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Prof Warwick Sauer
HoD: Department of Ichthyology & Fisheries Science
Rhodes University
P.O. Box 94
Grahamstown, 6140

1 October 2015

Re: Vanderkloof fishery permit application

Dear Warwick

Due to the reservations SACRAA and SASACC have in terms of the proposed permit application process for the Vanderkloof experimental fishery, a submission was made to the Department of Environmental Affairs (DEA) on 6 July 2015 after a meeting with Dr Guy Preston and Ms Magdel Boshoff (who was tele-conferenced in on the meeting) on 1 July 2015. Our full submission to them has been provided to you as a separate document (Legal Queries to DEA.pdf). Below are their responses to some of our queries and our additional comments based on these. Please note that the DEA responses are their views on our queries and should not be considered as a formal legal opinion. Each query is highlighted in bold. The DEA opinions appear as normal text with our comments in italics. This document will be discussed with the DEA prior to the next Vanderkloof committee meeting for further clarity on our queries. An update in this regard will be made available as soon as possible.

Query 1

Whether regulation 95(2) (a) of the Northern Cape: Nature Conservation Regulations (Provincial Gazette No. 1589 of April 2012) published in terms of the NC: NCA is a general prohibition against the issuing of a permit, which cannot be done away with by paragraphs (b) and (c).

It is our interpretation that a permit can be issued in terms of Regulation 95(2), for the purpose of subregulation (2) (b) or (c), only if the LY is not a protected or specially protected species.

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 and will be caught in gillnets. It is therefore clear that the DENC cannot issue a permit to harvest any of these species using a net under Regulation 95(2) of the NC Regulations.

Query 2

Who is the competent issuing authority between the national and provincial department, for experimental fishery permit, for a two year research project to be conducted by Rhodes University (twenty four month standing permit)?

To respond to this question, a thorough interrogation was done to determine whether the Rhodes University is an organ of state as contemplated in Section 239 of the Constitution of the Republic of South Africa, 1996.

In terms of the ‘control test’ adopted in a number of court decisions, the initial finding is that Rhodes University is not regarded as an organ of state. Therefore, the Minister is not the issuing authority.

The DEA acknowledges the implication of the initial finding for DEA and provincial issuing authorities. It was therefore agreed that a more in-depth interrogation will be conducted in order for a final conclusion to be made.

This obviously needs to be interrogated further and needs to be done prior to the next scheduled Vanderkloof committee meeting.

The issue that needs to be clarified is who the issuing authority is (NEM:BA Section 87a). If it is Province then the provincial Act and Regulations must be used, in which case it is clear from Query 1 above that the NC: NCA cannot be used to issue a permit to use nets. If it is National then the NEM:BA and TOPS Regulations must be used. However, while NEM:BA and TOPS both make provision for research permits to conduct restricted activities they do not automatically take precedence over the Provincial ordinance. According to Section 146 of the Constitution National legislation will prevail if a matter cannot be regulated effectively by Provincial legislation. The Constitution must be applied if there is any conflict in this regard.

Query 3

Whether the proposed research programme meets the requirements under regulation 5(2)(h) of the TOPS Regulations, 2007 in respect of the issuance of a standing permit; in view of the fact that 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. Further, 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.

Linked to the above question, whether, NC: DALRRD, which does not have jurisdiction over Vanderkloof Dam, the mandate of which is shared by Department of Water and Sanitation and NC: DENC, can be issued with a permit in terms of regulation 5(2a) of the TOPS Regulations, 2007.

It is our view that the proposed research programme would meet the requirements under regulation 5(2) (h) of the TOPS Regulations, 2007; irrespective of the fact that 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. Regulation 5(2) (h) appears to cover research and restricted activities involving specimens of listed threatened or protected species kept at that institution

We do not agree with this. The above is a very wide interpretation of Regulation 5(2)(h), and it is doubtful whether it will stand in any court of law if you take the purpose of NEM:BA and TOPS into consideration. The research must be aimed at the protection of listed threatened and protected species, not the trading thereof in a commercial enterprise

Furthermore, the term “research programme” maybe misleading terminology. This is an experimental fisheries program. In terms of Regulation 5(h) a standing permit may only be applied for by a registered scientific institution to undertake restricted activities involving specimens of listed threatened or protected species kept at that institution or being researched by the institution. It is our contention that the listed species is neither being kept at the institution (Rhodes) nor is it being specifically researched. The aim of the programme is to determine harvesting levels to see if the yield is sufficient to operate a long-term commercial enterprise.

However, the scientific institution may have to consider other requirement with regard to its carrying out of restricted activities involving specimens of listed threatened or protected species kept at that institution other than its research on the species, such as the selling of species.

It is the issuing authority (not the scientific institution) that will need to consider all other requirements in terms of TOPS Regulations 10, 15 and 17 (if NEM:BA and TOPS are used) before a standing permit may be issued.

If Rhodes University will be conducting the feasibility/viability research programme (Rhodes University will be the entity carrying out restricted activities involving the LY), then NC: DALRRD cannot be issued a permit.

We agree with this. Even though this program is a NC: DALRRD initiative, they do not have any jurisdiction over the Dam. As such (if NEM:BA and TOPS are used), Rhodes must apply for and be issued the permit. However, in order to do this, Rhodes must first register as a scientific institution in accordance with Chapter 3 of the TOPS Regulations (if it has not already done so) and also register as a wildlife trader as they will be trading in (selling) a listed species as part of the experimental program. If Rhodes is unregistered in both instances they cannot be issued a permit under TOPS Regulations 5(2)(h) or 5(2)(k).

The DEA agrees with a recommendation that the correct way to proceed in terms of the NEMBA, and the TOPS Regulations, is for Rhodes University to register as a Scientific Institution in terms of regulation 27(1) of TOPS (if not already registered), and then apply for a standing permit to conduct research specifically aimed at determining the vulnerability of LY

to gill nets. Once this is done, and the most suitable way of proceeding with a fishery with minimal impact on LY (by gill nets) has been determined, separate permits can be applied for to conduct an experimental fishery to determine the viability of the commercial enterprise.

We agree that this is the best way to proceed. As mentioned previously we believe it is doubtful whether the program can proceed (in terms of TOPS Regulation 5(2h)) as currently proposed, namely conducting an experimental fishery that will result in the selling of a listed species under the guise of research to protect the very same species in terms of the TOPS Regulations.

An initial research project complying with scientific standards must be carried out to determine the vulnerability of LM yellowfish to gillnetting at Vanderkloof. If the study proves that LM yellowfish will not be compromised at VDK Dam the experimental fisheries program can then be initiated to determine its commercial viability. These are two different research projects. The first can be done in terms of the existing TOPS Regulations, the second is a commercial study, a purpose that has not been catered for in terms of TOPS, and which can be done if a listed species is not involved.

Query 4

How will any permit issued in terms of the NEMBA, and the existing TOPS Regulations, 2007 be affected when the proposed new TOPS Regulations and the List come into operation? Under regulation 119(1) and (2) of the proposed TOPS Regulation (sic), will any permit issued still be valid until such time as it expires (even if listed species is being caught, killed and sold) or will it need to be reviewed as soon as the new Regulations comes in to operation.

The question on the effect of regulation 100 of the proposed TOPS Regulations to the existing permits is dealt with expressly in regulation 100(2) of the proposed TOPS Regulations.

The above statement refers to Regulation 100 and 100(2), but should read 119 and 119(2).

A permit issued in terms of the TOPS Regulations, 2007, will remain valid until expiry, despite the coming into operation of the new TOPS Regulations. Thereafter, a new permit for the same purpose may not be issued in terms of the new TOPS Regulations, as no provision has been proposed for the killing of listed fresh water fish species, except by low risk-escape research facilities.

We believe this statement is incorrect. An existing permit holder cannot continue with an activity if that activity is not permitted in terms of the new TOPS Regulations. Regulation 119(1) of the proposed new TOPS clearly states that you can only continue with an action permitted in terms of the previous Regulations if it is still permitted to do so in terms of the new Regulations. In terms of the proposed new Regulations, the restricted activities (catching, killing, selling) concerning LM yellowfish is not allowed. With very few exceptions, none of which apply to a commercial fishery, only catch & release is permitted. Regulation 119(2) of the proposed new TOPS Regulations is only applicable where the previous permit and actions associated with it are valid in terms of the new Regulations. Thus, when the proposed new

TOPS Regulations come into effect, the permit issued under the existing Regulations (allowing catching, killing and selling) will not be considered valid.

Even if the proposed new TOPS Regulations only come into effect after the experimental phase, there is no allowance for a commercial enterprise that will catch, kill and trade in a listed species. In other words a permit cannot be issued under the proposed new Regulations for the proposed commercial fishery in its current format.

Query 5

Whether Vanderkloof Advisory Committee has the authority to determine the acceptable off-take limits for the LY, listed protected species, in either experimental /research fishery or a subsequent small-scale commercial fishery.

The Advisory Committee may determine acceptable off-take limits for the LY, but such determination cannot be made in terms of regulation 72(1) of the TOPS Regulations, 2007, and such off-take limits will therefore not be enforceable.

We do not agree with this. According to the Regulations only SANBI (current Regulations) or the Scientific Authority (proposed new Regulations) have the authority to determine off-take limits for listed species. There is no provision in the Regulations or any other legislation that gives authority to the Advisory Committee to set off-take limits for a listed species.

Concluding remarks

As mentioned earlier, the DEA's views are not a formal legal opinion. In addition to this document, SACRAA and SASACC will be seeking a formal legal opinion on all the issues raised in our communications with DEA in order to prepare for legal action if necessary. SACRAA and SASACC reserve the right to ensure that the Vanderkloof experimental fishery (and subsequent small-scale commercial fishery) proceed only in a lawful manner.

This submission is made to the members of the Vanderkloof Advisory Committee so that they may prepare for the discussion at the next meeting, which at present is scheduled for 21 October 2015. SACRAA & SASACC will have a representative of the DEA present to help facilitate discussion and the best way forward.

Yours Sincerely



Dr Aidan Wood (for SACRAA and SASACC)
CC: Dr Guy Preston; Ms Magdel Boshoff (both DEA)