



REFERENCE NO: 14/3/6/E3/1/0426/19

Mr J.P. Crafford
Lemoenshoek Plase (Pty) Ltd
P.O. Box 170
BARRYDALE
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Dear Mr Crafford

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE ADMINISTRATIVE FINE DECISION ISSUED FOR THE UNLAWFUL COMMENCEMENT OF LISTED ACTIVITIES ON PORTION 37 OF FARM LEMOENSHOEK NO. 24, BARRYDALE

1. Your Appeal lodged against the Administrative Fine decision issued by the Department of Environmental Affairs and Development Planning ("Department") on 19 August 2019, refers.
2. After considering all relevant facts and supportive documents, I wish to advise that, in terms of Section 43(6) of the *National Environmental Management Act, 1998 (Act No. 107 of 1998)* ("NEMA"), I have decided to dismiss your Appeal and confirm the abovementioned decision of the delegated officer.
3. In terms of section 24G (4) of the NEMA you are hereby informed that for the Competent Authority to process your Application further, an Administrative Fine of **R125,000** (One hundred and twenty-five thousand rand) must be paid.
4. **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, 1st floor Utilitas Building, 1 Dorp Street, Cape Town from Mondays to Fridays between 8h00 and 12h30. The following allocations must be given to the cashier when making the payment:

Reference No: S24G00238
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.: S24G00238

5. 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 Ms Zaidah Toefy (Tel: (021) 483 5827 and Email: Zaidah.Toefy@westerncape.gov.za) and quote the abovementioned reference number to ensure that the case officer can acknowledge the payment of the Administrative Fine.
6. The Administrative Fine must be paid within **30 days** from the date of this letter. However, the payment of the Administrative Fine in instalments may be arranged with the Competent Authority. If no payment of the Administrative Fine is received and/or no extended period arrangement of the fine payment is made with the Competent Authority within the abovementioned timeframe, the Competent Authority will proceed with the law enforcement action with regards to non-compliance with Section 24F of the NEMA.
7. Please take note that the Administrative Fine is not an authorisation of the unlawful commencement of the listed activities according to the NEMA. However, your voluntary submission of the Section 24G of the NEMA Application is acknowledged. Consideration of your Application will only commence upon the payment of the Administrative Fine.
8. **REASONS FOR THE DECISION:**
The following are reasons for dismissing your Appeal and confirm the original Administrative Fine issued by the delegated authority:

Background to the Administrative Fine decision and Appeal
8.1 The Competent Authority was correct in imposing an Administrative Fine as Section 24G(4) of the NEMA requires an 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 R5 million. Although the listed activity was commenced with in 2008 when the Administrative Fine was up to R1 million, the Application was only submitted when the NEMA was amended to ensure an Administrative Fine that can be up to R5 million.

- 8.2 Section 24G(4) of the NEMA does not make provision for exemption from the payment of the Administrative Fine.
- 8.3 In the Revised Application form received on 11 January 2017, it is confirmed that the commencement of the following listed activities was triggered by the canal embankment replacement in 2009 and the Lemoenshoek dam wall sealing in July 2008:

Government Notice No. R 386 of 21 April 2006:

Activity Number 1(m):

"The construction of facilities or infrastructure, including associated structures or infrastructure, for any purpose in the one in ten-year flood line of a river or stream, or within 32 metres from the bank of a river or stream where the flood line is unknown, excluding purposes associated with existing residential use, but including (i) canals, (ii) channels, (iii) bridges, (iv) dams and (v) weirs."

Activity Number 4:

"The dredging, excavation, infilling, removal or moving of soil, sand or rock exceeding 5 cubic metres from a river, tidal lagoon, tidal river, lake, in-stream dam, floodplain or wetland."

- 8.4 The similarly listed activities in terms of the current listing notices 1, 2 and 3 promulgated on 4 December 2014 (as amended on 7 April 2017) were not included in the Revised Application form although they were included in the original Application form which was received in September 2015.

Circumstances that gave rise to the commencement of the illegal activity

- 8.5 I note, as detailed in the Appeal, that:
- 8.5.1 The Lemoenshoek Dam is located on the Huis River and has a catchment area of approximately 5.94 km² and an estimated mean annual runoff of 1.56 million cubic metres per annum. The full supply capacity of the Lemoenshoek Dam is 176,000m³ or approximately 11.3% of the mean annual runoff.
- 8.5.2 Suitable clay soil material was sourced from immediately upstream of the right flank of the dam wall outside the full supply capacity of the dam and approximately 114 metres away from the original bank of the Lemoenshoek Stream.
- 8.5.3 An area of approximately 2,500m² of Western Little Karoo vegetation was removed to access the clay seal material outside the "reduced full supply capacity" of the dam basin. After the clay seal material was removed the thin layer of topsoil and vegetation material was spread over the scar to rehabilitate that section.
- 8.5.4 Western Little Karoo vegetation carried a conservation status of Least Threatened according to the 2006 South African Vegetation Map. At the time of this activity, the limit of removal of critically endangered or endangered vegetation was limited to 3 hectares before it constituted a listed activity under the NEMA and the 2006 EIA Regulations. Thus, the removal of 2500m² of least threatened Western Little Karoo vegetation was not a listed activity.
- 8.5.5 The sealing of the dam wall to meet the dam safety requirements removed the threat of downstream damage to the environment and possible loss of

life, should the previously unsafe dam wall collapse due to slow leakage and possible "piping" through the dam wall.

8.5.6 The sealing of the dam ameliorated:

8.5.6.1 A real threat to the environment related to a possible dam wall break which relates to the massive amount of sediment from the dam wall and dam basin transported downstream that will settle out and blanket bottom stream biota in the medium to longer term.

8.5.6.2 The water scour effect on riparian vegetation, which will result in possible stream blockages and stream diversion downstream.

Legislative context

8.6 The NEMA principles that apply to the actions of all organs of state that may significantly affect the environment and specifically require *inter alia* that:

8.6.1 Environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural and social interests equitably;

8.6.2 Development must be socially, environmentally and economically sustainable;

8.6.3 The disturbance of ecosystems and loss of biological diversity are avoided, or where they cannot be altogether avoided, are minimised and remedied;

8.6.4 A risk-averse and cautious approach is applied, which considers the limits of current knowledge about the consequences of decisions and actions; and

8.6.5 The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.

8.7 On 20 June 2014, the National Department of Environmental Affairs developed the Section 24G Standard Operating Procedure ("SOP") for the determination of Section 24G(4) Administrative Fines. This Section 24G SOP (which was made available for the Applicant's consideration) included a calculator for the determination of the Administrative Fines.

8.8 The calculator is based on the following indexes which must be informed by the impacts that have resulted from the unlawful activities:

8.8.1 Social Benefit Index (e.g. intended only for Municipal Infrastructure);

8.8.2 Socio-Economic Impact Index;

8.8.3 Biodiversity Impact Index;

8.8.4 Sense of Place &/ or Heritage Impact Index; and

8.8.5 Pollution Impact Index.

8.9 The SOP states that the Section 24G Calculator serves as a guideline for the determination of the quantum of the fine and should therefore not be rigidly applied.

8.10 On 18 December 2013, sub-sections 44 (1) (aC) and (1B) of the *National Environment Laws Second Amendment Act, 2013 (Act No. 13 of 2013)* ("NELSAA") came into effect. Section 44 (1) (aC) of the NELSAA stated that "The Minister may make regulations relating to the procedure and criteria to be followed in the determination of an administrative fine in terms of section 24G". Section 44 (1)(1B) of the NELSAA further stated that "Until such time that the regulations under subsection (1) come into effect, the existing standard operating procedure, adopted by the Minister for determining administrative fines in terms of section 24G, applies".

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

- 8.11.1 Category 1 offenders are companies, parastatals and government departments.
- 8.11.2 Category 2 offenders are individual persons.
- 8.12 I concur with the Department's Responding Statement that:
 - 8.12.1 The Administrative Fine is based on the information and assessment of impacts, benefits and mitigation measures contained in the EIA Report and not on a judgement value expressed by an individual, fine committee, relevant authority or Provincial Minister.
 - 8.12.2 Deviation from, or adjustment of the Administrative Fine quantum using the Administrative Fine Calculator is possible having regard to, *inter alia*, aggravating and mitigating circumstances, the nature and seriousness of the offence, the profile of the company, previous offences, any other EIA applications by the company, and the consistency of the proposed fine with other fines imposed on applicants for similar contraventions. The quantum of the Administrative Fine which was determined with the use of the calculator was reduced from R250,000 to R125,000.
- 8.13 The Administrative Fine decision is accompanied by the reasons for the decisions to indicate how the Administrative Fine was determined.

A case of default bias built into the Administrative Fine Calculator?

- 8.14 I noted, as detailed in the Appeal, that the quantum of the Administrative Fine is severe considering the section 24G EIA Report's findings, specifically the mitigation information which should have been considered in the determination of the Administrative Fine.
- 8.15 To ensure a procedurally fair administrative process, the Applicant was provided with an opportunity to submit written representations with regards to the following information which was used for the determination of the Administrative Fine:
 - 8.15.1 Section 24G Standard Operating Procedure ("SOP") for the determination of Section 24G(4) Administrative Fines.
 - 8.15.2 The Section 24G Administrative Fines Calculator.
- 8.16 As detailed in the EIA Report, I concurred with the Department's Responding Statement that the following negative and positive environmental impacts, *inter alia*, resulted from the listed activities:
 - 8.16.1 The impact was the sealing of the Lemoenshoek Dam wall and that formalisation of the overflow structure that made it possible to allow the dam to be filled to full storage capacity.
 - 8.16.2 Assurance of registered irrigation water supply from the dam.
 - 8.16.3 Removal of approximately 2500m² of natural vegetation to source the sealing material for Lemoenshoek Dam infrastructure.
 - 8.16.4 Generation of employment.
 - 8.16.5 Generation of localised construction noise in a rural area.
 - 8.16.6 Avoidance of the consequences of a dam wall failure e.g. the sediment deposition downstream and possible new river courses.
 - 8.16.7 Maintenance of job security and financial viability of Lemoenshoek.

Social Benefits

- 8.17 As detailed in the reasons for the decision, the **Social Benefit index** (the only index which results in the decrease of the administrative fine amount) was rated in the EIA Report that: "The activity provides an essential social service/ infrastructure to the affected community". The motivation for this rating is that: "[t]he sealing of the

Lemoenshoek dam wall and formalising of the overflow structure removed the threat of the possibility of the dam wall breaking causing severe damage and possible loss of life on the immediate downstream social environment. The repair of the dam also ensured the jobs of the permanent and seasonal workers on Lemoenshoek Plase that amount to approximately 120 historically disadvantaged individuals."

- 8.18 The EIA Report which informed the determination of the Administrative Fine decision, stated inter alia that:
- 8.18.1 The commencement of the activity has resulted in permanent and seasonal employment for many people in the area.
- 8.18.2 The Applicant has just been through a costly court case to ascertain his water rights and would not be able to financially survive if a high fine is levied.
- 8.19 South Africa's current economic situation, in conjunction with the significant consequences of the drought that was recently experienced in the Western Cape, act as a significant impediment to job security, particularly in farming communities. It is submitted that this is significant considering the current economic climate in South Africa.
- 8.20 The socio-economic impacts are positive, in that they will increase the economic viability of the agricultural activities on the subject-property through a safe water storage capacity.
- 8.21 It must be noted that an unlawful activity has been commenced with although the need for sustainable management of the water infrastructure and the role water plays in eradicating poverty and under-development in South Africa should not be undermined. The importance of protecting and restoring ecological infrastructure and diversifying water supply options must take the centre stage of water management and planning but the applicable legislation must be enforced where there is non-compliance with the legislation.
- 8.22 Considering the above, the Appeal must be dismissed and the Administrative Fine decision must be confirmed in terms of Section 43(6) of the NEMA as the Administrative Fine which was determined with the calculator was already reduced from R250,000 to R125,000.

Socio-Economic Impacts

- 8.23 The **Socio-Economic Impact index** was rated by the EAP in the EIA Report that: "*[t]he activity could give rise to negative socio-economic impacts, but highly localised.*"
- 8.24 The motivation for the EIA Report's rating was that: "*[t]he socio-economic impact of the dam repair infrastructure was very positive in the sense that the registered irrigation water storage of 176000m³ could be realised. This ensured that Lemoenshoek Plase could maintain its full economic potential and ensured the permanent and seasonal job opportunities. A further very important potential socio-economic impact to consider was the potential loss of downstream infrastructure and loss of life that would be associated in the case of a collapse of the Lemoenshoek dam wall due to this wall not conforming to the NWA Dam Safety Standards.*"
- 8.25 In the reasons for the Administrative Fine decision however, the decision-maker correctly rated that "*[t]he activity will not give rise to any negative socio-economic impacts*" in the administrative fine calculator.
- 8.26 I note, as detailed in the Appeal, that:
- 8.26.1 Mr J.P. Crafford, a director of Lemoenshoek Plase (Pty) Ltd falls in the category of innocent violator for the reasons which are stated in the Section 24G EIA Report.

- 8.26.2 The history of the existence of the Lemoenshoek Dam was that it was constructed in the Lemoenshoek Stream, also known as Huisrivier for a previous owner, allegedly during late 1980s by the then Roads Department on Portion 37 of the Farm Lemoenshoek No. 24, Swellendam. Since its inception the dam was operated at a full supply capacity of 176,000m³ up until approximately 2002.
- 8.27 The Department's Responding Statement is concurred with in terms of the following:
- 8.27.1 The reasoning against the statement of "*direct benefit*" is perplexing, since Lemoenshoek Plase (Pty) Ltd repaired its own dam (Lemoenshoek Dam), for its own farming/ agricultural operations, and as stated: "*The same benefit would accrue to the applicant whether the dam was operated at 50% or 100% of full supply capacity, because of the way that the dam operation had to be managed in conjunction with the diversion weir and Tierkloof Dam to distribute the irrigation water to the agricultural fields of the Lemoenshoek Plase (Pty) Ltd farming operation.*"
- 8.27.2 Although repairs to the Lemoenshoek Dam were undertaken under the instruction of the DWS, this was done as part of its mandate to ensure dam safety and compliance with the NWA. Compliance with the instructions from the then DWA did not provide an exemption from compliance with any other applicable legislation. The resealing and reinforcement of the Lemoenshoek Dam remains a listed activity. The unlawfulness of the activity and the subsequent environmental impacts thereof cannot be ignored.
- 8.27.3 The NEMA gives effect to the constitutional right that:
- 8.27.3.1 "*Everyone has the right to an environment that is not harmful to his or her health or wellbeing*"
- 8.27.3.2 "*Provides for environmental governance by establishing principles for decision-making on matters affecting the environment*"
- 8.27.3.3 "*Everyone has the right to have the environment protected, for the benefit of present and future generations*".
- These are the underpinning principles, amongst others, that guide a decision-maker in applying his/her discretion in deciding on an appropriate Administrative Fine.
- 8.28 Considering the above, the Appeal must be dismissed and the Administrative Fine decision must be confirmed in terms of Section 43(6) of the NEMA as the Administrative Fine which was determined with the calculator was already reduced from R250,000 to R125,000.

Biodiversity Impacts

- 8.29 The **Biodiversity Impact index** was rated by the EAP in the EIA Report that: "*[t]he activity could give rise to localised biodiversity impacts.*"
- 8.30 The motivation for the EIA Report's rating was that: "*[w]ith the repair of the Lemoenshoek dam wall it could be filled to full supply capacity. This increased the water body area as opposed to the previous stream environment. When the Lemoenshoek Dam was constructed during the 1980s it transformed the inundated original water course from a lotic (running water) to a lentic (still water) environment that has totally different environmental conditions and management objectives. This condition has been maintained for approximately 20 years prior to the sealing of the dam wall. This alteration gave rise to the formation and stabilisation of a variety of environmental habitats that did not exist in the Lemoenshoek Stream prior to the construction of the dam.*"

- 8.31 The EIA Report which informed the determination of the Administrative Fine decision, stated inter alia the following:
- 8.31.1 An area of approximately 2500m² of Western Little Karoo vegetation was removed to access the seal material outside the dam basin. Western Little Karoo vegetation carries a conservation status of Least Threatened according to the 2006 South African Vegetation Map. At the time of the commencement of the activity, the threshold removal of critically endangered or endangered vegetation was limited to 3 hectares.
 - 8.31.2 In the considered opinion of the EAP, no environmental damage was caused by the activities.
 - 8.31.3 When Lemoenshoek was constructed during the 1980s, it transformed the inundated original water course from a lotic (running water) to a lentic (still water) environment that has totally different environmental and biodiversity conditions and management objectives when compared to the original stream. These conditions have been maintained for approximately 20 years prior to the sealing of the dam wall. This alteration gave rise to the formation and stabilisation of a variety of environmental habitats that did not exist in the Lemoenshoek stream prior to the construction of the dam. All these different habitats created and offered opportunities for a large variety of flora and fauna that now manage to inhabit these newly created habitats. These habitats are briefly the following:
 - 8.31.3.1 The large still water body created a habitat for the proliferation of primary producers such as microscopic algae and diatoms which in turn stimulate the development of benthic and limnetic invertebrates.
 - 8.31.3.2 The shallow muddy areas and open waters of the dam attract a variety of birds such as waders and ducks, while the areas at the inflow to the dam favour the development of reeds.
 - 8.31.4 The newly created habitats are colonised by a variety of water birds. The dam with its open water body, fringing vegetation and the associated wildlife also has a calming visual and aesthetically pleasing impact on the viewer in the semi-arid surrounding landscape.
 - 8.31.5 The overall impact of a safe dam structure has added much to the increase in biodiversity, especially with the fact that the dam sealing has allowed the water body to largely extend its surface area to the maximum allowed storage capacity of 176,000m³.
- 8.32 The quantum of the Administrative Fine issued in the Administrative Fine decision dated 19 August 2019 was R125,000 (One hundred and twenty-five thousand rand) and not R75,000 (Seventy-five thousand rand) as stated in the Appeal.
- 8.33 In the reasons for the Administrative Fine decision however, the decision-maker rated the calculator that "[t]he activity will not give rise to any biodiversity impacts". The reasons for the rating (as detailed in the reasons for the decision) that "[t]he activity will not give rise to any biodiversity impacts" include inter alia the following:
- 8.33.1 According to the Freshwater Site Assessment Report compiled by CapeNature dated 31 August 2018, the whole valley upstream and downstream of the instream dam is located in a channelled valley-bottom wetland consisting of Rainshadow Valley Karoo (classified as a Critically Endangered and not well protected). The site falls in a transition area between the Western Little Karoo and the North Langeberg Sandstone Fynbos terrestrial vegetation type (least threatened and moderately well to well protected, respectively). The instream dam is also located within the

confluence area of three non-perennial watercourses (Eerste River, Tierkloof River and an unnamed tributary) and falls in the Breede-Gouritz Water Management Area.

- 8.33.2 The dam is situated in the upper reaches of the Huis River, formerly also known as the Lemoenshoek Stream. In 2001, the land owner was instructed to install an overflow structure in the dam wall and to seal the dam wall against leakage, following a dam safety assessment by the DWS. The DWS restricted the volume of storage to fifty percent of full supply capacity i.e. 88,000m³ because the dam was regarded as a safety risk. The registered full supply capacity of the dam is 176,000m³. The repair of the Lemoenshoek Dam wall was undertaken between 2004 and 2008. According to the EIA Report, the dam wall was repaired using material from an area of approximately 2500m², which affected the natural Western Little Karoo vegetation. The material was removed from the right flank of the dam (when facing downstream).
- 8.34 I note, as detailed in the Appeal, that:
- 8.34.1 The information regarding the impact on biodiversity in the EIA Report pointed out that there were biodiversity impacts already when the Lemoenshoek Dam was constructed. This activity was carried out long before the environmental legislation regulations regarding in-stream dams were promulgated and came into effect in 1997.
- 8.34.2 The EIA Report indicated that the sealing of the dam wall had a positive impact on biodiversity in that it expanded an existing permanent still water environment that did not exist in the Lemoenshoek stream prior to the construction of the Lemoenshoek Dam during the late 1980s. This expansion occurred during 2008 with the sealing of the dam wall, allowing the increase in standing water surface area and volume that created concomitant expansion in physio-chemical regimes and habitat space that could be colonized by biota not normally found in running water systems, thus positively influencing biodiversity.
- 8.34.3 The Department motivates for the rating ("*The activity could give rise to localized biodiversity impacts*") based on the following abstract from a report by CapeNature. "*According to the Freshwater Site Assessment Report compiled by CapeNature dated 31 August 2018, the whole valley upstream and downstream of the instream dam is located in a channelled valley bottom wetland consisting of Rainshadow Valley Karoo (classified as Critically Endangered and not well protected). The site falls in a transition area between the Western Little Karoo and the North Langeberg Sandstone Fynbos terrestrial vegetation type (Least threatened and moderately well to well protected respectively (see the Freshwater Site Assessment Report)).*"
- 8.34.4 The basis for the Department's recommendation may be found in the statement from the report that "*Based on the findings ... it is clear that the excavations that took place in the past to strengthen and seal the Lemoenshoek dam wall has caused some destabilization to the local freshwater ecosystem.*" The report then goes further to specifically define this destabilization as "*The vegetation cover on the impacted right bank of the river had been removed and resulted in some erosion of this bank since 2008. The presence of the dam has impeded the hydrological and ecosystems function of the river and the associated channelled valley-bottom wetland.*" CapeNature's report then further recommends vegetative rehabilitation

procedures and noted that progress of replanting and rehabilitation may be impeded by drought conditions. The Specialist Freshwater Report dated 25 February 2019 addresses this issue inter alia as follows:

- 8.34.4.1 The dam has impeded the hydrological and ecosystems functioning of the river and the channelled valley-bottom wetland since the late 1980's.
- 8.34.5 Regarding the removed vegetation cover resulting in some erosion of the bank, the Specialist Freshwater Report dated 25 February 2019 states that:
 - 8.34.5.1 *"The site report by CapeNature pointed out that there was some erosion on the right flank where the material was sourced for the sealing of the dam. If one considers that this erosion took place over the last 10 years after the dam wall was sealed, it would constitute very little and the eroded material would remain inside the dam.*
 - 8.34.5.2 *It would be very difficult to get a vegetative cover on this area as it falls both within and outside the area of the water level fluctuation. It must be noted that, immediately upstream of the dam, there is no significant riparian vegetation and the riverbed is one that consists of coarse sands and boulders. This is indicative of rather flashy runoff in the bed of the Huis River upstream of the dam since the low flow was diverted out of the riverbed and into the turn canal and further downstream via the pipeline.*
 - 8.34.5.3 *Due to the aridity of the region, as indicated by the natural vegetation, the sloped area above the full supply level will receive very little rainfall and the runoff would be rapid. Thus, the arid conditions are maintained, and this is most probably the reason why the vegetation above the full supply level has not re-established well, even though the topsoil was replaced."*
- 8.34.6 The erosive impact that occurs upstream of the dam wall is not related to the illegal activity that resulted in the removal of the said 2500m² of Least Threatened Western Karoo vegetation. The area of the scar where no vegetation occurs around the dam within the dam basin between 50% and 100% of full supply capacity is approximately 11000m². Thus, when the dam is drawn down to 50% or more at the end of summer, there is at least an additional 11000m² of totally unvegetated gravel area that would contribute to erosion, apart from the 2500m² mentioned in the CapeNature report. The inspection of erosion that has occurred during the last 10 years around the dam below the full supply level has proven to be minimal. Also note that all the eroded material will end up within the Lemoenshoek dam and will not be transported downstream into the channelled valley-bottom wetland. Therefore, this impact of the 2500m² cannot be regarded as negative when placed in context of the bigger erosion picture upstream of the dam wall.
- 8.34.7 The reasons for the decision (under the biodiversity impact index) should be amended that *"The activity will not give rise to any impacts on biodiversity"* as was scored on the Impact Index Calculator.
- 8.35 Considering the above, the Appeal must be dismissed and the Administrative Fine decision must be confirmed in terms of Section 43(6) of the NEMA as the Administrative Fine which was determined with the calculator was already reduced from R250,000 to R125,000.

Sense of Place and Heritage Impacts

- 8.36 The **Sense of Place and Heritage Impacts index** was rated by the EAP in the EIA Report that: *"The activity is in keeping with the surrounding environment and/or does not negatively impact on the affected area's sense of place and/or heritage."*

- 8.37 The motivation for the EIA Report's rating was that: "*[t]he Lemoenshoek dam has been in existence since the late 1980s and thus the dam has become a feature in the landscape. Without the sealing of the dam wall, the dam was only allowed to fill approximately 50% of full supply capacity. This left an ugly wide barred scar around the dam. With the sealing of the dam wall it can now be filled to full supply capacity, hiding the barred scar under the full supply level for most of the time. The dam is also out of the way on private property and is not visible to any of the neighbours or public.*"
- 8.38 The EIA Report which informed the determination of the Administrative Fine decision did not identify any sense of place/ visual/ heritage impacts that have resulted due to the commencement of the activities.
- 8.39 The quantum of the Administrative Fine issued in the Administrative fine decision dated 19 August 2019 was R125,000 (One hundred and twenty-five thousand rand) and not R50,000 (Fifty thousand rand) as stated in the appeal.
- 8.40 In the reasons for the Administrative Fine decision however, the decision-maker correctly rated the calculator that "*[t]he activity is in keeping with the surrounding environment and/or does not negatively impact on the affected area's sense of place and/or heritage*".
- 8.41 Considering the above, the Appeal must be dismissed and the Administrative Fine decision must be confirmed in terms of Section 43(6) of the NEMA as the Administrative Fine which was determined with the calculator was already reduced from R250,000 to R125,000.

Pollution Impacts

- 8.42 The **Pollution Impact index** was rated by the EAP in the EIA Report that: "*[t]he activity will not give rise to any pollution.*"
- 8.43 The motivation for the EIA Report's rating was that: "*[t]he dam is filled with high rainfall runoff from the mountain ridges and this water is of a good quality. The discharge from the dam is therefore also of a good quality. There are no pollutant sources upstream of the dam.*"
- 8.44 In the reasons for the Administrative Fine decision however, the decision-maker correctly rated the calculator that "*The activity will not give rise to any pollution*".
- 8.45 Considering the above, the Appeal must be dismissed and the Administrative Fine decision must be confirmed in terms of Section 43(6) of the NEMA as the Administrative Fine which was determined with the calculator was already reduced from R250,000 to R125,000.

Consideration of deviation from the calculated fine

- 8.46 It is correct that an Administrative Fine has been issued as Section 24G(4) of the NEMA provides no exemption from the payment of the Administrative Fine.
- 8.47 It is concurred with the Department's Responding Statement that:
- 8.47.1 The Competent Authority requested a Freshwater Assessment by an independent, freshwater specialist to obtain independent, objective, accurate, good quality and reliable information to confirm the freshwater-related impacts as well as the freshwater-related information in the Application form submitted on 16 September 2015. Several requests were issued via correspondence letters, status letters and emails. A meeting was held with the EAP because of the undue delays in submitting the information which was required.

- 8.47.2 The NEMA presently affords the Competent Authority a discretionary power in determining an Administrative Fine and in deciding on an Application for an EA. The Competent Authority considered the circumstances of the Applicant as stated in the EIA Report and applied her discretion in deviating from the calculated Administrative Fine.
- 8.47.3 A Pre-Directive and Directive was issued to the Applicant, the issuance of which highlights the disregard for legislation, and disregard for the Department as the administrators of the environmental legislation.
- 8.48 I do not concur that the Applicant should be considered a Category 2 (individual person) offender as no adequate information has been provided in terms of the factors:
 - 8.48.1 Mitigating circumstances.
 - 8.48.2 Profile of the company.
- 8.49 As such, the Appeal must be dismissed and the Administrative Fine decision must be confirmed in terms of Section 43(6) of the NEMA as the Administrative Fine which was determined with the calculator was already reduced from R250,000 to R125,000.

Impact of bias built into the definition of a watercourse under the NEMA 2014 EIA Regulations (as amended)

- 8.50 The Revised Application form which has been submitted in terms of Section 24G of the NEMA states that the activities were commenced with in 2008 when the 2006 EIA Regulations' listed activities came into effect. Hence, the Application has been submitted for consideration in terms of Section 24G of the NEMA.

Further mitigation regarding the Administrative Fine

- 8.51 It is acknowledged that:
 - 8.51.1 The instructions of the then DWA were complied with regarding the 88,000m³ storage of water at Lemoenshoek dam and the sealing of the dam to prevent environmental degradation and health hazards to human life.
 - 8.51.2 The Applicant has submitted a Section 24G of the NEMA Application to obtain a retrospective EA for the unlawful activities.

The potential costs that the Applicant will incur in complying with the directions as to the remedial measure

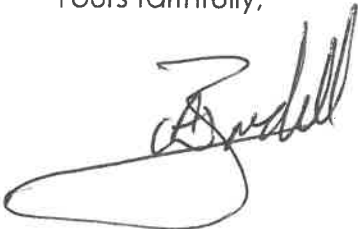
- 8.52 I do not concur that a further reduced Administrative Fine must be considered in the Appeal decision although the following is noted:
 - 8.52.1 The Applicant has already incurred major costs during the process of emptying the Lemoenshoek Dam and the sealing of the upstream face of the Lemoenshoek Dam wall. At present, the area in which Lemoenshoek dam is located has been subjected to the worst drought.
 - 8.52.2 The drought of the past four years has resulted in the loss of many hectares of multi-annual fruit trees due to die-off. To replace these trees once the normal rainfall pattern re-establishes will be very expensive and a return on the financial layout will only be realized once the trees produce a harvestable crop about 4 years after the re-planting.
 - 8.52.3 Mr J.P. Crafford has also been recently involved in an expensive High Court case to confirm the water rights with regards to the portions of land under Lemoenshoek Plase (Pty) Ltd.
 - 8.52.4 An Administrative Fine of R125,000 as it stands at present will have a major impact on Lemoenshoek Plase (Pty) Ltd, that could only be managed

financially by scaling down the farming operation with concomitant social and financial impacts on the farm workers employed by Lemoenshoek Plase (Pty) Ltd.

- 8.53 The Appeal must be dismissed and the Administrative Fine decision must be confirmed in terms of Section 43(6) of the NEMA as the Administrative Fine which was determined with the calculator was already reduced from R250,000 to R125,000.
- 8.54 If the Administrative Fine cannot be paid as a once-off payment, an arrangement may be made with the Department to ensure the payment of the Administrative Fine over an extended period.

The National Environmental Management Principles (set out in section 2 of the NEMA) which apply to the actions of all organs of state, serve as guidelines by reference to which any organ of state must exercise any function when taking any decision, and which must guide the interpretation, administration and implementation of any other law concerned with the protection or management of the environment. In terms of the NEMA Principles, the effects of decisions on all aspects of the environment are to be considered. As such, the consideration, assessment and evaluation of the social, economic and ecological impacts of activities (disadvantages and benefits) must be undertaken, and decisions are to be appropriate in the light of such consideration and assessment.

Yours faithfully,



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

DATE: 22/1/2020

CC: (1) Mr C. Bruwer (EnviroAfrica)
(2) Ms Z. Toefy (Sub-directorate: Rectification)
(3) Directorate: Financial Management)
(4) W. Hattingh (Swellendam Municipality)
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REFERENCE NO: 14/3/6/E3/1/0426/19

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Dear Adv. Maré

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE ADMINISTRATIVE FINE DECISION ISSUED FOR THE UNLAWFUL COMMENCEMENT OF LISTED ACTIVITIES ON PORTION 37 OF FARM LEMOENSHOEK NO. 24, BARRYDALE

Your Responding Statement lodged with regards to the Appeal lodged against the Section 24G Administrative Fine decision issued on 19 August 2019, refers.

Please find attached the Appeal decision regarding this matter as issued to Mr J.P. Crafford, i.e. the Applicant in terms of section 24G of the National Environmental Management Act, 1998 (Act No. 107 of 1998) ("NEMA").

Your interest in the future of our environment is appreciated.

Yours faithfully

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

DATE: 27/11/2020

Copied to: Ms Zaidah Toefy (Sub-directorate: Rectification)

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