

23 October 2026

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Your ref: MCE276792

Dear Honourable Minister

RE: PILCHARD HERPESVIRUS SARDINE MORTALITY EVENT – REQUEST FOR DECISIONS AND REASONS, AND FOR AN URGENT TEMPORARY MORATORIUM ON DIRECTED SARDINE FISHING

1. This letter is addressed to you on behalf of the Biodiversity Law Centre (“**BLC**”), The Green Connection, Whale Coast Conservation (“**WCC**”) and the Dyer Island Conservation Trust (“**DICT**”) (“**we; the Signatories**”).
2. The Green Connection is a registered non-profit environmental justice organisation established to empower coastal communities, small-scale fishers, and civil society to participate meaningfully in environmental decision-making processes across South Africa. The organisation operates on the premise that economic development must be environmentally sustainable and socially equitable, actively safeguarding the constitutional rights of present and future generations under section 24 of the Constitution¹. Through legal advocacy, community capacity building, and policy engagement, The Green Connection works to protect marine ecosystems, coastal livelihoods, and natural heritage from destructive industrial activities and non-compliant administrative processes.
3. WCC is an independent, environmentally-focused NGO active in the Overstrand area of the Western Cape. For the past 20 years WCC has worked with a focus on information, education and oversight in order to protect, conserve and raise awareness of the unique and threatened natural environment of the area, including the marine environment. We have also been actively involved in many initiatives to raise awareness of the plight of the African Penguin and the looming extinction threat to this iconic species caused by the depletion of their primary food source.
4. DICT is a registered Public Benefit Organisation founded in 2006 by Wilfred Chivell, with a long-standing commitment to marine conservation, scientific research and the protection of the Greater Dyer Island ecosystem. Through the African Penguin and Seabird Sanctuary, established by DICT in 2015, DICT provides rescue, rehabilitation and veterinary care for injured, ill and oiled African penguins and other seabirds. DICT also supports marine research, environmental education and conservation initiatives informed by scientific evidence. DICT takes an ecosystem-wide approach, recognising that the declining sardine stocks threaten the critically endangered African Penguin and numerous other marine

¹ Constitution of the Republic of South Africa Act 108 of 1996 (“**the Constitution**”).

species, while also affecting local fishing livelihoods and marine ecotourism. DICT is concerned that fishing without reliable, up-to-date biomass data could further damage this interconnected ecosystem and supports a precautionary, science-based approach to fisheries management.

5. We refer to correspondence of 28 August 2026 ("**August Letter**"), the response from the Department of Forestry, Fisheries and Environment ("**DFFE; the Department**") dated 10 September 2026 with your reference MCE276792 ("**Department Response**"), and a letter dated 25 September 2026 ("**September Letter**"), as well as email correspondence of 5 October 2026, in which the BLC raised concerns about the continuation of commercial fishing where the population of remaining sardine is unknown.
6. In addition, we refer to the Small Pelagic Scientific Working Group's ("**SWG-PEL**") recommendation of 7 September 2026, governing the period 7 September to 2 October 2026 ("**September Recommendation**"),² and its updated recommendation of 30 September 2026, governing the period 3 to 30 October 2026 ("**October Recommendation**"),³ which the BLC received from Dr K Prochazka on 5 October 2026 (noting that upon request the BLC received the September Recommendation from Dr Janet Coetzee as Chairperson of the SWG-PEL on 25 September 2026).
7. We write to request, as a matter of urgency, two things. First, that the Department disclose the decisions it has taken in response to the sardine mortality event, including the delegated authority (if any), under what legal provision, and the reasons for those decisions (including the best available science that they were based on). Second, that a temporary moratorium be imposed on directed sardine fishing, pending the completion of the spawner biomass survey.
8. We set out the reasons for these requests below. The mortality event began in late July 2026. Since then, the Department has not published any of the decisions it has taken to regulate directed sardine fishing in response to it. The public, for whom the resource is held in trust, has learnt of those decisions mainly through media statements. It has not been disclosed who took them, under what power, or the reasons on which the decision-maker acted. That is not acceptable for decisions that govern the exploitation of a public resource during an unprecedented mortality event.

Correspondence and corresponding SWG-PEL recommendations to date

9. The August Letter raised concerns that the Pilchard Herpesvirus ("**PHV**") outbreak, considered a "mass mortality" event by the DFFE,⁴ affecting an already compromised and immunologically naïve sardine stock, could cause a population collapse, with serious consequences for dependent predators (such as the Critically Endangered African Penguin and snoek), for small-scale fishers, and for food security. Throughout, the DFFE and the SWG-PEL have stated that the full magnitude of the mortality event will not be known until the outcome of the small pelagic biomass survey scheduled for October/November 2026. The letter referred to the only other recorded case of PHV, which was in Australia in the 1990s and which resulted in the loss of up to 75% of the sardine population on their coasts.⁵ The letter submitted that the precautionary principle be applied and that the outbreak constituted an emergency under section 16 of the Marine Living Resources Act ("**MLRA**")⁶ and requested that the Department

² FISHERIES/2026/SEP/SWG-PEL/42.

³ FISHERIES/2026/SEP/SWG-PEL/46.

⁴ DFFE Media Release, available at <https://www.dffe.gov.za/index.php/mediarelease/sardinemortalityinvestigation>.

⁵ FISHERIES_2026_AUG_SWG-PEL_38 at page 2, citing Ward et al (2001); Gaughan et al (2004); and Gaughan et al (2008).

⁶ Act 18 of 1998.

confirm by 7 September 2026 whether it intended to invoke section 16 or other precautionary measures that protected the compromised sardine population.

10. In the Department's Response of 10 September, the Department stated that *'the magnitude of any impact on the sardine spawning biomass will only become substantially clearer once the small pelagic spawner biomass survey is undertaken in October/November 2026. The Department considers this information to be critical to assessing the status of the stock following the mortality event and determining appropriate management responses.'* It suggests that in the interim, decisions be based on the best available scientific evidence. We return to this when we discuss the law as it applies in South Africa, which was communicated to the Department in the September Letter. The Department accepted the relevance of the precautionary principle, but made no commitment to a closure or to exercising section 16, instead deferring the question to the SWG-PEL and the October/November 2026 spawner biomass survey, and noting that fishing pressure was already limited during what is traditionally a quiet season. It further noted that the precautionary approach does not remove the need for decisions to be based on the best available scientific information and for management intervention to be proportionate to the risks. The Department stated that the SWG-PEL's advice will inform consideration of whether a precautionary closure or other management intervention is warranted. We note in this regard, that no record of decision has been made publicly available, nor a Gazette published⁷. We therefore do not know the basis on which a moratorium was not imposed and fishing was instead allowed to continue, except in so far as what was recommended by the SWG-PEL. The Department concluded that it is *'following an evidence-based process in which the emerging information is being assessed and management interventions are being considered as the evidence develops.'*
11. The September Recommendation did not propose a closure, instead recommending that directed sardine catches be limited to 25% of the remaining TAC in each management area (a limit of 1 800 t west and 2 200 t east of Cape Agulhas)⁸ from 7 September until 2 October 2026. The Department decided to implement this recommendation, as recorded in its media statement of 13 September 2026.⁹ A decision on the implementation of the September Recommendation has not been made available to the public despite repeated requests, as detailed below. The Recommendation notes that mortality estimates are uncertain and depend on assumptions, and that there are no acceptable methods for estimating the number of fish that may have sunk. It then draws the incongruous conclusion that the preliminary scenarios *'do not indicate that mortality represents a large proportion of the overall sardine stock'*. In coming to its conclusion that reduced fishing may continue, it relies on the following justification: *'Directed sardine catches are historically low during August and September, reducing the immediate risk of rapid uptake of the remaining TAC and providing a limited period during which further monitoring and sampling can be undertaken without exposing the sardine stock to undue risk. The SWG-PEL therefore considered that a precautionary, time-limited restriction on catches of the remaining directed sardine TAC, accompanied by intensified observation and a defined reassessment date, provides an appropriate interim response.'* The Recommendation does not assess the risk posed by this continued fishing on a population that is unknowable and which could be on the brink of collapse.
12. The September Letter noted that the PHV had spread to the Eastern Cape and Namibia, covering approximately 2 600 km of coastline. The Letter submitted that the 25% limitation on directed sardine catches was inadequate and not precautionary, and it urged the Department to temporarily close the

⁷ https://www.dffe.gov.za/legislation/gazetted_notices.

⁸ September Recommendation at page 2, Table 1.

⁹ See https://www.dffe.gov.za/mediareleases/sardine_PHVinvestigation.

fishery pending the planned biomass survey. It again pointed out that, until a biomass survey is conducted in October/ November 2026, the population of sardine is unknowable, and that a risk-averse and cautious approach is mandatory.¹⁰ The legal duty that the precautionary principle imposes on the Department (as detailed below) is that it does not have a discretion to wait for better information to become available through its next biomass survey. It is required to act now and ensure against a collapse of the sardine population, which will have implications for species that depend on small pelagic fish and consequences for fisheries and fishing-dependent communities – for current and future generations. The September Letter also requested, by 30 September 2026, the SWG-PEL's written recommendation, the Department's decision and reasons for adopting it, and details of how that decision was communicated to industry and other interested and affected parties. It also sought an undertaking that any further decision, including on the limitation due to lapse on 2 October 2026, would be published in full when made, together with its reasons and the scientific advice on which it was based.

13. The September Letter called for a response by 30 September 2026. On 5 October 2026, having received none, the BLC wrote again, asking for the immediate cessation of fishing and for copies of the Department's decisions.¹¹ Dr Prochazka replied on the same day, providing the two SWG-PEL recommendations referred to and advising that the remaining records must be requested under the Promotion of Access to Information Act ("PAIA")^{12, 13} The Department has not otherwise responded to the September Letter, and has not provided any of the decisions or reasons requested in it.
14. The October Recommendation expressly admitted that the September Recommendation was '*intended to limit catches while further information was gathered on the extent of the mortality*'. It concluded, without substantiation of how the SWG-PEL would know this, that there is '*no evidence of large-scale juvenile mortality*'. It further concluded that '*uncertainty remained regarding the total population impact and the possibility of a further outbreak*'. It further recorded that conservation-sector biologists and ENGO (Environmental NGOs) representatives had argued for a moratorium, but this was rejected by the SWG-PEL which instead recommended that, from 3 to 30 October 2026, each sardine right holder would be limited to 33% of its remaining directed sardine TAC.
15. As the rationale for this, the SWG-PEL relied on principle 15 of the Rio Declaration. As discussed below, that is not the applicable legal standard where South African law has domesticated the precautionary principle, which has been repeatedly brought to the Department's and the SWG-PEL's attention. In any event, the SWG-PEL misapplied this principle of international law, when it concluded, again without substantiation, that a '*moratorium would involve substantial socio-economics costs but likely provide little benefit to predators*'. Principle 15 does not require a weighing of costs and benefits, but rather that: '*where there are threats of irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*'.
16. From media statements, we understand that the Department has adopted the October Recommendation. We note that this is an increase from the September Recommendation of the amount of sardines permitted to be extracted, without any additional information confirming the health or otherwise of the sardine population.

¹⁰ *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* 2019 (2) SA 403 (WCC).

¹¹ Email from T Paine (BLC) to Mr P Zako and Dr K Prochazka, 5 October 2026.

¹² Promotion of Access to Information Act 2 of 2000.

¹³ Email from Dr K Prochazka to T Paine, 5 October 2026.

17. The October Recommendation records the SWG-PEL acknowledged the following –
 - 17.1. Directed sardine fishing during September 2026 was extremely limited, with no directed catch reported west of Cape Agulhas and only 26 t east of Cape Agulhas.¹⁴
 - 17.2. Consequently, little new catch-rate or biological information was available with which to assess changes in sardine abundance or availability.¹⁵
 - 17.3. Uncertainty remained regarding the total population impact and the possibility of a further outbreak.¹⁶
 - 17.4. The African Penguin results were suggestive of recent changes in penguin weights, but the magnitude of any effect, and the extent to which it could be attributed to the mortality event, could not yet be determined.¹⁷
 - 17.5. The hydroacoustic observations were qualitative and required further processing before possible changes in prey abundance can be assessed.¹⁸
 - 17.6. Planning for the 2026 spawner biomass survey should proceed as a priority.¹⁹
18. The extent of the mortality event, therefore, remains as uncertain as it was in September 2026. There is, therefore, on the SWG-PEL's own account, very little evidence available to the Department to justify continued fishing, never mind relaxing the limit imposed in September 2026. The limitation has, nonetheless, been relaxed, from a combined limit of 4 000 t of directed sardine catch in September 2026 to approximately 5 500 t in October 2026.²⁰
19. The September Recommendation was to the same effect. It recorded that the available mortality estimates were '*scenario-based, very uncertain and non-additive*', that '*there is currently no acceptable method for estimating the number of fish that may have sunk*', and that observer catch-rate information '*provided some indication of reduced sardine availability after the onset of the event*'.²¹ It preferred a limit to a closure partly because directed sardine catches are historically low in August and September, which provided '*a limited period during which further monitoring and sampling can be undertaken without exposing the sardine stock to undue risk*'.²² That period has passed without producing the information it was meant to provide.

The decisions, and the reasons for them, have been withheld

20. On its own public account, the Department has taken at least the following decisions in response to the mortality event:

¹⁴ October Recommendation at page 1.

¹⁵ October Recommendation at page 1.

¹⁶ October Recommendation at page 1.

¹⁷ October Recommendation at page 1.

¹⁸ October Recommendation at pages 1 – 2.

¹⁹ October Recommendation at page 3.

²⁰ September Recommendation at page 2, Table 1 (1 800 t west and 2 200 t east of Cape Agulhas); October Recommendation at page 2 (approximately 2 800 t west and 2 700 t east of Cape Agulhas, subject to verification of landings).

²¹ September Recommendation at page 1.

²² September Recommendation at page 1.

- 20.1. the decision to adopt and implement the September Recommendation;²³
 - 20.2. the decision to adopt and implement the October Recommendation, which relaxed the September limitation;²⁴ and
 - 20.3. the decision, whether express or implicit and following the '*scientific and legal consideration*' of section 16 referred to in the Department Response, not to exercise the Minister's emergency powers under section 16 of the MLRA and not to impose a moratorium on directed sardine fishing.
21. None of these decisions have been published or provided to us. We do not know who took them, whether that person had the power to do so, what information was before them, or the reasons for which each decision was taken. The SWG-PEL's recommendations are not an answer. The SWG-PEL is a non-statutory advisory body: its recommendations are not decisions, and the reasons it gave for them are not, without more, the reasons of the decision-maker. Whoever adopted them was required to apply their own mind to them, having regard to the principles in section 2 of the MLRA and section 2 of the National Environmental Management Act ("**NEMA**")²⁵. Nothing we have seen shows that this was done, or how.
 22. The withholding of these decisions and reasons is inconsistent with the Department's constitutional and statutory obligations:
 - 22.1. Section 33(2) of the Constitution gives everyone whose rights have been adversely affected by administrative action the right to be given written reasons. Section 5 of the Promotion of Administrative Justice Act ("**PAJA**")²⁶ gives effect to that right.²⁷
 - 22.2. Section 195(1) of the Constitution requires public administration to be accountable and requires transparency to be fostered by providing the public with timely, accessible and accurate information.²⁸
 - 22.3. Section 2(4)(k) of NEMA requires decisions to be taken in an open and transparent manner.²⁹ Section 2(4)(o) provides that the environment is held in public trust for the people, that the beneficial use of environmental resources must serve the public interest, and that the environment must be protected as the people's common heritage. These principles apply to the actions of all organs of state that may significantly affect the environment.³⁰
 - 22.4. If either limitation was imposed under section 16 of the MLRA, section 16(2) required its particulars to be made known by notice in the *Gazette*.³¹ We are not aware of any such notice. If

²³ DFFE Media Statement, 13 September 2026, available at https://www.dffe.gov.za/mediareleases/sardine_PHVinvestigation.

²⁴ DFFE Media Statement, 11 October 2026, available at <https://www.gov.za/news/media-statements/forestry-fisheries-and-environment-reports-sardine-mortality-11-oct-2026>.

²⁵ Act 107 of 1998.

²⁶ Act 3 of 2000.

²⁷ PAJA, section 5(1) and (2).

²⁸ Constitution, section 195(1)(f) and (g).

²⁹ NEMA, section 2(4)(k), which provides that '*[d]ecisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law*'.

³⁰ NEMA, sections 2(4)(o) and 2(1).

³¹ MLRA, section 16(2), which provides that '*[t]he particulars of any measures taken in terms of this section shall be made known by notice in the Gazette*'.

the limitations were imposed under another provision of the MLRA, the Department has not said which provision they have used.

23. The reasons should already exist. A decision that is lawfully taken is taken for reasons that exist when it is made and providing them requires no fresh deliberation. We are aware that section 5(2) of PAJA allows an administrator up to 90 days to furnish reasons after a request. That period is an outer limit, not an entitlement to delay. Section 237 of the Constitution requires all constitutional obligations to be performed diligently and without delay,³² and the decisions in question have a lifespan measured in weeks: the October limitation lapses on 30 October 2026. Reasons provided after the limitation has lapsed, and after the fish have been caught, will serve no purpose.
24. Nor is PAIA the appropriate route. The right to reasons for administrative action arises under section 33(2) of the Constitution and section 5 of PAJA, not under PAIA. In any event, nothing in PAIA prevents the Department from publishing its own decisions on the exploitation of a public resource, and its obligations of accountability and transparency require it to do so. This is particularly so in circumstances such as the present. Lengthy PAIA request procedures frustrate the public's right to timeous and proactive access to information on a topic that is of considerable public interest.

The importance of the Biomass Survey

25. The Department's Response to the August Letter stated that *'the magnitude of any impact on the sardine spawning biomass will only become substantially clearer once the small pelagic spawner biomass survey is undertaken in October/November 2026'* and that the Department *'considers this information to be critical to assessing the status of the stock following the mortality event and determining appropriate management responses'*.³³
26. The Department's own case is that the impact of the mortality event on the sardine biomass (i.e. what the remaining population is) cannot be properly assessed until the biomass survey is conducted, and the survey information is critical to determining management responses. However, it is uncertain when the biomass survey will take place. We say this for the following reasons:
 - 26.1. The Department Response states that the biomass survey is planned for October/November 2026, whereas a Departmental media release of 4 October 2026 refers to the *'planned end-of-year hydroacoustic survey'*.³⁴ This change is not explained.
 - 26.2. The biomass survey has departed late in every year since 2019. In four of the last five survey years (2021, 2023, 2024 and 2025) it was not conducted in October/November at all,³⁵ and the last three surveys took place only in February to April of the following year.³⁶ After the most recent delayed survey (meant to take place in October/ November 2025, but taking place in February/March 2026), the Department's own survey report recorded that *'the Department must*

³² Constitution, section 237.

³³ Department Response at page 2.

³⁴ See https://www.dffe.gov.za/mediareleases/nofurther Sardines mortality_PHVinvestigationcontinues.

³⁵ FISHERIES/2019/DEC/SWG-PEL/41Rev2 (survey conducted 2 Nov – 17 Dec); FISHERIES/2020/DEC/SWG-PEL/130rev2 (survey conducted 13 Nov– 19 Dec); FISHERIES/2022/SWG-PEL/JAN/01 (survey conducted from 15 Dec with only 3.5 days of actual data used); FISHERIES/2023/FEB/SWG-PEL/02 (survey conducted 13 Nov – 20 Dec).

³⁶ FISHERIES/2024/MAR/SWG-PEL/12 (survey conducted 16 Feb – 17 March); FISHERIES/2025/MAY/SWG-PEL/21 (survey conducted between 12 and 28 March); FISHERIES/2026/APR/SWG-PEL/15 (survey conducted 24 Feb – 31 March).

*ensure that future surveys take place between October and November – not only for comparability between estimates but also to limit risk to the resources’.*³⁷

- 26.3. Despite knowledge of the *R.S. Africana*’s maintenance difficulties,³⁸ as well as of the PHV mortality event that began in late July 2026, the Department only released the tender for a survey vessel on 16 September 2026, with a closing date of 23 October 2026.³⁹ On this timeline, even an “end of year” date for a biomass survey is ambitious.
27. It is, therefore, not only uncertain, but improbable, that the biomass survey will be completed before the end of 2026.
28. As discussed below, the Minister is under a duty to take reasonable measures without further delay to guard against the potential collapse or depletion of the sardine population.

The legal standard under South African law

29. As pointed out in the August Letter, section 2(4)(a)(vii) of NEMA provides, as one of the core principles governing environmental management, that a *‘risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions’*. Section 2(c) of the MLRA separately requires that, in exercising powers under that Act, the Minister must have regard to *‘the need to apply precautionary approaches in respect of the management and development of marine living resources’*. This principle must be applied when exercising a power under the MLRA.
30. The Constitutional Court has confirmed this risk-averse and cautious approach is engaged where, as here, scientific knowledge about the future consequences of a decision (or failure to decide) is incomplete, and that development (such as, in this scenario, the continued exploitation of a resource under conditions of material uncertainty) cannot proceed on a deteriorating environmental base.⁴⁰
31. South African courts generally engage the precautionary principle when two related features are present: (1) a threat of serious or irreversible environmental damage, and (2) genuine scientific uncertainty as to that damage.⁴¹
32. In terms of fishery decisions, this was applied directly in *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* (“**WWF South Africa**”).⁴² The Court held that the precautionary approach is mandatory in South African law, that decision-makers must have regard to the best available scientific evidence, and that the absence of complete scientific certainty is not, of itself, a proper basis for postponing measures necessary to conserve a target species.⁴³

³⁷ FISHERIES/2026/APR/SWG-PEL/15 at page 3.

³⁸ FISHERIES/2026/APR/SWG-PEL/15 at page 1, recording that the October/November 2025 survey could not be conducted “owing to outstanding maintenance issues for class clearance of the *R.S. Africana*”.

³⁹ See https://www.dffe.gov.za/sites/default/files/tenders/mlrf223.26.27%20smallpelagicspawnerbiomasssurvey_0.pdf.

⁴⁰ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Mpumalanga* 2007 (6) SA 4 (CC) at paragraphs 44 and 81.

⁴¹ *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* 2019 (2) SA 403 (WCC) at paragraphs 100 and 104.

⁴² *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* 2019 (2) SA 403 (WCC).

⁴³ *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* 2019 (2) SA 403 (WCC) at paragraphs 85 – 87, 101, and 105 – 106.

33. The Court in *Fisher v President of the Republic of South Africa* ("**Fisher**")⁴⁴, held that the decline in abalone stocks constituted an emergency in the context of section 16 of the MLRA and that the Minister's decision had been reasonable. Further, the Court held that the Minister, as custodian of a resource that "may be destroyed if not carefully managed", must balance the long-term ecological survival of the resource against short-term commercial interests, and that the precautionary principle was a relevant statutory objective that must be applied.⁴⁵
34. The October Recommendation did not disclose the information relied on by the SWG-PEL for its claim that a moratorium '*would involve substantial socio-economic costs but likely provide little benefit to predators*'.⁴⁶ After expressly considering the precautionary principle as set out in Principle 15 of the Rio Declaration,⁴⁷ the SWG-PEL concluded that applying the principle did '*not necessarily require the complete cessation of fishing*'.⁴⁸
35. The SWG-PEL's application of the precautionary principle relies on the wrong test and an incorrect legal basis, despite being provided with the source of the domesticated principle in NEMA and the MLRA, as well as how our courts have interpreted the principle. The Department, if in adopting the SWG-PEL's recommendation, also adopted its reasoning, it would have based its decision on the wrong test and an incorrect legal basis for its decision.
36. As it stands, the precautionary principle must be applied on its domesticated legal basis, which is in both the NEMA⁴⁹ and the MLRA.⁵⁰ In both Acts, the precautionary principle appears alongside a host of other objectives and principles that must be considered when taking action that may significantly affect the environment. The court in *WWF South Africa* emphasised the overlap between these Acts and section 24 of the Constitution,⁵¹ and that none of these principles can be ignored. Practical steps must, therefore, be taken towards their fulfilment.⁵²
37. The Constitution⁵³, NEMA, and the MLRA together do not permit socioeconomic concerns to displace a risk-averse and cautious approach. This does not mean that they are irrelevant, but when applying the precautionary principle, the inquiry is whether there is sufficient scientific information to make a decision, and if not, then the precautionary principle requires action to protect the environment in the absence of such information.

The Minister's duty of care

38. The precautionary principle governs how the Minister must decide in the face of uncertainty. It operates within a more basic obligation: the Minister's duty of care in respect of the sardine resource, which the

⁴⁴ [2008] 4 All SA 189 (C) (20 March 2008) ("**Fisher**") at paragraphs 29 and 30.

⁴⁵ *Fisher* at paragraph 23, applying *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

⁴⁶ October Recommendation at pages 2 – 3.

⁴⁷ United Nations Conference on Environment and Development: The Rio Declaration on Environment and Development, June 13, 1992, principle 15. UN Doc A/CONF.151/26/Rev.1 (vol.1). Available at: [https://docs.un.org/en/A/CONF.151/26/Rev.1\(vol.I\)](https://docs.un.org/en/A/CONF.151/26/Rev.1(vol.I)). Accessed 30 September 2026. Principle 15 reads "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

⁴⁸ October Recommendation at pages 2 – 3.

⁴⁹ Act 107 of 1998; section 2(4)(a)(vii) provides "Sustainable development requires the consideration of all relevant factors including the following ... that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions".

⁵⁰ Act 18 of 1998; section 2(c) provides "the Minister and any organ of state shall in exercising any power under this Act, have regard to the following objectives and principles ... the need to apply precautionary approaches in respect of the management and development of marine living resources".

⁵¹ Constitution of the Republic of South Africa Act 108 of 1996.

⁵² *WWF South Africa* at paragraph 83, citing *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at paragraph 40.

⁵³ Constitution of the Republic of South Africa, section 24.

Minister controls on behalf of the public. That duty arises under the Constitution, NEMA and the MLRA. It is a positive duty to take reasonable measures to protect the resource, and not only a duty to refrain from causing harm.

39. Section 24(b) of the Constitution gives everyone the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. The State must respect, protect, promote and fulfil that right,⁵⁴ and the Bill of Rights binds the executive and all organs of state.⁵⁵
40. The Constitutional Court has described this obligation in terms of trusteeship: *'[t]he present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment'*.⁵⁶ The Supreme Court of Appeal has since confirmed three things. First, section 24 not only confers a right but *'mandates the state to realise that right through reasonable legislative and other measures'*.⁵⁷ Second, environmental rights are not subject to progressive realisation within the State's available resources.⁵⁸ Third, where the conditions for the exercise of a statutory power are met and the harm is ongoing, a Minister who holds that power may be *'dutybound to act'*, so that the word 'may' in the empowering provision *'ought to be interpreted as "must"'*.⁵⁹ As that Court reiterated, government *'must do right, and it must do it properly'*.⁶⁰
41. NEMA was enacted to give effect to section 24 of the Constitution. Its principles apply to the actions of all organs of state that may significantly affect the environment. They serve as binding guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of any statutory provision concerning the protection of the environment.⁶¹ That includes every decision taken under the MLRA in respect of the sardine fishery. Three principles are directly engaged:
 - 41.1. the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest, and the environment must be protected as the people's common heritage;⁶²
 - 41.2. sustainable development requires consideration of whether the use and exploitation of renewable resources, and of the ecosystems of which they are part, exceed the level beyond which their integrity is jeopardised;⁶³ and

⁵⁴ Constitution, section 7(2).

⁵⁵ Constitution, section 8(1).

⁵⁶ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) ("**Fuel Retailers**") at paragraph 102.

⁵⁷ *Minister of Environmental Affairs v The Trustees for the time being of Groundwork Trust and Others* 2025 (4) SA 98 (SCA) (11 April 2025) ("**Groundwork**") at paragraph 26.

⁵⁸ *Minister of Environmental Affairs v The Trustees for the time being of Groundwork Trust and Others* 2025 (4) SA 98 (SCA) (11 April 2025) ("**Groundwork**") at paragraph 45.

⁵⁹ *Groundwork* at paragraphs 49 and 50. See also paragraph 44, where the Court, with reference to section 237 of the Constitution, held that a failure to exercise the power in circumstances that called for prompt action would have amounted to an improper exercise of discretion.

⁶⁰ *Groundwork* at paragraph 49.

⁶¹ NEMA, sections 2(1) and 2(1)(c).

⁶² NEMA, section 2(4)(o).

⁶³ NEMA, section 2(4)(a)(vi).

- 41.3. sustainable development requires that the disturbance of ecosystems and loss of biological diversity be avoided or, where they cannot be altogether avoided, minimised and remedied.⁶⁴
42. NEMA also imposes a general duty of care. Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent it from occurring, continuing or recurring.⁶⁵ The sardine stock, and the predators and people that depend on it, form part of the environment as NEMA defines it.⁶⁶
43. The MLRA gives specific content to these obligations in the fisheries context. Its long title records that it provides for '*the conservation of the marine ecosystem*' and '*the long-term sustainable utilisation of marine living resources*', and for control over those resources '*in a fair and equitable manner to the benefit of all the citizens of South Africa*'. In exercising any power under the MLRA, the Minister must have regard to, among other things:⁶⁷
- 43.1. the need to conserve marine living resources for both present and future generations;
- 43.2. the need to apply precautionary approaches;
- 43.3. the need to protect the ecosystem as a whole, including species which are not targeted for exploitation; and
- 43.4. the need to preserve marine biodiversity.
44. Parliament has also given the Minister the means to discharge this duty. The MLRA permits the Minister to determine that a TAC, or a portion of it, is nil.⁶⁸ In an emergency, the Minister may suspend all or any of the fishing in a fishery.⁶⁹ Where it is in the interests of the protection or ecologically sustainable utilisation of a marine living resource, the Minister may suspend or reduce a right by written notice to its holder.⁷⁰

SWG-PEL's recommendations and consequent DFFE actions fall short of the standard required under South African law.

45. It does not appear that the SWG-PEL, or the Department in adopting its recommendations, took such precautions or considered and applied the principles in NEMA and the MLRA, or discharged the duty of care described above.
46. The critical fact remains that no one knows the severity or otherwise of the PHV outbreak on the sardine population and that this will not be known until the biomass survey has been conducted. This is common cause.
47. The Department's Response to the August Letter stated that '*the magnitude of any impact on the sardine spawning biomass will only become substantially clearer once the small pelagic spawner*

⁶⁴ NEMA, section 2(4)(a)(i).

⁶⁵ NEMA, section 28(1).

⁶⁶ NEMA, section 1(1), definition of "environment", which includes '*micro-organisms, plant and animal life*' and '*the interrelationships among and between them*'.

⁶⁷ MLRA, section 2(b), (c), (e) and (f).

⁶⁸ MLRA, section 14.

⁶⁹ MLRA, section 16.

⁷⁰ MLRA, section 28(4).

biomass survey is undertaken in October/November 2026 and that the Department *'considers this information to be critical to assessing the status of the stock following the mortality event and determining appropriate management responses'*.⁷¹

48. Continued fishing of sardine based on a pre-PHV population TAC, on any basis, is allowing extraction of sardine where the proportion of the population being extracted is unknown. This is not precautionary. It carries a material risk to the sardine population. An increase from 25% to 33% increases that risk.
49. The September and October Recommendations expressly do not revise the annual TACs,⁷² which were set on the basis of the February/March 2026 biomass survey, before the outbreak.⁷³ The 33% figure *'broadly represents one month's share of the TAC remaining for the final three months of 2026'*.⁷⁴ It paces the catch of a TAC calculated before the outbreak, rather than adjusting that TAC to the outbreak.
50. Knowing how much of the population is left is fundamental to decisions about the sustainability, or otherwise, of continued fishing. A collapse of the directed fishery would only worsen the socioeconomic position, as well as the state of the ecosystem, in the future. The Constitution, NEMA, and the MLRA make it clear that the environment and our marine living resources must be conserved for both current and future generations.⁷⁵
51. On the Department's own account, the impact of the mortality event on the sardine biomass cannot be properly assessed until the biomass survey is conducted, and the survey information is critical to determining management responses. These are things entirely in the control of the Department. A temporary moratorium, pending the conclusion of a biomass survey, is precautionary. The Department can gather the information needed to make a determination based on a known population.
52. As stated above, a risk-averse and cautious approach is mandatory.⁷⁶ The Department cannot lawfully treat the absence of survey information as a reason to defer protective measures until the next biomass survey, a point the Department has itself accepted. It must act now to guard against the collapse of the sardine population, and in so doing, it must act reasonably in line with the duty of care and the precautionary principle.
53. Section 2(4)(a)(vii) of NEMA requires a risk-averse and cautious approach *'which takes into account the limits of current knowledge about the consequences of decisions and actions'*. The Department has accepted that this requires it to *'take account of uncertainty and the potential consequences of decisions where the available scientific information is incomplete'*, and that any intervention must be *'proportionate to the risks identified'*. On the present facts, these standards do not support continued directed fishing. First, the remaining pre-outbreak TAC is being released in monthly portions that would allow all of it to be landed by the end of 2026. It is improbable that the biomass survey will be completed by then. Second, the apparent end of the mortality event says nothing about how many fish survived, and on the SWG-PEL's own account uncertainty remains regarding the total population impact. Third, the consequences of error are not equal. If fishing is suspended and the stock proves healthy, the fish remain in the water as spawning stock and remain available to be caught under a TAC based on the

⁷¹ Department response at page 2.

⁷² September recommendation at pages 2 – 3; October recommendation at pages 2 and 4.

⁷³ FISHERIES/2026/APR/SWG-PEL/18 at pages 1 – 3 (directed sardine TAC of 51 800 t, recommended on 13 April 2026 on the basis of the February/March 2026 biomass survey).

⁷⁴ October Recommendation at page 2.

⁷⁵ Constitution section 24(b); NEMA section 2; MLRA section 2(b).

⁷⁶ WWF South Africa.

survey. If the remaining TAC is landed and the stock proves badly depleted, the harm cannot be undone. That threat of irreversible harm, under genuine scientific uncertainty, is exactly the circumstance in which the precautionary principle operates.

54. Proportionality requires that the risk be identified and weighed. As far as we can determine, neither the SWG-PEL nor the Department has assessed the risk to the sardine population of landing the rest of a pre-outbreak TAC from a stock that the mortality event may have substantially reduced. A measure cannot be shown to be proportionate to a risk that has not been assessed, and that risk is a consideration the decision-maker was required to take into account.⁷⁷ It is our submission that where the information needed to assess the risk does not exist, the risk-averse and cautious approach required by NEMA obliges the Department to resolve that uncertainty in favour of protecting the resource, not in favour of continued extraction. Continued directed fishing exposes the sardine population to a risk of potential depletion or collapse that no one has measured.
55. The duty of care is not discharged by taking a step of some sort, but by taking reasonable measures to prevent ecological degradation, judged against what is at stake and what is known. It is common cause that the size of the sardine stock after the mortality event is unknown, and that it will remain unknown until the spawner biomass survey has been completed. As set out above, the September and October limits do not reduce a TAC that was set before the outbreak; at best they pace its catch. They leave open the possibility that the remainder of that TAC is landed before the Department knows what proportion of the surviving stock it represents. In October, the permitted catch was increased without any new information on the state of the stock. Neither the SWG-PEL nor the Department appears to have assessed the risk to the stock of landing the remaining TAC if the mortality event has substantially reduced it.
56. The consequences of getting this wrong are not equal. One decision preserves the stock, the other risks its survival. If directed sardine fishing is suspended and the survey shows the stock to be healthy, the fish remain in the water, where they contribute to spawning and recovery, and remain available to be caught under a TAC set on the basis of the survey. If fishing continues and the survey shows the stock to be badly depleted, the fish landed in the interim cannot be returned. The harm to the stock, to the predators that depend on it, and to the fishers whose livelihoods depend on both, cannot be undone. Faced with that choice, a trustee under a duty to take reasonable measures to prevent ecological degradation, for the benefit of present and future generations, must choose the course that preserves the resource. That duty must be performed diligently and without delay.⁷⁸

Requests

57. We accordingly request that the Minister –
 - 57.1. suspend all directed sardine fishing with immediate effect, by exercising the power in section 16(1)(a) of the MLRA or any other power lawfully available to the Minister or the Department;
 - 57.2. confirm that no directed sardine fishing will be authorised when the current limitation lapses on 30 October 2026; and

⁷⁷ PAJA, sections 6(2)(e)(iii) and 6(2)(f)(ii)(cc).

⁷⁸ Constitution, section 237.

- 57.3. maintain that suspension until the spawner biomass survey has been completed and a new sardine TAC has been determined, and published, on the basis of its results.
58. The power in section 16 is conferred on the Minister, and the Department Response to the August Letter was signed by the Acting Deputy Director-General. We therefore ask that this letter be placed before the Minister personally, and that the response either come from the Minister or state the authority under which it is given.
59. In addition, we ask the Department to provide us with the following in respect of each of the decisions referred to above:
- 59.1. the record of the decisions to adopt the September and October Recommendations, including all documents related to those decisions;
- 59.2. the identity of the decision-maker and the instrument of delegation under which each decision was taken, if taken by a delegated official;
- 59.3. the reasons for those decisions, including their legal and factual basis; and
- 59.4. the outcome of the '*scientific and legal consideration*' of section 16 referred to in the Department's Response.
60. This request is made without prejudice to our rights under section 5 of PAJA and under any other statute.
61. We also ask that the Minister to –
- 61.1. undertake that any decision governing directed sardine fishing after 30 October 2026 will be published when it is made, together with the reasons for it and the scientific advice on which it is based; and
- 61.2. provide the Department's current timetable for the 2026 spawner biomass survey, including the vessel to be used, the expected start and completion dates, and the steps taken to secure them.
62. For the reasons set out above related to urgency and the iterative decision-making process adopted by the Department, we ask that the reasons be provided by **29 October 2026**, and not at the end of the 90-day period in terms of PAJA.
63. The short period allowed is dictated by the circumstances set out above: the size of the stock after the mortality event is unknown, the current limitation lapses on 30 October 2026, and the survey on which the Department's position depends has not yet been procured, with tenders closing only on 23 October 2026. Further, this is our third letter requesting urgent reconsideration of the Department's approach as well as for the records of decisions as set out above. Therefore, the shortened period for response should be understood in this context.
64. We trust that this letter will receive the Minister's urgent and personal attention, as well as be placed before the SWG-PEL and Task Team before they meet towards the end of October 2026. Our rights remain reserved.

Yours faithfully,

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