



CONSORTIUM OF INTERESTED AND  
AFFECTED PARTIES

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C/O: [iancox@coxattorneys.co.za](mailto:iancox@coxattorneys.co.za)

13 March 2018

**Honourable Dr. Edna Molewa**

**Minister of Environmental Affairs**

**PRETORIA**

Per email:

[GRamutshila@environment.gov.za](mailto:GRamutshila@environment.gov.za);

[bsobayeni@environment.gov.za](mailto:bsobayeni@environment.gov.za);

[iabader@environment.gov.za](mailto:iabader@environment.gov.za) (CC)

Dear Honourable Minister Molewa,

**RE: Formal demand for the withdrawal of notices GN 112 and 115**

The purpose of this letter is to inform you, as the Minister of Environmental Affairs, that these notices are unlawful for the reasons set out below.

We request the following actions:

1. The urgent withdrawal of the Draft 2017 AIS Regulations and the Draft AIS Amendment Lists that were published for comment under GN 112 and 115 on Friday 16 February 2018. This is because they do not comply with section 100 of the National Environmental Management Biodiversity Act, 2004 (“NEMBA”) and thus are unlawful; and
2. That you undertake that neither you nor your Department will take further steps to list species as invasive until:
  - 2.1. The notices inviting the public to comment on the draft lists and regulations contain sufficient information to enable members of the public to submit meaningful representations or objections; and
  - 2.2. That information explains:
    - 2.2.1. by reference to the definition of invasive in NEMBA why the species proposed for listing are invasive as defined having regard:
      - Firstly, to why, how and in what areas within South Africa, that alien species “threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species”;

- Secondly, on terms that are evidence (legal) rather than opinion based and that accordingly apply the concept of a **significant** threat in a manner that can be tested objectively in relation to facts and which is not based on expert opinion that does not speak objectively to the aforesaid facts;
- Thirdly, why, how and in what areas within South Africa, the presence of such alien species may result in economic harm, or harm to human health, or environmental harm, “environmental harm” being interpreted applying the definition of “environment” in the National Environmental Management Act, 1998(“NEMA”); and not just as a harm to ecosystems, habitats or other species.

2.2.2. by reference to the principles set out in section 2 of NEMA (the NEMA Principles) and having regard to:

- Firstly, section 2(1)(c) of NEMA which states that these principles “apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment” why the species that have been identified as invasive by virtue of the definition of invasive set out in NEMBA must be listed as such;
- Secondly, section 2(2) of NEMA which states that: “Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably”;
- Thirdly, having regard to the above, explain the need to list a species as invasive in relation to the balancing of risks and benefits. They must not speak to the generalised and vague terms characteristic of DEA’s recent responding emails to members of the public. DEA must rather give the sort of detail that both the public, all spheres of government and organs of state reasonably require if there is to be a coordinated and integrated effort directed at controlling such species.

You are hereby informed that if you do not withdraw these notices and give these undertakings then it is likely that an urgent application will be brought for an interim interdict preventing you from proceeding further, pending a final interdict declaring the notices unlawful.

Please revert by no later than 17 March 2018.

This letter is written on behalf of a Consortium of interested and affected stakeholders (See list of organisations attached as annexure A).

The notices are unlawful due to numerous defects, including:

1. They do not contain any information reasonably necessary to enable members of the public to object or make representations in an informed manner to the substance of what is proposed as is required in terms of section 100(2)(b) of NEMBA.
2. That the notice was not published in a newspaper as is required in terms of section 100(1)(b) on 16 February 2018 but according to information supplied by DEA was only published 5 days later in the Star on 21 February.
3. The notice does not alert members of the public that they may ask you for permission to submit their representations orally in terms of section 100(3) of NEMBA.

4. The notice, by requiring objections to be submitted by 16h00 on the last day, does not comply with the 30 day notice period prescribed in section 100(2)(a) of NEMBA. The notice period is short by 8 hours or one third of a day.
5. No Socio-economic Impact Analysis (SEIA) was supplied despite this being part of the information reasonably required in order to make representations or objections.
6. We are aware that the department has failed to publish notices in compliance with section 100 of NEMBA<sup>1</sup>. This has not happened despite the constitutional obligation to do so in terms of section 155 of the Constitution.

The judgement of the full bench of the Gauteng Division (Pretoria) of the High Court of South Africa in *Kruger and Another v Minister of Water and Environmental Affairs and Others*<sup>2</sup> is authority for the proposition that these defects are sufficiently serious to render any subsequent law unlawful. You will recall that applications brought by your department to appeal this judgement were refused by both the Supreme Court of Appeal and also by the Constitutional Court.

Paragraph 34 of that judgement is of particular relevance:

“However, what is disappointing in the present case is that, compliance in terms of sections 99 and 100 was not adhered to and no proactive steps were taken before the moratorium was imposed. The moratorium on domestic trade in rhino horns should be having a significant adverse impact on the employees and families of the rhino breeders like Hume and Kruger. The communities and business owners in the surrounding areas where rhino breeding operations are conducted could have been engaged due to possible loss of employment benefits occasioned by the moratorium. Secondly, the notice in the Gazette did not contain sufficient information to enable members of the public to submit meaningful representations and/or objectives. All of this has a significant bearing on the decision to impose the moratorium. On this finding alone, the moratorium ought to be set aside.” (Emphasis added)

The draft lists, if made law, will declare a number of economically useful species invasive. The impact of this proposed listing on these species has not been addressed in the notices or provided in any consultation or response to stakeholder groups.

In the light of the above, kindly respond as requested by no later than 17 March 2018.

Yours Faithfully



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pp Consortium of Interested and Affected Parties

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<sup>1</sup> [http://www.durbanflytyers.co.za/Articles/20171011\\_Letter\\_To\\_The\\_Minister\\_Final.pdf](http://www.durbanflytyers.co.za/Articles/20171011_Letter_To_The_Minister_Final.pdf)

<sup>2</sup> <http://www.saflii.org/za/cases/ZAGPPHC/2015/1018.html>

## APPENDIX A

### List of supporting organisations:

Aquaculture South Africa

Aquaculture Association of Southern Africa

Wildlife Producers Association

Trout South Africa

The Federation of Southern African Fly fishers

South African Fly Fishing Association

The Wild Trout Association

Blue Crane Tourism

Rhodes Tourist and Information Centre

Southern Drakensberg Tourism

Dabchick Wildlife Reserve (Pty) Ltd

Abalone Farmers' Association

Bivalve Shellfish Association of SA

Mpumalanga Tourism Association