

10 September 2018

Mr C Ramaphosa
Honorable State President
Republic of South Africa

Via email: presidentrsa@presidency.gov.za

RESPONSE OF DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES TO HIGH COURT CHALLENGE RE WEST COAST ROCK LOBSTER TOTAL ALLOWABLE CATCH

Dear President Ramaphosa

1. Background to correspondence

- a) On 10 November 2017 the Department of Agriculture, Forestry and Fisheries (DAFF) announced the total allowable catch (TAC) for South African West Coast Rock Lobster for the 2017/18 fishing season, as determined in accordance with section 14 (1) of the Marine Living Resources Act (Act 18 of 1998, as amended).
- b) On 27 June 2018 the World Wide Fund for Nature South Africa (WWF) approached the High Court with a view to having the TAC set aside because of inconsistencies in the decision-making process and on the basis that the decision was irrational and cannot sustain the long-term survival of either the West Coast Rock Lobster resource or the fishers that depend on it.¹
- c) WWF is additionally prevailing on the Court to direct that for the 2018/19 and later seasons, the TAC must
 - i. not be determined at levels beyond which the integrity of the West Coast Rock Lobster resource is jeopardized;
 - ii. be consistent with the obligations of the Republic of South Africa under article 61 of the United Nations Convention on the Law of the Sea and the Southern African Development Community Protocol on Fisheries, and
 - iii. promote the continual recovery of the West Coast Rock Lobster resource towards achieving maximum sustainable yield consistent with

¹ WWF Statement entitled *Court Action over West Coast rock lobster*, 16 July 2018 - attached as Annexure 1 to this document.

international best practice and based on the best available scientific evidence in accordance with article 61 (2) of the United Nations Convention on the Law of the Sea.²

- d) WWF's action is being opposed by the Minister for Agriculture, Forestry and Fisheries ("the Minister") and DAFF's Deputy Director-General: Fisheries Management.³
- e) The South African Small Scale Fisheries Collective has applied to the Court to be admitted as *amicus curiae* in the matter,⁴ and is in support of the orders being sought by WWF in association with points 1 b) and c) above.⁵
- f) The matter is scheduled to be heard in the Western Cape Division of the High Court on 11 and 12 September 2018.

2. WWF's profile in relation to this matter

- a) In its founding affidavit WWF describes its organisational mission as being to *stop the degradation of the planet's natural environment and to build a future in which people live in harmony with nature, by conserving the world's biological diversity, including ensuring that the use of natural resources is sustainable.*⁶
- b) In turn, WWF's marine programme *works towards creating healthy oceans which support abundant biodiversity, sustainable livelihoods and a thriving economy.*⁷
- c) Within this context, WWF is actively engaged in the management of the West Coast Rock Lobster fishery, including by way of its observer status and participation in DAFF-established scientific working and management structures.⁸

3. The dispute

- a) In conjunction with announcing that WWF's action is to be opposed, the Minister's spokesperson was quoted as having stated that *at the heart* of the dispute is the question of *whether government should consider socially denuded*

² Applicant's notice of motion in the High Court of South Africa (Western Cape Division, Cape Town) dated 27 June 2018, p. 3 -

http://awsassets.wwf.org.za/downloads/notice_of_motion_with_annexures_2_.pdf

³ First and second respondents' answering affidavit dated 10 August 2018, High Court case no. 11487/18 - http://awsassets.wwf.org.za/downloads/11_answering_affidavit_first_and_second_respondent.pdf

⁴ South African Small Scale Fisheries Collective's answering affidavit dated 10 August 2018, High Court case no. 11478/18, Annexure "SSF1" -

http://awsassets.wwf.org.za/downloads/12_answering_affidavit_amicus_the_collective.pdf

⁵ *Ibid*, p. 2.

⁶ Applicant's founding affidavit dated 25 June 2018, High Court case no. 11478/18, p. 2 - http://awsassets.wwf.org.za/downloads/founding_affidavit_25_06_2019_2_.pdf

⁷ *Ibid*.

⁸ *Ibid*, p. 3.

*scientific advices against a balance between scientific opinions taken together with socio economic realities within which their application will be premise.*⁹

- b) In the same statement, the spokesperson averred that *the determination of the West Coast Rock Lobster allocation of quotas involved a careful balance of the most competing interests and considerations such as scientific, ecological, economic and social justice, as opposed to a lopsided biological and scientific consideration by WWF and other Scientists.*
- c) This is indeed the heart of the matter, with WWF arguing that DAFF's approach *reflects the wrong perception that "sustainability" and "socio-economic considerations" are competing considerations which require balancing, whereas properly interpreted and applied, the concept of "sustainability" means the integration of social, economic and environmental factors in a manner than serves present and future generations.*¹⁰
- d) In line with this argument, WWF goes on to assert that *quite obviously, if the TAC is determined in a non-sustainable manner, that will lead to a continued resource decline to extinction which is inconsistent with the socioeconomic considerations provided for in section 2 of the Marine Living Resources Act.*¹¹

4. Basis for PSAM's correspondence

- a) The Public Service Accountability Monitor¹² (PSAM) forms part of the School of Journalism and Media Studies at Rhodes University, and engages in research, monitoring, advocacy and capacity building activities. The organisation's Monitoring and Advocacy Programme evaluates the planning, budgeting, expenditure and performance of selected South African organs of State.
- b) PSAM has no affiliation to WWF, but does have an interest in the State's fulfillment of its mandated environmental governance responsibilities, and as such, shares concerns which underpin WWF's action.
- c) That said, with the Court being drawn on to rule on the contesting viewpoints being advanced in the case before it, the purpose of this correspondence is not to hold forth on what its ruling will be, but rather to draw attention to additional pronouncements made by the Minister's spokesperson, as well as to one made by the Minister himself, in the course of their respectively alluding to the case.

⁹ Cape Argus article, 11 July 2018 – <https://www.iol.co.za/capeargus/news/rock-lobster-quota-court-drama-daff-responds-15956179>.

¹⁰ Applicant's founding affidavit dated 25 June 2018, High Court case no. 11478/18, p. 49 - http://awsassets.wwf.org.za/downloads/founding_affidavit_25_06_2019_2_.pdf

¹¹ *Ibid.*

¹² www.psam.org.za

5. Further pronouncements by the Minister's spokesperson

Assuming that all the quotations to which we refer have been accurately captured by the reporting agency involved, pronouncements made by the Minister's spokesperson in conjunction with his comments on the nature of the dispute, as outlined at our point 3 above, include that

- WWF's action is *a subterfuge designed to scupper Fisheries Transformation agenda, as well as another fig leaf that disguises itself as a morally just cause against government when in fact it is a subterfuge designed to scupper radical economic transformation within the fisheries economy* (sic), and
- *no amount of big corporate media campaign and well financed front NGOs using courts against government will deter our determination to transform the marine living resources harvest to benefit those that were previously excluded by apartheid and colonialism* (sic).¹³

6. Statement by the Minister

A statement subsequently issued by the Minister on 2 August 2018 reflects a similarly disparaging approach in conveying that as a *Department we have been dragged to Court by World Wild Fund (WWF) for us to reduce significantly the Total Allowable Catch (TAC) in West Coast Rock lobster Crayfish* (sic).¹⁴

7. Comment on the pronouncements

- a) PSAM contends that both the tone and content of these pronouncements are unfortunate, and detract from the gravity of the matter before the Court.
- b) We are wholly alive to the harsh socio-economic milieu in which the State has to exercise its functions, but this reality exists alongside the equally compelling fact that ecosystems and renewable natural resources attain and exceed sustainability thresholds without concern for human circumstance.
- c) In the face of this, we would want to believe that direction which emanates from the legal process which is underway (recognizing that this may extend beyond the current High Court proceedings if the Court's findings are appealed) will be pivotal in determining how South Africa proceeds forthwith in implementing Constitutional, policy and legislative prescripts which pertain to the sustainable utilization of natural resources.
- d) Overridingly, it is imperative that clarity be attained on the paramountcy or otherwise of the notion of sustainability, as proffered by WWF and others, in the determination of allowable harvests of renewable natural resources.

¹³ *Cape Argus* article, 11 July 2018 – <https://www.iol.co.za/capeargus/news/rock-lobster-quota-court-drama-daff-responds-15956179>

¹⁴ Statement by the Minister for Agriculture, Forestry and Fisheries, 2 August 2018, p. 1 – attached as Annexure 2 to this document.

- e) In these circumstances we contend that pending finalization of the legal process, associated pronouncements by the State should be effected with sobriety and circumspection, not acrimoniously.

8. The National Development Plan

- a) The matter at hand, while deeply vexing, is elementary.
- b) Hence in outlining *key drivers of change*, the *National Development Plan* (NDP) refers to *natural capital.....being degraded, destroyed or depleted faster than it can be replenished*, with *marine life* receiving specific mention,¹⁵ and *depleted fishing stocks* being listed as being a *key ecological challenge*.¹⁶
- c) Over and above this, the NDP notes that *most fishing resources are optimally harvested or over-exploited*, and *if sustainability is not maintained, the fishery collapses and everyone loses*.¹⁷

9. Programme of Action

- a) Pointedly, and complementing the above provisions of the NDP, one of seven key 2019 targets under Outcome 10 (*Protect and enhance our environmental assets and natural resources*) of the Programme of Action for the Plan's implementation is that *West Coast Rock Lobster stock levels increase to 26% above the 2006 level*.¹⁸
- b) This aligns with the trajectory contained within the Outcome 10 delivery agreement, whereby *growing public awareness of the consequences ofunconstrained consumption of our natural resources leads to a refocusing of political priorities towards the protection and rehabilitation of the region's natural assets*.¹⁹
- c) In turn this accords with the statement that *the challenge for marine fisheries is to maintain the integrity of and balance in marine ecosystems while delivering sustainable economic benefits from living marine resources*.²⁰
- d) The desired impact of sub-outcome 01 (*ecosystems are maintained and natural resources are used efficiently*) is moreover to *restore the ecological integrity of natural resources and environmental assets*.²¹

¹⁵ *National Development Plan*, National Planning Commission, 11 November 2011, p. 68.

¹⁶ *Ibid*, p. 69.

¹⁷ *Ibid*, p. 209.

¹⁸ <http://www.poa.gov.za/environment/Pages/default.aspx>

¹⁹ *Outcome 10 MTSF 2014 – 2019 delivery agreement*, Department: Planning, Monitoring and Evaluation, p. 1 -

<https://www.poa.gov.za/environment/Delivery%20Agreement/Outcome%2010%20refined%20Environment%20MTSF%20Chapter.pdf>

²⁰ *Ibid*, p. 2.

²¹ *Ibid*, p. 5.

10. DAFF's Strategic Plan

- a) The *strategic goals and associated objectives* articulated in DAFF's Strategic Plan for the period 2015/16 – 2019/20 are a response to achieve the.....*objectives and targets* of the NDP,²² with one of the Department's four strategic goals being *sustainable use of natural resources in the sector*.²³
- b) Stemming from this goal, a Departmental strategic objective is *to ensure the conservation, protection, rehabilitation and recovery of depleted and degraded natural resources*,²⁴ with a corresponding objective statement expressly indicating that *compliance and management of fish stocks* is to be ensured by, among others, the *updating of recovery plans for West Coast Rock Lobster to increase fish stock levels*.²⁵
- c) Amplifying this, the Strategic Plan's problem statement for DAFF's Fisheries Programme notes that *the sector is facing declining, and in some instances, collapsing fish stocks while at the same time the country is experiencing a growing reliance on the fish resources as a source of food security*.²⁶
- d) Within this context, the problem statement goes on to articulate *the challenge to the Department* as being *to address recovery and rebuild measures for depleted stocks, to allocate the finite resources in a way that deals with the competing challenges of transforming the sector, to provide access to resources to the previously excluded small-scale fishing sector, while remaining globally competitive, but managing the resources sustainably*.²⁷
- e) The Programme's implementation strategy in turn includes a commitment to the effect that the Department *will continue to embark on fishery specific research, which will inform the setting of total allowable catches/total allowable efforts*.²⁸

11. TAC anomaly

- a) It appears to be undisputed that the West Coast Rock Lobster resource is severely depleted, with a 2017 general submission from DAFF's Acting Chief Director: Marine Resource Management indicating that a 2016 assessment had revealed that the biomass of male lobster above minimum size limit had over *the last few years dropped to about 1.9% of the pristine level, even lower than the last few decades of 2.5 %*, and that *the resource in 2016 was 20% below its 2006 abundance*.²⁹

²² 2015/16 to 2019/20 Strategic Plan, Department: Agriculture, Forestry and Fisheries, March 2015, p. 5 - http://www.daff.gov.za/doaDev/topMenu/DAFF_SP_%20complete.pdf

²³ *Ibid*, p. 19.

²⁴ *Ibid*, p. 36.

²⁵ *Ibid*.

²⁶ *Ibid*, p. 37.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ Applicant's founding affidavit dated 25 June 2018, High Court case no. 11478/18, Annexure "JAD 3", p. 3 - http://awsassets.wwf.org.za/downloads/annexures_to_founding_affidavit_jad1_jad8_2_.pdf

- b) It is against this backdrop that WWF is arguing that the 2017/18 TAC cannot sustain the long-term survival of either the West Coast Rock Lobster resource or the fishers that depend on it. Indeed a perusal of the organisation's submissions to the Court does point to deep disjuncture between the TAC and the NDP, Outcome 10 and DAFF Strategic Plan components we have alluded to.

12. Requested interventions

- a) On the basis of the information tabled in this document we respectfully call on you to urge the Minister and DAFF to exercise restraint in issuing pronouncements relating to the High Court action, and simultaneously recognize that concerns regarding the sustainability of the West Coast Rock Lobster are raised in good faith, and should be accorded due respect.
- b) In making this call we express the view that at this time in history the sustenance of renewable resources demands unprecedented boldness and sagacity on the part of our national leadership, and we prevail on you to exemplify these values in instilling direction to your functionaries in relation to the West Coast Rock Lobster conundrum.
- c) We furthermore suggest that if at the conclusion of this legal process DAFF is found to have been misguided in its approach to the matter of sustainability, such omission would be fundamental to the extent that it would merit consideration being afforded to the Department's Fisheries Programme being rehoused at the Department of Environmental Affairs, where it previously resided, and where we believe the institutional culture is inherently more conducive to the upholding of essential sustainability criteria.
- d) By the same token, it is difficult not to perceive the statements which are the subject of this correspondence as reflecting entrenched resistance, if not hostility, within DAFF to the concept of sustainability as espoused by WWF, and backed by the eminent sources upon which it has drawn in crafting its representations to the High Court.

Please note that given the importance, in our view, of the issues covered in this correspondence, combined with the public interest associated with this matter, it is our intention to post the correspondence on our website on 24 September 2018, and to further avail it in the public domain as we may deem prudent.

Our submission is offered in the spirit of *thuma mina*.

Sincerely

A handwritten signature in black ink, appearing to be 'N G Scarr', written in a cursive style.

N G Scarr
PSAM Monitoring & Advocacy Programme

Annexures

Annexure 1: WWF Statement entitled *Court Action over West Coast rock lobster*, 16 July 2018.

Annexure 2: Statement by the Minister for Agriculture, Forestry and Fisheries, 2 August 2018.