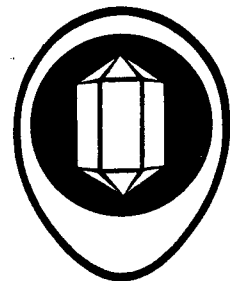




Lanioturdus torquatus
Drosselwürger

MITTEILUNGEN

ORNITHOLOGISCHE ARBEITSGRUPPE



SCHRIFTFLEITUNG: POSTFACH 67, WINDHOEK, S.W.A.

No. 1

11. Jahrg.

April 1975

SOUTH AFRICAN ORNITHOLOGICAL SOCIETY
CONSERVATION COMMITTEE

REPORT ON: 25th October, 1974.

LEGAL ASPECTS OF MARINE POLLUTION BY FISH OIL

Report on discussions with Prof. M.A. Rabie of the Law Faculty of UNISA, in Pretoria on the 30th September 1974.

1. INTRODUCTION:

On the 27th September I telephoned Prof. Rabie to outline the Conservation Committee's involvement with the oiling incident at Lambert's Bay. I also mentioned that similar incidents have in the meantime occurred at other sites. Prof. Rabie undertook to look into the relevant legislation and we arranged a meeting in Pretoria on the 30th September. At this meeting we discussed the desirability of instituting legal proceedings against companies responsible for fish oil pollution, the applicability of various statutes to cases of this kind, and the procedure to be followed in documenting and preparing such cases.

2. DESIRABILITY OF PROSECUTIONS:

We agreed that legal proceedings or prosecution should only be resorted to if friendly persuasion fails. We should approach the companies involved, explain to them the harmful effects of fish oil pollution, and try to obtain their cooperation. At this stage we should not threaten legal action. Threats usually produce an uncooperative attitude. Legal action, besides being expensive, is also one of the least effective means to achieve conservation ends.

3. RELEVANT LEGISLATION:

We discussed three Acts that are relevant to our problem:

3.1. THE SEA FISHERIES ACT, NO. 58 of 1973:

This Act is aimed at the protection of fish and not of birds. Therefore it will be difficult to utilize it in cases where birds are involved.

"10 (1) Any person who -

(j) dumps in or allows to enter or permits to be dumped or discharged in the sea anything which is or may be injurious to fish, fish food or seaweed, or which

may disturb or change the ecological balance in any area of the sea, or which may detrimentally affect the marketability of fish or seaweed, or which may hinder the catching of fish

shall be guilty of an offence and on conviction liable to a fine not exceeding R 7500 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment".

Birds are not specifically mentioned here. This Act is not particularly concerned with birds. Although it may seem obvious to us that the massive killing of seabirds by fish oil discharged into the sea "may disturb or change the ecological balance in (a given area) of the sea", Prof. Rabie explained that this will be very difficult to prove in a court of law. If we want to utilize this Act, we should rather concentrate on the detrimental effects of the fish oil on fish, fish-food or seaweed, as defined in Section 1 of the Act:

(V) "fish" means any species of sea animal, whether vertebrate or invertebrate, and includes the spawn or larvae of any such sea animal, but does not include any seal or sea bird.

(XXIV) "Sea-weed" means any kind of sea-weed or algae found in the sea or on the sea-shore. ("sea-shore" means the water and the land between the low-water mark and the high-water mark - Sect. 1 (XXIII))

"Fish-food" is not defined.

We should note that Section 16(1)(j) reads "...anything which is or may be injurious ...". It will not be necessary to prove that the discharged substance has actually injured fish, fish food or sea-weed, the possibility of such injury will suffice. We could also look into the effect of pollution on the "marketability" (not defined in the Act) of fish.

If we concentrate on fish, fish food and sea-weed, we are likely to have more success with a prosecution than if we tried to bring in birds under "the ecological balance".

3.2. THE SEA BIRDS AND SEALS PROTECTION ACT, No. 46 of 1973.

Although this Act is aimed at the exploitation rather than at the protection of sea birds, it does have two Sections which offer us avenues of approach.

Section 3(b) reads:

"3. No person shall -

(b) upon any island or within the territorial waters or fishing zone of the Republic or along the coast of the Republic between the low-water mark as defined in Section 1 of the Sea-shore Act, 1935 (Act No. 21 of 1935), and the high-water mark as so defined, pursue or shoot at or wilfully disturb, kill or capture any sea bird or seal...."

Prof. Rabie explains that this wording does not mean that the killing has to be done wilfully to fall under the prohibition. Accidental killing would also seem to be prohibited. If we can prove that sea birds were killed, whether wil-

fully or not, by the action of the factory in discharging fish oil into the sea, the factory in question will have contravened this Act. Section 12 of the Act specifies that "any person who (a) contravenes or fails to comply with the provisions of this Act shall be guilty of an offence and liable on conviction to a fine not exceeding R200 or to imprisonment for a period not exceeding three months or to both"

Although the fine and prison sentence do not seem to be very stiff, Section 3(b) does offer us grounds for laying a charge. Proving a contravention of this Act would seem to be simpler than proving a contravention of Section 16(1)(j) of the Sea Fisheries Act 58, 1973.

In the long term we should also pay attention to Section 11(1)(c) which empowers the Minister (of Economic Affairs) to "make regulations providing for the further conservation or protection of sea birds or seals". We should think of persuading the Minister to frame regulations which will explicitly protect sea birds from the discharge of noxious substances into the sea. This will require further thought.

3.3. THE WATER ACT, No. 54 of 1956.

Prof. Rabie pointed out, that, contrary to my own assumption, this Act also regulates the discharge of effluent into the sea, and that it is well worth following up Section 21(5)(a) (i) and (ii) since the Department of Water Affairs has a real interest in combating pollution. This Section in brief provides for a system of permits issued under certain conditions to allow factories to discharge effluent into streams or into the sea. (Relevant portions of Section 21 are quoted in an Appendix). Prof. Rabie suggests that we enter into discussions with an official of the Department of Water Affairs to ascertain whether the factories discharging fish oil into the sea are in possession of the required permits, if so, what conditions are stipulated in the permits and whether the factories are in fact complying with these conditions. If factories do not have the required permits or are not complying with the conditions laid down, the Department of Water Affairs should take action against them, and may furthermore prove more cooperative in this respect than the Fisheries Branch in respect of the Sea Fisheries Act, No. 58, 1973.

4. PROCEDURE FOR DOCUMENTING OILING INCIDENTS.

A complete dossier should be built up for every incident. Apart from recording date, time, locality, number of birds affected in detail and as accurately as possible supplemented with photographs as we have done in the past, we should also take samples of the discharged effluent, examine dead and dying birds and take samples of oiled plumage. The samples of discharged effluent and oiled plumage should be chemically analyzed and compared. This is very important, since we shall have to prove a causal relationship between the discharge of the oil and the mortality occurring in the bird population. We must do this ourselves and not leave it to the Sea Fisheries Branch officials, who do not have a vested interest in sea birds. We must aim to build up a watertight case for every oiling incident even if we do not intend to lay any charge.

5. NOTIFICATION OF FACTORY MANAGEMENT AND OFFICIAL BODIES.

As soon as evidence of an oiling incident has been gathered, a letter should be sent by registered mail to the Company concerned. In this letter we must point out that we are in possession of evidence that the factory has, by discharging effluent into the sea, caused the death of ... sea birds and that this constitutes a contravention of Section 3(b) of Act No. 46, 1973 or alternately, of Section 16(1)(j) of Act No. 58, 1973. If the factory, after receipt of our letter, continues such discharging, they will be wilfully contravening these Acts, which puts them in a worse situation should we decide to ask for prosecution. We should keep in our dossier a copy of the abovementioned letter together with the Post Office registration receipt, for this eventuality. At the same time the matter should also be brought to the attention of the Sea Fisheries Branch of the Department of Industries, the Department of Water Affairs, and the provincial Nature Conservation Department. This could be done by sending them each a copy of the abovementioned letter.

6. PROSECUTION.

If the factory's management proves to be unco-operative and continues to discharge effluent in spite of our warning letter, a charge should be laid at the local Police station. Since the local police do not usually have the technical expertise for cases of this nature, we should, apart from laying the charge and declaring ourselves to be prepared to make a statement and give evidence, also help them in their investigation by pointing out evidence to be collected and by taking, in the presence of a police officer, the necessary samples as outlined in paragraph 4.

7. PRIVATE PROSECUTIONS.

In the event of the Attorney-general's declining to prosecute after we have laid a charge, there is little we can do. Prof. Rabie does not consider that we stand much chance of successfully undertaking a private prosecution. In fact, demanding such private prosecutions could, unless we have a very good case, lead to our being considered as "vexatious litigants", which will be very harmful to our position in later cases.

8. PUBLICITY.

It is important to bring the threat posed to sea birds by fish oil pollution to the attention of the general public. Factual, well documented cases should be brought to their attention by publicity in the mass media, e.g. illustrated articles in the Sunday papers. In the long term an alerted and concerned public should prove a more potent weapon than prosecutions.

9. SOURCES OF ASSISTANCE.

Prof. Rabie feels that we should apply pressure on the local Department of Nature Conservation to pay attention to cases of environmental pollution. He mentioned Prof. R. Fuggle of the U.C.T. School of Environmental Studies as someone who could help us in connection with the broader aspects of such pollution (i.e. when we venture outside our own field of birds). Prof. Rabie himself is prepared to give us any further assistance he can provide at any time we should need to consult him and he said that other members of UNISA's law faculty would be willing to help as well.

10. CONCLUSIONS AND RECOMMENDATIONS.

- 10.1 Prosecution should only be used as a last resort. Private prosecutions stand little chance of success.
- 10.2 The most relevant legal provision for our problem is Section 3(b) of the SEA BIRDS AND SEALS PROTECTION ACT, No. 46, 1973. An alternate charge could be laid under Section 16(1)(j) of the Sea Fisheries Act No. 58, 1973. However, our concern with birds does not fit in well within the framework of the latter Act.
- 10.3 It is important that a complete and accurate dossier be built up for every oiling incident, whether we intend to lay a charge or not.
- 10.4 As a long term project we should press for regulations which will effectively and explicitly deal with the threat of fish oil pollution. (Cf. paragraph 3.2).
- 10.5 We must make contact with the Department of Water Affairs to obtain information on the permit system discussed in paragraph 3.3, and if necessary get the Department to take action against factories that do not comply with this system.
- 10.6 We should pay attention to alerting the general public to the fish oil pollution problem.

PETER LOR.
STELLENBOSCH.
9th October 1974.

APPENDIX

Portions of Section 21 of the Water Act, No. 54 of 1956 referred to in paragraph 3.3. (As amended by Acts 56, 1961 and 79, 1967).

PURIFICATION AND DISPOSAL OF INDUSTRIAL WATER AND EFFLUENTS.

- 21.(1)(a) The purification of any waste water or any effluent or waste produced by or resulting from the use of water for industrial purposes shall form an integral part of the process of such use and, subject to the provisions of sub-section (5), any person using water for industrial purposes shall purify such water, effluent or waste so as to conform to such requirements as the Minister may, from time to time after consultation with the South African Bureau of Standards, prescribe by notice in the Gazette either generally or in relation to water used for or in connection with any one or more specified industrial purposes or in relation to water derived from any specified public stream or in relation to water used in any prescribed area. (Amended by Section 5 of Act No. 56 of 1961).
- (b) Any requirements prescribed under paragraph (a) shall be such as to ensure that the waste water, effluent or waste to which such requirements relate will, after purification in accordance with those requirements, be at least as free of impurities as would have been the case if the purification thereof had been effected in accordance with the recommendation of the said Bureau.
5. (a) Any person or user referred to in sub-section (1) or (2) may apply to the Minister for a permit exempting him from

compliance with the provisions of either of those sub-sections, and the Minister may, after such investigation as he may consider necessary, if he is satisfied that compliance with the said provisions is impracticable in the particular circumstances, grant a permit subject to such conditions as he may deem fit to impose, exempting such person or user from compliance therewith to such extent as the Minister may determine, or authorizing such person or user to discharge any waste water, effluent or waste referred to in sub-section (1) in an unpurified state or in such state of semi-purification as the Minister may determine, into any public stream at a point to be fixed by the Minister: Provided that, in the case of an application for exemption from compliance with the provisions of sub-section (1), the Minister shall in considering such application have due regard to the regulations made under paragraph (d) of sub-section (1) of section TEN of the Sea-shore Act, 1935 (Act No. 21 of 1935), and shall not issue such a permit unless he is satisfied that -

- (i) the conditions to be imposed in connection with any such permit will be at least as effective for the purpose of preventing the pollution of public or other water, including sea water, as any conditions or requirements which may have been recommended by the South African Bureau of Standards; and
 - (ii) any point so fixed by him is in such proximity to the sea that it is unlikely that any other person will be prejudicially affected and that the dilution of such waste water, effluent or waste by sea water or other water contained in the said stream will be such that neither aquatic nor marine fauna or flora in the public stream or the sea will be detrimentally affected.
- (b) Any interested person, other than an applicant for a permit under paragraph (a), may after written notification to the Minister apply to a water court for the cancellation or modification of any permit issued under that paragraph, and the water court may make such order on the application as it may consider equitable.
- (c) The Minister may at any time by notice in writing to the holder of any permit issued in terms of paragraph (a), withdraw that permit or amend it in such manner as he may deem fit.
- (6) (a) The Minister may in prescribing any requirements under sub-section (1) or imposing any conditions under sub-section (5), also specify the steps to be taken by any person carrying on any mining or other industrial operations, in order to prevent the pollution of public or private water, including underground water, by seepage or drainage from any area on which those operations are carried on both while such operations are in progress and after the abandonment thereof.
- (b) Any such person who fails to take the steps so specified within a period determined by the Minister and made known by notice in the Gazette or by notice in writing addressed to such person, shall be guilty of an offence.
- (7) For the purpose of this section, a local authority which uses water for the purification or disposal of sewage or any effluent or waste referred to in sub-section (3), shall be deemed to use such water for industrial purposes.

(8) Any person who contravenes or fails to comply with the provisions of this section or of any permit issued under sub-section (5), shall be guilty of an offence. (Amended by Section 3 of Act 79 (1967)).

Sub-sections (5)(a)(ii) and 5(b) seem to me to be particularly important for our purposes.

"BIRDS OF ETOSHA NATIONAL PARK"

Die nachfolgende Liste, die uns von Dr. R.A.C. Jensen, Senior Professional Officer der Naturschutzbehoerde, mit der Bitte um Veroeffentlichung uebergeben wurde, moechte ich unseren fotobegeisterten Mitgliedern und Freunden zur genauen Durchsicht besonders empfehlen. Es werden nur Diapositive (Dias) 24 x 30 mm oder 6 x 6 cm erbeten. Wie aus der englischen Nachschrift zu ersehen ist, erhalten alle Fotografen, deren Bild oder Bilder in dem geplanten Heft erscheinen, anstelle einer Bezahlung 5 Hefte gratis. Aus diesem Grunde ist es notwendig, dass alle Einsendungen mit Adressenangabe versehen werden; aber auch weitere Angaben (evtl. Jahreszeit, Ort der Aufnahme usw.) werden dankbar begruesst. Beitraege sind an die unten angegebene Adresse zu senden. In diesem Zusammenhang moechte ich die Mitglieder daran erinnern, dass auch die Arbeitsgruppe ein dankbarer Abnehmer von Vogel-Dias ist; auch wenn sie Ihrer Meinung nach nicht so recht gelungen sein sollten. Moeglicherweise koennen wir damit unsere Dia-Sammlung vervollstaendigen.

(H. Kolberg)

Rob.

1	Ostrich	Strauss
55	Black-headed Heron	Schwarzkopfreiher
59	Little Egret	Seidenreiher
73	Marabou Stork	Marabu
76	Wood Ibis	Nimmersatt
78	White-bellied Stork	Abdimsstorch
86	Greater Flamingo	Gr. Flamingo
87	Lesser Flamingo	Kl. Flamingo
91	Knob-billed Duck	Glanzgans
98	Cape Teal	Kapente
105	Secretary Bird	Sekretaer
107	Wht.-backed Vulture	Weissrueckengeier
129	Yellow-billed Kite	Schmaröttermilan
130	Black-shouldered Kite	Gleitaar
134	Tawny Eagle	Raubadler
151	Bateleur	Gaukler
162	Gabar Goshawk	Gabarhabicht
165	Chanting Goshawk	Singhabicht
214	Crowned Crane	Kronenkranich
216	Blue Crane	Paradieskranich
217	Kori Bustard	Riesentrappe
225	Black Korhaan	Gackeltrappe
242	Crowned Plover	Kronenkiebitz
275	Cape Dikkop	Kaptriel
278	Double-bnd. Courser	Afrik. Rennvogel
310	Dbl.-bnd. Sandgrouse	Nachtflughuhn
352	Barn Owl	Schleiereule
372	Rufous-chkd. Nightjar	Rostnacken Nachtschwalbe
387	Palm Swift	Palmensegler