



**Western Cape
Government**

Environmental Affairs and
Development Planning

Directorate: Environmental Governance
Sub-directorate: Rectification

REFERENCE: 14/2/1/2/B1/2/0011/17

ENQUIRIES: Jamie-Lee van Zyl

REGISTERED MAIL

The Board of Directors
Indigo Fruit Farming (Pty) Ltd
P. O. Box 36
ASHTON
6715

Tel: (023) 615 1146
Fax: (086) 235 8498
Email: dewalt@indigofruit.co.za

Attention: Mr Dewalt Viviers

Dear Sir

ADMINISTRATIVE FINE IN TERMS OF SECTION 24G OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT 107 OF 1998) ("NEMA"): THE UNLAWFUL CROSSING OF THE KOGMANSKLOOF RIVER WITH IRRIGATION PIPELINES ON PORTION 181 OF FARM 117, ZANDVLIET ESTATES, ASHTON

1. Your application in terms of section 24G of the NEMA ("the section 24G application") dated 4 July 2017 and the Environmental Impact Report dated 9 November have reference.
2. In order for the Department to process your application, you are required to pay an administrative fine of **R50 000 (Fifty thousand Rand)** in accordance with section 24G(4) of the NEMA.
3. The above administrative fine is determined by the type of activity or activities undertaken and the impact or impacts it has on the environment.
4. Please note that the continued operation, conduct or undertaking of the activity or activities will remain unlawful and should an environmental authorisation be issued at

the conclusion of the section 24G application process, it shall only take effect from the date on which it has been issued.

5. Please note that in terms of section 24G(4) of the NEMA you must pay the administrative fine **before** the competent authority may consider your report and thereafter issue or refuse an environmental authorisation.

Notification of the administrative fine decision

6. The applicant must in writing, within 14 days of the date of the administrative fine decision ("the decision")–
 - 6.1. notify all registered interested and affected parties ("I&APs") of –
 - 6.1.1. the amount of the administrative fine;
 - 6.1.2. the reasons for the decision as detailed in Annexure A; and
 - 6.1.3. the date of the decision;
 - 6.2. draw the attention of all registered I&APs to the manner in which they may access the decision; and
 - 6.3. provide the details of all registered I&APs (postal and/ physical address, contact number, facsimile and e-mail address) to all registered I&APs and the original decision-maker in the event that an appeal has been lodged in terms of the *National Appeal Regulations, 2014*.
7. Should the applicant intend to appeal the administrative fine, an appeal must be submitted to the appeal administrator in accordance with regulation 4 of the *National Appeal Regulations, 2014* within 20 (twenty) days from the date that the notification of the decision was sent to the applicant by the competent authority.
8. Should an interested and affected party intend to appeal the administrative fine, an appeal must be submitted to the appeal administrator within 20 (twenty) days from the date that the notification of the decision was sent to the registered interested and affected parties by the applicant.

Method of payment of the administrative fine

9. Please be advised that payment of the above administrative fine may be made by cash, cheque or electronic transfer in the following manner:

Cash Payment

The fine amount may be paid at the cashier's office of this Department, ground floor, Utilitas Building, 1 Dorp Street, Cape Town on Monday to Friday between 08h30 and 12h30.

The following allocations must be given to the cashier when making the payment:

Reference No: **S24G00216**

Item: Section 24G administrative fine

Company/ Individual Name

ID No.

Cheque Payment

The cheque must be crossed and made payable to the Department of Environmental Affairs and Development Planning and may either be deposited at the aforementioned cash office under the allocations mentioned above or deposited directly in the Department's bank account (see bank details below).

Electronic Transfer

An electronic transfer may be made to the following bank 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.	:	S24G00216

10. Kindly forward a copy of **the proof of payment** (e.g. receipt, deposit slip, electronic transfer confirmation) to the Department and quote the abovementioned reference

number to ensure that the Department may acknowledge payment of the administrative fine.

11. This proof of payment must also be accompanied by proof that the abovementioned administrative fine was brought to the attention of registered I&APs as required in paragraph 6 above.
12. The fine must be **paid within 60 (sixty) calendar days** from the date of this letter. If no such payment is received within the stipulated timeframe and no appeal has been lodged with the appeal administrator, the Department may proceed with appropriate criminal investigative action which may result in criminal prosecution and/or the deferral of a decision to issue an environmental authorisation until such time that the criminal investigation is concluded and:
 - 12.1. National Prosecuting Authority has decided not to institute prosecution;
 - 12.2. the applicant is acquitted or found not guilty after prosecution; or
 - 12.3. the applicant is convicted by a court of law.
13. Please be advised that the notice of payment of the administrative fine is **not an authorisation** for the consequences of unlawful commencement of a listed activity/ies according to the NEMA.
14. Further consideration of your application will only continue upon receipt and acknowledgement of payment of the administrative fine.

Appeals

Appeals must comply with the provisions contained in the *National Appeal Regulations, 2014* (Government Notice No. R. 993 in Government Gazette No. 38303 of 08 December 2014). Please note the provisions of Regulation 1(2) of the National Appeal Regulations, 2014 when calculating the period of days.

15. Should an appeal be lodged with the appeal administrator against the administrative fine, you are hereby advised of the following:
 - 15.1. An appellant (if the applicant) must –
 - 15.1.1. submit an appeal in accordance with regulation 4 of the *National Appeal Regulations, 2014*, to the appeal administrator and a copy of the appeal

to the decision maker, any registered I&APs and any organ of state with interest in the matter within 20 (twenty) calendar days from the date that the notification of the decision was sent to the applicant by the competent authority.

15.2. An appellant (if NOT the applicant) must –

15.2.1. submit an appeal in accordance with regulation 4 of the *National Appeal Regulations, 2014*, to the appeal administrator, and a copy of the appeal to the applicant, any registered I&APs, any organ of state with interest in the matter and the decision maker within 20 (twenty) calendar days from the date that the notification of the decision was sent to the registered interested and affected parties by the applicant.

15.3. The applicant (if not the appellant), the decision-maker, I&APs and organs of state must submit their responding statements, if any, to the appeal authority and the appellant within 20 (twenty) calendar days from the date of receipt of the appeal submission.

16. An appeal application form must be submitted by means of one of the following methods:

By post: Western Cape Ministry of Local Government, Environmental Affairs and Development Planning
Private Bag X9186
CAPE TOWN
8000

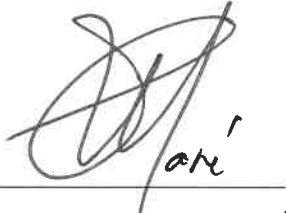
By facsimile: (021) 483 4174; or

By hand: Attention: Mr J. de Villiers
Room 809
8th Floor Utilitas Building, Dorp Street, Cape Town, 8001

By e-mail: Jaap.DeVilliers@westerncape.gov.za

Department of Environmental Affairs and Development Planning
Directorate: Environmental Governance

16.1. A prescribed appeal application form as well as assistance regarding the appeal processes is obtainable from the office of the Minister at: Tel. (021) 483 3721, E-mail Jaap.DeVilliers@westerncape.gov.za or URL <http://www.westerncape.gov.za/eadp>.



ADV. CHARMAINE MARÉ

DIRECTOR: ENVIRONMENTAL GOVERNANCE

DATE: 30 May 2018

Copied to: (1) Doug Jeffery (Doug Jeffery Environmental Consultants (Pty) Ltd)

Fax: (086) 660 2635

Email: lindsay@dougjeff.co.za

(2) Soyisile Mokweni (Langeberg Municipality)

Fax: (023) 615 2272

Email: mm@langeberg.gov.za

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 and Environmental Impact Assessment and Mitigation Measures as outlined in the section 24G Environmental Impact Assessment ("EIA") Report dated 9 November 2017.
- Public participation conducted for the application by the Environmental Assessment Practitioner ("EAP").
- The Environmental Management Programme submitted for the application of August 2017.
- 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 8 May 2018, attended by officials from this Department.

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 **Breederivier** newspaper on 22 August 2017;
- A site notice was erected; and
- Letters were sent to interested and affected parties ("I&APs") and the municipal ward councillor on 16 August 2017.
- I&APs were afforded the opportunity to provide comments on the draft and final EIA Reports.

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:

- CapeNature
- Langeberg Municipality
- Department of Water and Sanitation ("DWS")
- Department of Agriculture ("DoA")

CapeNature advised that the Kogmanskloof River which has been identified as an aquatic Critical Biodiversity Area ("CBA") and agree that the impacts of the pipeline were local and of a fairly short term. CapeNature supports the removal of excess fill remaining in the reedbed as per the freshwater specialist's recommendation. They further advised that the Maintenance Management Plan ("MMP") must include requirements for regular monitoring of erosion (that may be caused by natural or exacerbated by anthropogenic events) of all the water courses on the farm and allow for rehabilitation to be undertaken as necessary even when a specific maintenance or construction activity has not taken place. A request was also made that alien invasive species should also be monitored and removed throughout the farm. The EAP responded advising that the requests for changes to the MMP is out of the scope of the s24G application as the application was done for works within a section of the Kogmanskloof River on the farm.

The Langeberg Municipality advised that they have no objection to the construction of an irrigation pipeline across the Kogmanskloof River, subject to compliance with the recommendations of the EAP as set out in the EIA report. The approval of an MMP is supported to guide ongoing maintenance without the need for an environmental impact assessment to be undertaken for the on-going maintenance of the pipelines.

The DoA advised that they have no comment.

The DWS commented that the activities undertaken are in line with the General Authorisation dated 26 August 2016 and that the applicant will be kept liable to stay within the ambit of the reports submitted.

No further comments were received at the end of the public participation process.

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”.

Section 44(1)(B) goes on to stipulate that “*Until such time that the regulations made under subsection (1) have come into effect, the existing standard operating procedure, adopted by the Minister for determining administrative fines in terms of section 24G, applies*”.

The regulations referred to above have come into effect on 20 July 2017 and make transitional provision that an application submitted prior to the promulgation of the Section 24G Fine Regulations on 20 July 2017, must be dispensed with as if these regulations have not taken effect. The current standard operating procedure for determining a section 24G fine determination was however adopted in June 2014 and was thus applied. All applications submitted after that date are subject to the aforesaid standard operating procedure which stipulates that the maximum fine applicable 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 of 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; the section 24G process is distinct and not punitive in nature.

A report as outlined in section 24G(1)(vii) of the NEMA that 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, has been submitted.

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 under Section 9 (named "Impact Summary of Activity") of the EIA Report as informed by the EAP:

- Social Benefit Index (intended only for state organs, including municipalities, in terms of their respective service delivery mandates);
- Socio-Economic Impact Index;
- Biodiversity Impact Index;
- Sense of Place &/ or Heritage Impact Index; and
- Pollution Impact Index.

The administrative fine decision and the reasons for the decision were informed by the EIA Report submitted by the EAP, which stated *inter alia* the following:

2.1.1 Social Benefit

The **Socio-Economic Benefit Index** was rated by the EAP as "The activity provides no social service / infrastructure to the affected community".

The motivation for this rating is that "*The local community will not be significantly impacted on. The application relates to irrigation pipes crossing the river on a working farm.*"

I am in agreement with the fine committee's recommendation that the administrative fine calculator be scored consistent with the score of the EIA Report that: "*The activity provides no social service / infrastructure to the affected community.*"

The objective of any EIA is to find the best practicable option that will ensure the maintenance of ecological integrity while promoting justifiable social and economic development. The Department's Guideline on Need and Desirability (March 2013) speaks to balancing the need of the individual or applicant and the desirability of the activity from an environmental and social / economic point of view.

The works undertaken within the Kogmanskloof River was done for continued operations on the farm and does not have a direct benefit to the local community. According to the EIA report no new employment opportunities were created during the construction phase and none will be created during the operational phase of the activity.

2.1.2 Socio-economic Impact

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

The motivation for this rating by the EAP was that *"The activity will not give rise to any significant negative socio-economic impacts. The application relates to irrigation pipes crossing the river on a working farm."*

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 EIA Report that *"The activity will not give rise to any negative socio-economic impacts"*. The motivation for this rating was agreed to by the fine committee. I am in agreement with this motivation.

2.1.3 Biodiversity Impacts

The **Biodiversity Impact Index** was rated by the EAP that *"The activity could give rise to localised biodiversity impacts"*.

The motivation for this rating by the EAP was that *"Limited impacts on the river are likely to have occurred during construction. No further biodiversity type impacts are likely to occur during the operational phase. The potential freshwater impacts during construction were likely to have been negligible, and at worst, would had a low negative significance. No irreplaceable habitats would have been affected and the potential impacts identified were not considered irreversible. Any potential impacts would have taken place within a very localised area, and would have had a short-term effect only (weeks to months). From a freshwater perspective, the proposal is acceptable."*

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 differently to the score of the EIA Report that: *"The activity will not give rise to any impacts on biodiversity"*.

Although the Kogmanskloof is an aquatic CBA, the impacts of the activities were short term in duration, with a physical footprint of about 15m² (see below **Figure 1** in this regard). The motivation for the lowered impact rating is based on the conclusions made in the Freshwater Impact Assessment of (July 2017), listed below:

- The impact on the wetland is considered very low to negligible, with the only remnant impact being the very minor impact to river flow resulting from the small remnant earth fill left on the excavated corridor.
- The river flow, riparian vegetation, river corridor connectivity and other functional attributes have been fully restored.
- Over the two years that have elapsed since the pipelines were laid, there has been a near-complete recovery of the riverine environment from this impact. The only mitigation measure that is recommended is for the removal of the small pile of excess fill remaining in the reedbed alongside the pathway (right hand bank, facing downstream).

These conclusions were verified in the site inspection of 8 May 2018 (see **Figure 2**).



Figure 1: A view of the pipe installation works undertaken in the Kogmanskloof River. The works undertaken in September 2015.



Figure 2: A view of the current condition of the site. Image dated 8 May 2018.

2.1.4 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 proposal is for the installation of irrigation pipes on an operating farm. This is in keeping with the surrounding agricultural activities on the farm and the surrounding agricultural area."*

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 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"*. I concur with the EAP's motivation, agreed to by the fine committee, as the activity is in keeping with the intended land use of the site.

2.1.5 Pollution Impact

The **Pollution Impact 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 *"No waste or pollution will be generated by the proposed activity"*.

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 EIA Report as stated above. I am in agreement with the motivation provided for this impact rating, as agreed to by the fine committee.

The indices contained in the EIA Report submitted by the EAP were used in the determination of the fine, with the exception of the Biodiversity Impacts Index which was reduced to record that the *"The activity will not give rise to any impacts on biodiversity"*. This was assessed, reviewed and confirmed by observations obtained during the site inspection on 8 May 2018.

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

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

The calculation of the administrative fine is also based on the fact that the applicant in this matter is a category 1 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 1 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 as blameworthiness, non-compliance history and ignoring previous advice.

No aggravating circumstances exist to motivate deviation from the calculated fine quantum.

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 biodiversity impact considerations discussed above and the following mitigating factors that arose from the assessment:

- The impacts were very localised with a short-term effect.
- The impacts are considered negligible and at worst, low negative.
- There has been a near-complete recovery of the riverine environment.
- The construction of the pipeline was needed for ongoing agricultural activities on the farm as the old syphon line was a damaged cement line that leaked profusely.
- A Maintenance Management Plan ("MMP") has been submitted to the Department for approval for any future maintenance works to be undertaken on the newly installed irrigation pipes.
- The freshwater specialist recommended no other mitigation measures other than the removal of the small pile of excess fill remaining in the reedbed along the pathway adjacent the affected section of the Kogmanskloof River.

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 EIA Report, suggested rehabilitation measures, the EMPr and MMP 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 to justify 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 considering the circumstances and after weighing all the above factors, I have deviated from the calculated fine amount and am of the view that a fine of 50 000 (Fifty thousand Rand) is appropriate. The installation of the irrigation pipelines resulted in very low to negligible biodiversity impacts, with a near-complete restoration of the functional attributes of the affected section of the Kogmanskloof River. Any further works related to the pipelines will be done in accordance with an MMP to be approved by this Department. Please find a copy of the calculated fine, attached Appendix 1.

APPENDIX 1

14/2/1/2/B1/2/0011/17

2014 SECTION 24G CALCULATION (January 2014)
IMPACT INDEX CALCULATOR

B Social Benefit Index			
Description of variable		Weighting	Selection Score
B.1	The activity provides no social service / infrastructure to the affected community	0%	x 1
B.2	The activity provides indirect social service / infrastructure to the affected community	10%	0
B.3	The activity provides some social service / infrastructure to the affected community	30%	0
B.4	The activity provides an important social service / infrastructure to the affected community	60%	0
B.5	The activity provides an essential social service / infrastructure to the affected community	80%	0

Notes:

2 Socio Economic Impact Index			
Description of variable		Weighting	Selection Score
2.1	The activity will not give rise to any negative socio-economic impacts	0.5	x 10
2.2	The activity could give rise to negative socio-economic impacts, but highly localised	3	0
2.3	The activity could give rise to significant negative socio-economic and regionalized impacts	7	0
2.4	The activity could result in wide-scale socio-economic impacts.	10	0

Notes:

3 Biodiversity Impact Index			
Description of variable		Weighting	Selection Score
3.1	The activity will not give rise to any impacts on biodiversity	0.5	x 15
3.2	The activity could give rise to localised biodiversity impacts	3	0
3.3	The activity could give rise to significant biodiversity impacts	8	0
3.4	The activity is likely to permanently / irreversibly transform/ destroy a recognised biodiversity 'hot-spot' or threaten the existence of a species or sub-species.	10	0

Notes: x

4 Sense of Place & / or Heritage Impact Index			
Description of variable		Weighting	Selection Score
4.1	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	0.5	x 10
4.2	The activity is not in keeping with the surrounding environment and will have a localised impact on the affected area's sense of place and/or heritage	3	0
4.3	The activity is not in keeping with the surrounding environment and will have a significant impact on the affected area's sense of place and/or heritage	8	0
4.4	The activity is completely out of keeping with the surrounding environment and will have a significant impact on the affected area's sense of place and/or heritage	10	0

Notes:

5 Pollution Impact Index			
Description of variable		Weighting	Selection Score
5.1	The activity will not give rise to any pollution	0.5	x 15
5.2	The activity could give rise to pollution with low impacts.	3	0
5.3	The activity could give rise to pollution with moderate impacts.	5	0
5.4	The activity could give rise to pollution with high impacts.	8	0
5.5	The activity could give rise to pollution with major impacts.	10	0

Notes:

TOTAL SCORE 50
IMPACT INDEX 5.00%

Applicant

Individual 10 000.00

Company, Government & Parastatal 250 000.00

Reasons for Deviation

The potential impacts were very localised with a short-term effect.
 The potential impacts are considered negligible and at worst, low negative.
 There has been a near-complete recovery of the riverine environment.
 The construction of the pipeline was needed for ongoing agricultural activities on the farm as the old syphon line was a damaged cement line that leaked profusely.
 A Maintenance Management Plan has been compiled for future maintenance of the irrigation pipes.

Fine Amount 50 000.00

