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RECREATIONAL ANGLERS ASSOCIATION



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Ms Magdel Boshoff
Department of Environmental Affairs
Private Bag X447
Pretoria, 0001

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Re: Vanderkloof fishery enquiries

Dear Magdel

Our telephone conversation, in conference with Dr Guy Preston, on 1 July 2015 refers.

The South African Consolidated Recreational Angling Association (SACRAA) and the South African Sport Anglers & Casting Confederation (SASACC) have been a part of the advisory committee established at Vanderkloof Dam to oversee the development of an experimental (research) fishery with the ultimate aim of determining the feasibility of establishing a small-scale commercial fishery on the Dam.

During the course of developing the experimental fishery management plan (EFMP) several issues of concern have arisen. Although the two Northern Cape Provincial Departments that are involved, namely Agriculture, Land Reform & Rural Development (DALRRD) and Environment & Nature Conservation (DENC) and their technical advisors (Rhodes University) have given us assurances that they will look into these concerns, previous communications appear to indicate that they have already decided on the way forward have left us feeling a bit sceptical. While we acknowledged their commitment to try and resolve these issues, we have also informed the advisory committee that we intend to approach National DEA in our own capacity. We feel that time is of the essence and that it is vital to get clarification on the issues highlighted below before the EFMP can be finalised and the project can move forward.

All of the issues that require clarification have arisen as a result of the intended use of gillnets and our consequent concern for the survival of the Largemouth yellowfish (*Labeobarbus kimberleyensis*; LY), a listed species under NEM:BA and the associated TOPS Regulations. In addition to being a listed species, the LY is a much sought after trophy fish and a mainstay of the recreational fishing-based tourism industry at Vanderkloof. Its demise would have severe implications for the tourism industry and the jobs and livelihoods associated with it.

Our concerns are three-fold and we would appreciate formal input from DEA's legal advisors as to whether our concerns are realistic and our interpretation of the legislation is correct. We would like to see a fishery of some kind developed at Vanderkloof but would like to see it done

on a sound legal basis and in a way that aligns with the DEA's goals of biodiversity conservation. At present, we believe the project is moving forward based on a flawed understanding/interpretation of the requirements of both National and Provincial legislation.

ISSUE 1 – PROVINCIAL vs NATIONAL PERMIT FOR THE USE OF GILLNETS

This concern deals with the issuing of permits to firstly conduct an experimental fishery (a two-year research project conducted by Rhodes University; 24-month standing permit required) and secondly to allow a subsequent small-scale commercial fishery if the research project shows this to be feasible. At present we are at loggerheads with NC: DALRRD (the project is their initiative), NC: DENC (provincial issuing authority) and Rhodes University as to who should be approached as the competent issuing authority.

Therefore, we request your opinion on the question whether the national or provincial government is the competent issuing authority in the current matter.

In terms of Schedule 4 (Part A) of the Constitution of the Republic of South Africa, 1996, the Environment is one of the listed functional areas of concurrent National and Provincial legislative competence. In considering this issue, the following provisions of the Constitution should also be noted; Chapter 3 relating to co-operative governance and Section 146 pertaining to conflict between national and provincial legislation.

Northern Cape Province Legislation

Section 38 (c) of the Northern Cape: Nature Conservation Act (Act 9 of 2009; NC:NCA) states that:

No person may catch fish without a permit in an aquatic system – by means of a cast net, crab net, staked net (*also known as a gill net in terms of the Act's definitions*), trek net or fyke net.

In terms of Regulation 95(2) the Northern Cape: Nature Conservation Regulations (Provincial Gazette No. 1589 of 13 April 2012) published in terms of the NC:NCA:

The Director may only issue a permit to utilise a net for the harvesting of fish if –

- a. the fish species to be harvested is not a specially protected or a protected species;**
- b. the harvesting is to take place in the Vanderkloof Dam, the Vaalharts Dam or the Spitskop Dam and if he or she is convinced that the waters in which the harvesting is to be conducted are not situated within an ecological sensitive area in any of those dams;**
- c. he or she determines specific conditions for the harvesting of fish regarding –**
 - i. the area or zone in which harvesting may take place;**
 - ii. the equipment to be utilised when harvesting;**
 - iii. the quota and species of fish to be harvested; and**
 - iv. research and reporting on fish to be harvested.**

Our interpretation is that the prohibition (a) is a general prohibition and stands. Sub-paragraphs (b) and (c) cannot do away with this provision. Therefore, if requirement (a) is not met the Regulation is transgressed. If a permit is to be issued for the harvesting of fish with a net it must be done in accordance with (b) and (c) without (a) being transgressed. In other words, a permit for catching specially protected or protected species using a net may not be issued.

According to Schedule 1 of the NC:NCA, *Labeo umbratus* (moggel), *Labeobarbus aneus* (smallmouth yellowfish) and *L. kimberleyensis* (LY) are all specially protected, while according to Schedule 2 of the NC:NCA, *Labeo capensis* (mudfish) is a protected species. All four of these species are found in Vanderkloof Dam.

Although the Provincial issuing authority (NC: DENC) has promised to take another look into this, their last communication to us indicated that they were of the opinion that they could issue a permit (that would include using gill nets to catch the species mentioned above) under provision (c) of Regulation 95(2).

We believe their interpretation is flawed in that they ignore the standing of general prohibition (a) and that if they insist they are indeed the competent issuing authority, any permit issued that will allow the use of nets to catch the above-mentioned species will be illegal. Both SACRAA and SASACC cannot support any undertaking that we believe to be illegal.

Do you concur with this analysis and interpretation?

National Legislation

We believe that given the above interpretation, NC: DALRRD will need to submit the permit application to DEA for consideration by the Minister in terms of NEM:BA and the TOPS Regulations.

While Section 57 of NEM:BA provides for the consideration of permits for restricted activities, Section 87A is the key in determining the issuing authority responsible for deciding applications for a permit for the carrying out of a restricted activity involving a listed threatened or protected species. Regulation 3 of the TOPS Regulations provides for the issuing authorities.

The mudfish, moggel and smallmouth yellowfish are not listed species under NEM:BA and the associated TOPS Regulations. The LY is, however, listed as Vulnerable. Although the catching, killing, selling etc. of a listed species is a restricted activity under NEM:BA, the Act does allow the Minister to consider a permit application to undertake these activities as the current TOPS Regulations do not expressly prohibit this.

Given the stringent requirements for a permit application and the many considerations the issuing authority needs to take into account (e.g. Sections 88 and 89 of NEM:BA and Regulations 10 and 15 of the TOPS Regulations), will the issuing of a permit that will result in the catching & killing (by gill nets) of a listed species actually conform to the ideals and

purpose of NEM:BA and the TOPS Regulations? The validity of issuing a permit for the proposed research/experimental fishery in its present format is further queried below.

According to TOPS Regulation 5(2a, h & k), and in the context of the Vanderkloof scenario, a standing permit may only be applied for by:

- a. The provincial department, for a standing permit authorising the carrying out of restricted activities involving listed threatened or protected species on land under its jurisdiction and to control damage causing animals originating from protected areas in accordance with regulation 14;**
- h. The operator or head of a registered scientific institution or a person approved in writing by such an institution, for a standing permit authorising restricted activities involving specimens of listed threatened or protected species kept at that institution or being researched by the institution;**
- k. A registered wildlife trader, for a standing permit authorising him or her to operate as a wildlife trader in listed threatened or protected species as specified by the issuing authority.**

Our interpretation of the above is as follows:

- a. The Provincial department applying for the permit, NC: DALRRD, does not have jurisdiction over the Vanderkloof Dam. This mandate is shared by the Department of Water & Sanitation and the NC: DENC. A permit for conducting restricted activities may therefore not be issued to them under Regulation 5(2a).

Is this interpretation correct?

- b. If it is decided that Rhodes University are to apply for the research permit, it is clear that the listed LY is not specifically being researched. The research programme is to determine the feasibility/viability of a commercial enterprise (small-scale commercial fishery), where all fish caught will be processed and sold (see also sub-paragraph c below). Although one of the aspects of the research programme will be to monitor the number of LY caught and killed in gill nets, it is not the primary goal of the programme. Therefore the proposed research programme does not meet the requirements under Regulation 5 (2h).

Is this interpretation correct?

- c. The proposed research project will involve the processing and sale of all fish caught, including the listed LY. Neither NC: DALRRD nor Rhodes University is a registered wildlife trader so a permit may not be issued under Regulation 5(2k) either.

Is this interpretation correct?

- d. Taking all this into account, it is our contention that a permit may not be issued to conduct the proposed experimental/research fishery in its present format.

Is this interpretation correct?

- e. In our opinion, the correct way to proceed in terms of the NEM:BA and TOPS Regulations would be for Rhodes University to first register as a scientific institution in terms of Regulation 27(1) of the TOPS Regulations (if it has not already done so) and then to apply for a permit to conduct research specifically aimed at determining the vulnerability of LY to gill nets (this has been done in !Gariep Dam but not Vanderkloof). Once this has been done and the most suitable way of proceeding with a fishery with minimal impact on LY (by gill nets) has been determined, separate permits (standing permit for fishing activities and a personal effects permit for the buying/selling of listed species) can be applied for to conduct an experimental fishery to determine the viability of the commercial enterprise. However, either NC: DALRRD, Rhodes University or the entity established by the fishery participants will first need to apply for registration as a wildlife trader if the specific LY research demonstrates that LY will still be caught and killed and obviously sold.

Is this interpretation correct?

ISSUE 2 – EXISTING TOPS vs PROPOSED NEW TOPS REGULATIONS

This concern revolves around the impact the proposed new TOPS Regulations and Lists will have on any undertaking at Vanderkloof

The proposed new TOPS Regulations and Lists differ significantly from the existing ones and have direct implications for the proposed Vanderkloof fishery. Under the new Regulations and Lists, the LY is now listed as Protected (as opposed to Vulnerable), and has specific conditions related to restricted activities, where the issuing of a permit to conduct a restricted activity is either prohibited under Section 57(2) of NEM:BA, or exempted. The new Regulations and Lists specifically prohibit the issuing of a permit for the Protected LY for the following restricted activities (for live specimens): **catching or capturing, killing, selling, conveying, moving or otherwise translocating, having in possession or exercising physical control over**. Exemption from a permit is given for the catch and immediate release of live fish into the water from where they were caught. In terms of dead fish there is the prohibition of issuing a permit for the following restricted activities (amongst others): **having in possession or exercising physical control over**. Presumably if a fish dies it must also be returned to the water to satisfy the requirement that one may not be in possession of a specimen, unless it involves a registered low escape-risk research facility.

While there are exceptions to the above under certain circumstances, e.g. when research, exhibition or breeding facilities are involved, there is no reference to an exception being made for any type of fishery (recreational or small-scale subsistence/commercial) or for registered wildlife traders.

Furthermore, Regulation 119(1 & 2) of the proposed new TOPS Regulations states:

1. Anything done in terms of the previous Regulations and which can be done in terms of these Regulations must be regarded as having been done in terms of these Regulations.
2. Any permit, including a game farm hunting permit, a nursery possession permit, a personal effects permit, a boat-based whale and dolphin watching permit and a white shark cage diving permit or registration certificate issued in terms of the previous Regulations that have not expired on the date of coming into effect of these Regulations, must despite the repeal of the previous Regulations be regarded as having been issued in terms of these Regulations, and remains valid until the expiry date indicated on such permit or registration certificate.

In terms of the above, our queries are as follows:

1. *How will any permit (referred to under Issue 1 above) if issued under NEM:BA and the existing TOPS Regulations be affected when the proposed new TOPS Regulations & Lists come into effect. Under the proposed new Regulation 119(1 & 2), will any permit issued still be valid until such time as it expires (even if a listed species is being caught, killed and sold) or will it need to be reviewed as soon as the new Regulations come into effect?*
2. *It is our understanding that any new permit application (or review of an existing permit) under the proposed new Regulations and Lists, must be denied in terms of NEM:BA Section 57(2) if a listed species such as the LY is involved and it is to be caught, killed and sold. There is no provision that allows exemption in this regard, even for registered research institutions or wildlife traders, and no mention is made for an exemption for a commercial fishery. Is this correct?*

With regards to point (2) above we realize that there is currently no National Policy on inland fisheries but that once it has been drafted it will almost certainly contain Provisions for the development of small-scale subsistence and commercial fisheries. It is our concern that these provisions may well conflict with DEA's biodiversity legislation in that it will allow for harvesting of listed fish species such as the LY. This concern has been highlighted in a separate communication and we trust that DEA will liaise with DAFF in this regard to try and avoid the conflict before the Inland Fishery Policy is drafted.

ISSUE 3 - OFF-TAKE LIMITS

This concern deals with who has the authority and obligation to determine off-take limits for listed species such as the LY. Although the concerns surrounding permit authorizations and validity (Issues 1 and 2 above) are our primary concern, the off-take issue still needs clarification.

In terms of Regulation 72(1) of the existing TOPS Regulations:

SANBI must each year before the end of September determine for the following year, annual hunting off-take limits for the country as a whole and per province in respect of a listed threatened or protected animal species determined by the Minister.

There is no separate reference to fishing or angling in the Regulations' definitions so it is our understanding that these activities are included under the definition of hunting.

In terms of Regulation 98 of the proposed new TOPS Regulations:

The Scientific Authority must each year before the end of September determine for the following year, if and where so required, annual off-take limits of specimens of listed threatened or protected species for the country as a whole and /or per province.

This Regulation clearly includes all methods of capture, whether hunting (terrestrial) or fishing/angling.

Currently the Vanderkloof Experimental Fishery Advisory Committee has determined that a total of 20 LY may be killed per month as by-catch in the gill nets (if the process proceeds as currently planned). Once this off-take has been reached, the nets may no longer be fished for that month. As it stands, this off-take of the listed LY will remain in effect if the small-scale commercial fishery is initiated after the two-year research period.

Our query is whether or not the Vanderkloof Advisory Committee actually has the authority to determine the acceptable off-take limits for the LY. Under both the existing and proposed new TOPS Regulations, it is our understanding that the Committee does in fact not have this authority (only SANBI or the Scientific Authority does). Although the LY will not be the main target species in the gill net section of the fishery it is known that they will form part of the catch.

CONCLUDING REMARKS

We submit that these queries are based on our understanding and interpretation of the existing and proposed new TOPS Regulations and Lists and on the existing environmental legislation in terms of experimental/research permits and the conservation status of the LY. In order for us to move forward, SACRAA and SASACC feel that the Vanderkloof Advisory Committee needs clarification from the DEA on the above issues so that it can make an informed (and legal) decision on how to proceed.

To summarise:

1. We believe that the NC: DENC is not authorised to issue the required permits in terms of its legislation.
2. We believe that National DEA must be approached as the competent issuing authority, but that there is currently no provision or regulation that will allow a permit to be issued for the proposed experimental fishery in its present format.
3. We believe there is currently no provision or regulation that will allow for the issuing of a permit for a subsequent small-scale commercial fishery that involves catching, killing and selling a listed (protected) species, and that this belief is further reinforced once the proposed new TOPS Regulations and Lists are promulgated.

4. We believe that that the Vanderkloof Advisory Committee does not have the authority to determine the off-take limits of a listed (protected) species in either an experimental/research fishery or a subsequent small-scale commercial fishery.

The NC: DENC representative on the Vanderkloof Advisory Committee who is following up on these issues in their own right is Mr Peter Ramollo (ramolopp@gmail.com). Although we will communicate DEA's response to our queries to the Advisory Committee, it may be useful if DEA liaise with him in this regard as well so that we may all reach the same level of understanding before the next meeting. We would like to reiterate that we feel time is of the essence and that it is vital to get clarification on these issues so that the EFMP can be finalised and the project can move forward.

Thank-you for your consideration in this regard.

Yours Sincerely



Dr Aidan Wood (for SACRAA and SASACC)

CC: Dr Guy Preston