as such, CapeNature does not agree with the approach that has been taken to focus solely on the activities undertaken to upgrade the existing access road i.e. building bridges/culverts, and to take the presence of the existing road as a given.

CapeNature does not agree with the recommendations of the Draft Section 24G Report and the freshwater specialist report, which focuses solely on the location of the bridge crossings without considering the access road across the estuary. CapeNature recommended that removal of the road and rehabilitation of the footprint must be included as an alternative to be considered.

I have also noted that the Western Cape Department of Agriculture (WCDOA) indicated that, while access to farms is important, so is the conservation of natural resources and that the elevation of the existing road surface has the potential to increase erosion. The WCDOA therefore raised concerns as reflected in the decision-maker's administrative fine letter. The increased velocity through the culverts as a result of water and the possible blocking of the culverts and overflowing of the elevated road have a greater risk to erosion.

It is noted that your farming operations contribute towards food security and provides employment opportunities in an area that has limited opportunities, this is however true of many similar operations and does not warrant consideration for deviation of the fine as determined.

It is advised that you will suffer considerable financial hardship in the event that he is required to pay the administrative fine. Financial records and the financial impact on farming operations were, however not included in the section 24G application, EIR or the appeal documents submitted.

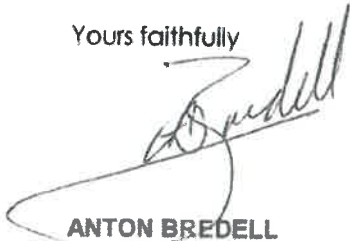
The fact that the Pre-Compliance Notice did not deal with the diversion of the channel in the proximity of the second bridge would not preclude you from having to comply with the recommendations contained in the EIR in relation hereto.

Accordingly, no factors exist that would justify deviation from the fine amount and after considering all the above factors and relevant documentation, I am of the view that the fine of R250 000-00, is an appropriate fine.

I wish to advise you to approach in future an environmental assessment practitioner and/or the Department of Environmental Affairs and Development Planning for advice prior to commencement of an activity/activities on the farm which may require an environmental authorisation in terms of the National Environmental Management Act, 1998 ("NEMA").

Thank you for your interest in our environment.

Yours faithfully



ANTON BREDELL
WESTERN CAPE MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

DATE: 20/8/2018

cc. Mrs Z Toefy
Ross Holland
S. Msila

Sub-directorate: Rectification
Holland & Assoc. Environmental Consultants
Directorate: Finance

Fax: (021) 483 4033
Fax: (086) 653 1765
email: Siposake.Msila@westerncape.gov.za