

ANNEXURE A: REASONS FOR THE DECISION

In determining the quantum of the administrative fine, the competent authority took, *inter alia*, the following into consideration:

- The section 24G application dated 25 May 2022 with supporting environmental impact assessment and mitigation measures.
- Public participation conducted for the application by the Environmental Assessment Practitioner.
- The Environmental Management Programme of May 2022 submitted for the application.
- Relevant information contained in the Departmental EIA Guideline and Information Document Series (March 2013), including, the Guidelines on Need and Desirability, Public Participation and Alternatives.
- The site inspection conducted on 9 September 2022, attended by officials of this Directorate.

All relevant information presented to the competent authority was taken into account in the determination of the fine quantum. A summary of the issues which, according to the competent authority, were the most significant reasons for the decision is set out below.

1. PUBLIC PARTICIPATION

A public participation process as outlined in section 24G(1)(vii)(dd) of the NEMA, “...a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed...” was undertaken.

The public participation process conducted by the EAP comprised of the following:

- An advertisement was placed in the **Knysna-Plett Herald** newspaper on 3 February 2022;
- A site notice was erected; and
- Letters were sent to interested and affected parties (“I&APs”) and the municipal ward councillor on 8 June 2022.
- I&APs were afforded the opportunity to provide comments on the application.

The Plettenberg Bay Community Environment Forum (PBCEF) highlighted the fact that, for many years, there has been a very practical concern to those dependent on the water supply of Whiskey Creek. This was due to the fact that the system has a very limited capacity and has been known to dry up (an unreliable system). The system requires as much inflow as possible in order to feed properties that are dependent on this river and who have existing water rights.

Considering this, it would appear from the reports that not enough investigation or forethought was given to the requirements for 20 hectares of almond trees or the legalities of constructing dams.

It remains unacceptable, in PBCEF's opinion, that the dams remain, particularly as they are in wetland /instream areas that feed into Whiskey Creek. The precedent that would be set is not acceptable and the potential impacts of this damming on the health of the system and the needs of downstream water users is also unacceptable. At the very least, the dams that were in existence with change of ownership should be rehabilitated and the new dams decommissioned.

The PBCEF therefore object to the existence of the new dams and recommend that the dams are decommissioned and restored as wetland areas, understandably not as per their historic state as the soils have already been impacted.

Furthermore, the Forum believes that the cumulative impact of past and ongoing illegal and legal dams that are being developed in this catchment needs to be investigated. Considering the above, the PBCEF recommends that a water audit is done for the area and that an agricultural specialist is appointed to investigate best land use practices for the area. Possibly a Biodiversity and Agriculture (WWF-SA) programme could be initiated to the benefit of everyone in the area.

The EAP indicated that no new dams were constructed by the present owner. All the dams were constructed by previous owners and existed prior to the properties being purchased - some storage is therefore considered legal as they are an Existing Lawful Use.

The dams on these properties are on two tributaries of the Whiskey Creek. Both tributaries have existing neighbouring dams located downstream which would collect and store water that is not stored upstream. Therefore, removal of the dams does not mean the water will end up in the Whiskey Creek. To ensure the ecological reserve or any Existing Lawful Uses that have been Validated and Verified are met and maintained in the Whiskey Creek, a broader catchment scale Reserve Determination would need to be undertaken. The hydrological study (Confluent 2022) confirms this.

The landowner has an agreement with the neighbour downstream of Dam 4 which allows for the periodic release of water to ensure adequate levels are sustained in their dam. This demonstrates the willingness of the applicant to ensure downstream water users are not negatively impacted by their water use.

When dam walls were maintained and upgraded to prevent leakage on Dams 2 and 4, outlet valves were incorporated to allow water to trickle out and maintain wetland habitat downstream.

The hydrological study has addressed the water requirements for irrigation of 20 ha of almond trees and has determined that 60 000m³ of surface water supplemented by 24 000m³ of groundwater will be sufficient for irrigation of the orchards. This historical unauthorised construction of the dams, and more recent enlargement of 3 of the 4 dams is the subject of the Water Use License Application. It is agreed that a water audit should be conducted for the area, as many unauthorised water uses are being undertaken. In terms of maintaining water quantities in the Whiskey Creek, the only way of ensuring that legitimate water users and the ecological reserve are met is to, a) conduct a Validation and Verification of water use for all users in the catchment, and b) to commission a Reserve Determination study for the catchment. These studies are beyond the scope of a single applicant's WULA but are recommended.

An I&AP highlighted her concerns that that allowing the plantation of 20ha of almonds, which are not proven to be successfully grown in The Craggs, will require 60,000 m³ of water per annum most of which will unlawfully come from two non-perennial watercourses. This, according to the I&AP, is beyond belief. No landowner should be allowed to divert the flow of a natural watercourse for their financial gain. Why should they be allowed to use water from a natural watercourse because it flows through their land? Filling a dam for recreation purposes should be seen differently.

20ha of almonds needs a huge number of bees to pollinate the trees. Has an environmental assessment been conducted on what happens to local bees when scores of new hives are brought into the area? The I&AP also stated that any reference to creating employment through these endeavours is not strictly above board either as most of these farms are employing unregistered Malawians either directly or via contractors.

The I&AP objects to this application - the water courses should be returned to their natural state. Any water for trees should come from water runoff. The landowners should be fined for their actions and should be refrained from carrying on with their intended plan. Too many people are buying property in the area, tearing the land up for financial gain with very little regard to the environmental impact (short and long term) and asking for forgiveness and not permission. This has to stop before even more irreversible damage is done to the environment.

The EAP indicated that, in response to the comment about underground water, A geohydrological assessment was requested by the BGCMA for the WULA and was done by a qualified specialist to determine the sustainability and impacts of abstracting groundwater through the borehole for supplementing irrigation. The proposed abstraction was found to pose a 'negligible negative' impact to the groundwater environment. The specialist stated

that up to 25 000m³ could be applied for without detrimental effect. The application is for 24 000m³ and the borehole is metered ensuring abstraction can be monitored.

On the question of the bees, the bees for pollination are brought in from outside the area only for the short pollination period and removed again afterwards.

The statement about employment of unregistered Malawians either directly or via contractors is factually incorrect. 9 full time workers and 8 temp workers employed all of which are South African.

1.1 Consultation with organs of state in terms of section 24O of the NEMA

The following organs of state provided comment on the application:

- National Department of Agriculture, Land Reform and Rural Development (DALRR)
- DEA&DP: Environmental Impact Management Services Region 3 (DEA&DP: EIMS)
- The Department of Forestry, Fisheries & the Environment: Forestry Western Cape (DFFE)
- Breede Gouritz Catchment Management Agency (BGCMA)
- Garden Route District Municipality (GRDM)
- SANParks (SP)
- CapeNature (CN)

The DALRR highlighted various requirements and recommendations related to the *Conservation of Agricultural Resources Act, 1983 (Act 43 of 1983) (CARA)* .

Any action taken to control alien plants shall be extended with caution and in a manner that will cause least possible damage to the environment.

Detailed rehabilitation plan including all mitigation plans must be included in EMP report, as the plan will be used as a guideline for ongoing monitoring of rehabilitation/mitigation plans. Such plan should be considered for decommissioning and post closure of the proposed development in ascertaining all mitigations conditions are compiled and adhered to.

The EAP indicated that majority of the property has already been rehabilitated; therefore, the need for a rehabilitation plan would be irrelevant. The applicant is currently undertaking rehabilitation as per the recommendations provided in the aquatic impact assessment.

The DFFE is responsible for the implementation and enforcement of the *National Forest Act (NFA), Act 84 of 1998 as amended* and the *National Veld and Forest Fire Act, Act 101 of 1998 as amended (NVFFA)*.

The NVFFA prohibits the cutting, disturbing, damaging or destroying of protected tree species without a licence as well as provides for the prohibition of the destruction of indigenous trees in any natural forest without a license.

According to the information provided only alien vegetation and old orchards were cleared, thus Forestry's mandate under the NFA is not affected. The DFFE recommends that the disturbed/ cleared areas, along the watercourse, be rehabilitated with indigenous/ endemic forest tree species. That the areas along the watercourse with indigenous forest patches be kept intact.

The BGCMA indicated that the illegal water uses were reported to the Compliance Monitoring and Enforcement (CME) unit to conduct further investigation for further investigation.

In light of the above, all illegal water uses should be ceased or discontinued until such time that a licence is issued or approval to continue with water uses is approved in writing by CME.

DEA&DP:EIMS indicated that the mitigation measures contemplated in the Terrestrial Biodiversity Environmental Sensitivity Report (of February 2022) must be implemented and incorporated into the Environmental Management Programme (EMPr).

The mitigation measures to restore wetland vegetation and revegetate buffers must be included in the EMPr and be implemented.

The revegetation plan provided by the Aquatic Specialist Impact Assessment for the Section 24G, and Water Use License Application required for Portions 4 and 9 / 232 Redford Farm, Knysna (Dated October 2021) must be implemented and be adhered to.

With reference to the aquatic specialist recommendation of a 25m buffer zone, the GRDM indicated that the applicant must ensure that this riparian buffer zone includes the wetland systems, as well as the natural dams, streams and/or rivers occurring on the farm.

With regards to the development setback line of 32m around water bodies such as wetlands, streams and dams, as set within the *National Environmental Management Act, 1998* (Act No.107 of 1998), please maintain this setback distance in the case of any development as per the NEMA Listing Notices.

The GRDM requested confirmation on the efforts made to include indigenous vegetation as is occurring within the direct neighbouring area/environment, and not just general indigenous vegetation. The EAP indicated that Indigenous vegetation that naturally occurs within the direct environment has been/will be used for rehabilitation.

Additionally, the GRDM requested confirmation on the type of pesticides and application methods which will be used, and possible impacts these will have on the water bodies/groundwater due to direct exposure, as well as surface and/or stormwater flows into these water bodies. The EAP indicated that as far as possible the applicant is following a biological approach on the farm and only use chemical pesticides when absolutely

necessary. Pesticides are either spot applied using a manual backpack sprayer, or for the Almond Orchard, pesticides are applied using an orchard sprayer. All spraying is done when there is no wind to ensure there is no drift of pesticides. There is no direct exposure to the water bodies/ground water. There is no risk of pesticides entering the surface and/or stormwater flows into these water bodies.

Portions 66 and 9 of the Farm Redford fall within the buffer zone of the Garden Route National Park (GRNP) and achieving a conservation outcome on these properties is important to SANParks. The activity that took place on these properties set a very bad precedent in terms of environmental impact and significant rehabilitation is required to benefit biodiversity conservation and landscape functionality.

SANParks supports the proposed mitigation measures in the Aquatic Specialist Impact Assessment. The following mitigation measures are particularly important:

- the 25m riparian buffers; rehabilitation of wetlands;
- revegetation of dam walls, spillways and outflow points;
- management of orchards for the protection of water resources and improved biodiversity and that no exotic fish species should be introduced in the dams.

SANParks support the mitigation measure for ongoing dam maintenance.

SANParks recommends that the generic draft EMP developed by Eco Route Environmental Consultancy is revised to reflect all the mitigation measures proposed in the Aquatic Specialist Impact Assessment, before it is approved.

CN indicated that, although 85 % of the property was infested by invasive alien plants and the vegetation is Least Threatened, it should not have been used as a reason to construct the dams. Infestation by alien plants does not necessarily mean that an area is not important for biodiversity. Some vegetation types are particularly prone to invasive alien infestation but may recover when cleared of alien vegetation and rehabilitated. Thus, the eradication of invasive alien plants must be a high priority.

As stipulated in the Western Cape Spatial Biodiversity Plan (WCSBP) Land Use Guidelines Handbook it is the landowner's responsibility to ensure their property is suitably maintained at a level consistent with Land Use Ordinance guidelines.

Having corridors for animal movement is important for conserving biodiversity and we therefore recommend maintaining ecological corridors across the landscape.

In conclusion, the activity (and the historical disturbance by agricultural activities) has compromised the indigenous vegetation on the site. The wetlands play a vital role and are important corridors for the Whiskey Creek Nature Reserve. Thus, to protect the Critical

Biodiversity Area's (CBA), Ecological Support Area's (ESA), and sensitive water sources CapeNature does not support the continuation of this activity due to its cumulative negative impact on the biodiversity at the site as well as the impact on the water sources of the area which are CBAs. The remaining areas on the property should remain undeveloped.

2. CALCULATION OF THE ADMINISTRATIVE FINE

Section 44(1)(aC) of the NEMA makes provision for the “Minister to make regulations relating to the procedure and criteria to be followed in the determination of an administrative fine in terms of section 24G.”

The Section 24G Fine Regulations, 2017 (“the regulations”) as referred to above have come into effect on 20 July 2017 which stipulate the procedure to be followed and criteria for the determination of a section 24G administrative fine. All applications submitted after the promulgation date are subject to the aforesaid regulations which stipulate the maximum fine applicable to an application is R5 million, as per the NEMA amendments.

The S24G fine calculator is a guide that is not rigidly applied and is used to determine an appropriate fine (to the maximum of R5 million) 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.

In accordance with section 24(4) of the *National Environmental Management Act, 1998 (Act No. 107 of 1998)* (“NEMA”) the application contains, *inter alia*, an assessment of the consequences and impacts on the environment, including cumulative impacts, and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the activity as well as a description of the mitigation measures that will be undertaken.

2.1 ASSESSMENT OF IMPACTS, BENEFITS AND MITIGATION MEASURES

The determination of the administrative fine is based on the administrative fine calculator which was developed by the National Department of Environmental Affairs. The fine calculator (which is a guide that is not applied rigidly) was based on the following indexes that were informed by the environmental assessment practitioner as specified in the section 24G application:

- Socio-Economic Impact Index
- Biodiversity Impact Index
- Sense of Place &/ or Heritage Impact Index
- Pollution Impact Index.

The administrative fine decision and the reasons for the decision were informed by the section 24G application with supporting information, submitted by the environmental assessment practitioner, which stated *inter alia* the following:

2.1.1 Socio-economic Impact

The **Socio-Economic Impact Index** was rated by the EAP that *"The activity is not giving, has not given and will not give rise to any negative socio-economic impacts"*.

The motivation for this rating by the EAP was that *"The activities will not arise in any negative socio-economic impacts. The dams provide water for agricultural purposes in an area zoned for Agricultural use. The activity would result in positive socio-economic impacts as the success of cultivating crops would support food production and continuously provide employment opportunities for the local community."*

Having regard to the impacts caused by the activities, I am in agreement with the fine committee's recommendation that the administrative fine calculator be scored consistent with the score of the application that: *"The activity is not giving, has not given and will not give rise to any negative socio-economic impacts"*.

The motivation for this rating is that the activities on site do not result in any socio-economic impacts.

2.1.2 Biodiversity Impacts

The **Biodiversity Impact Index** was rated by the EAP that *"The activity is giving, has given or could give rise to localised biodiversity impacts"*.

The motivation for this rating by the EAP was that *“Both terrestrial and aquatic vegetation were removed in the clearance of sediment and the expansion of in-stream dams; resulting in a localised negative impact on biodiversity. This resulted in the loss of habitat and the modification of the natural flow of water (a localised impact).”*

Having regard to the impacts caused by the activities, I am in agreement with the fine committee's recommendation that the administrative fine calculator be scored consistent with the score of the section 24G application that: *“The activity is giving, has given or could give rise to localised biodiversity impacts”*.

The motivation for this rating was based on the conclusions of the Terrestrial Biodiversity Environmental Sensitivity Report, the Aquatic Specialist Impact Assessment, the Hydrological Assessment, as well as the Geohydrological Assessment conducted for the site. It was confirmed that there has been a localized biodiversity impact due to the removal of terrestrial and aquatic vegetation linked to the expansion of the in-stream dams.

2.1.3 Sense of place and Heritage Impacts

The **Sense of place and Heritage Impacts Index** was rated by the EAP 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”*.

The motivation for this rating by the EAP was that *“The activity is located on an agricultural farm; therefore, sense of place is not affected. In addition, the activity is not located in close proximity to any cultural heritage site or areas of traditional value/significance.”*

Having regard to the impacts caused by the activities, I am in agreement with the fine committee's recommendation that the administrative fine calculator be scored consistent with the score of the section 24G application 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”*.

The motivation for this rating was based on the surrounding agricultural landscape. Additionally, the site was not deemed to contain any heritage remains or within close proximity to an area of cultural importance.

2.1.4 Pollution Impact

The **Pollution Impact Index** was rated by the EAP that *"The activity is not giving, has not given and will not give rise to any pollution"*.

The motivation for this rating by the EAP was that The activity is not generating any pollution.

Having regard to the impacts caused by the activities, I am in agreement with the fine committee's recommendation that the administrative fine calculator be scored consistent with the score of the section 24G application that: *"The activity is not giving, has not given and will not give rise to any pollution"*.

The motivation for this rating is that the activity does not and did not produce any pollution.

The indices contained in the section 24G application submitted by the EAP were used in the determination of the fine. This was assessed, reviewed and confirmed by observations obtained during the site inspection on 9 September 2022.

It should also be noted that the section 24G fine calculator distinguishes between the following two categories of offenders:

- Category 1 offenders are (firm) trusts, body corporates, close corporations, companies, parastatals and government departments.
- Category 2 offenders are individual/natural persons.

The calculation of the administrative fine is also based on the fact that the applicant in this matter is a category 2 offender. Nevertheless, the amounts determined by the section 24G fine calculator for both categories were analysed to assess whether it is appropriate to regard the applicant under the abovementioned category, given the personal circumstances of the applicant. I am of the opinion that it is appropriate to regard the applicant in this matter is a category 2 offender.

2.2 CONSIDERATION OF DEVIATION FROM THE CALCULATED FINE

Further to the above, the following factors were taken into account in determining whether the fine recommended by the fine calculator is appropriate in the circumstances of this matter and whether there are reasons to deviate from the quantum of the fine recommended:

2.2.1 Aggravating factors, or the absence thereof, such a blameworthiness, non-compliance history and ignoring previous advice.

In this regard, the fact that the applicant has no previous history of conduct such as occurred in the present matter.

2.2.2 Mitigation factors such as preventative measures, co-operation with the environmental authority, immediate voluntary remediation and restoration and personal circumstances.

In this regard, I have considered the applicants conduct and am of the view that no mitigating factors exist which justify a deviation from the recommended fine amount.

2.2.3 The potential costs that the applicant will incur in complying with directions as to remedial measures.

In this regard, the contents of the Application, together with the assessment report and suggested mitigation/rehabilitation measures are noted.

2.2.4 Social/Public benefit factors resulting from activities.

In this regard, I am of the opinion that the applicant's activities provide no direct social service to the affected community and will have little, or no, positive impact on job creation or poverty alleviation in the area which justifies a deviation from the recommended fine amount.

It is acknowledged that 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 taken into account. I am satisfied that the NEMA principles, including the consideration, assessment and evaluation of the social, economic and ecological impacts of activities (disadvantages and benefits), have been correctly applied in this application and this fine is appropriate in the light of such consideration and assessment.

In all the circumstances, and after weighing all the above factors, I am of the view that a fine of R25 000 (twenty-five thousand rand) is an appropriate fine. Please find attached a copy of the calculated fine (Appendix 1).
