CONSORTIUM OF INTERESTED AND AFFECTED PARTIES

Consortium of Interested and Affected Parties

C/O: mriette@gmail.com

17 April 2018

TO: The Portfolio Committee on Environmental Affairs

ATTN: Ms T Madubela

tmadubela@parliament.gov.za

Dear Ms Madubela

Re: Written comments and objections with regard to the National Environmental Management Laws Amendment Bill [B14 -2017].

Thank you for the invitation to make written comments/representations/objections with regard to the above Bill.

These representations are made by a Consortium of Interested and affected parties comprising the organisations as listed in ANNEXURE B.

These representations/comments/objections will focus on:

A. The amendment to sections 31 J and K of the National Environmental Management Act, No. 107 of 1998 ("NEMA") which are set out in sections 19 and 20 of the 2015 NEMLA Bill; and

B. The proposed amendments to the National Environmental Management Biodiversity Act, No. 10 of 2004 ("NEMBA") which are set out in sections 37 to 45 of the 2015 NEMLA Bill.

C. The proposed amendments to the National Environmental Management Biodiversity Act No. 10 of 2004 ("NEMBA") which are set out in sections 37, 41 and 42 of the 2015 NEMLA Bill – Amendments to the definition of "control" and the insertion of a new definition for "eradicate".

D. Policy Considerations - the lack of policy, compliant processes and SEIAS shortcomings.

A list of acronyms and abbreviations can be found in ANNEXURE C.

A. Sections 31J and 31K of NEMA

1. As was pointed out by Mr Ian Cox in his submission of 4 April 20128 ("the Cox submission"[1]) and his prior correspondence to the DEA, it is our respectful view that the proposed amendments to sections 31 J and K of NEMA are unconstitutional. This is because they purport to authorise environmental management inspectors to carry out what are in effect searches without warrants. This is unlawful as was clearly stated by the Constitutional Court in the Minister of Police and Others v Kunjana (CCT253/15) [2016] ZACC 21.[2]

2. Notwithstanding the above comments, it is unclear why these additional powers are required. The prevailing provisions of the Criminal Procedure Act, No. 51 of 1977 are more than sufficient for this purpose. DEA should explain why such powers are reasonable measures to achieve the rights and purposes set out in Section 24 of the Constitution.

3. It is thus respectfully suggested that these powers should be abandoned unless there is some justifiable purpose for their application. In that event, these proposed amendments should be referred back to DEA with an instruction that they be redrafted having regard to the above judgement and to the approach adopted in the 2017 amendment to the comparable section 45B of the Financial Intelligence Centre Act, No. 38 of 2001.

B. NEMBA

4. Previous representations:

   4.1. In August last year TSA and FOSAF submitted representations to the Portfolio committee dealing with some aspects of the issues raised by the NEMLA Bill. In the interests of brevity, it is requested that this submission be read as if incorporated herein.3

   4.2. The Cox submission refers to the draft South African National Biodiversity Institute (SANBI) report and the issues it raises with regard to the failure of NEMBA as an effective legislative framework. We endorse these observations and those of Cox and support the conclusions regarding cost effectiveness, practicality and workability.

5. Considerations regarding the Constitution and NEMA principles:

   5.1. It is our respectful view that before compounding the many problems alluded to in this and other submissions by the adoption of the NEMLA Amendments, South Africa would be well served by an opportunity to reconsider this framework in line with Section 24 of the Constitution and the NEMA principles.4

   5.2. The Cox submission also refers to the question of Draft Biodiversity Bill which though not yet before

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1 TSA and FOSAF made a submission in August 2017. Cox bases some of his submissions on this submission which is attached to the Cox submission. In the interests of brevity, it is not repeated herein.

2 See http://www.saflii.org.za/za/cases/ZACC/2016/21.html.

3 This submission is attached to the Cox submission.

4 The guiding principles set out section 2 of NEMA.

Parliament is in the pipeline and thus manifests the current thinking in the DEA. We support the observations made insofar as they argue that this Bill further reflects a wrong approach by the DEA and a move away from the requirements of Section 24 of the Constitution and the NEMA principles.

5.3. South Africa has many competing needs and priorities. This is why our Constitution reflects a framework for the progressive realisation of rights and requires Parliament to weigh up such factors in the allocation of resources. This is also why the Department of Planning Monitoring and Evaluation ("DPME") implemented the Socio-Economic Assessment System ("SEIAS") that now requires SEIA reports be prepared for all new legislation. This allows for an assessment of all alternatives, implications, risks and benefits.

6. Over-regulation:

6.1. A further aspect relates to the increasing trend by DEA to promote over regulation. This is borne out by the huge number of species listed as invasive and the enormous burden and obligations that this places on state and private resources. Various stakeholders have repeatedly drawn attention to the unwarranted nature of this approach which appears to be driven by purist notions rather than practical considerations. A practical approach would take account of only significant harm causing species/organisms as well as the state's capacity and resources (at all spheres of government) to practically address such matters in a progressive and cost-effective manner. We respectfully do not witness such an approach in the current NEMBA framework nor in the proposed amendments envisaged by the NEMLA Bill.

6.2. What is clear to stakeholders like ourselves is that in many instances the system of environmental law lacks a proportionality where thresholds of alleged harm which trigger requirements for various assessments are not objectively justifiable. This is because they are not proportionate in relation to the measures to be applied in mitigation of such alleged harm. This in turn undermines the public confidence in such measures and the buy-in from stakeholders. It also undermines on-going efforts at promoting investment in sustainable development by increasing administrative delays and uncertainty thereby giving a sense that such investments are at greater risk due to a failure of due process and inadequate responsiveness.

C. Definitions – amendments to the definition of "control", and the insertion of a new definition for "eradicate"

7. It has furthermore emerged that amendments to the definition of "control", which appeared to be cosmetic, may be interpreted so as to enable the Minister to not only list species as invasive but also list further areas where invasive species must be controlled.

8. If this interpretation is correct, the Minister will not only be able to:

8.1. As is presently the case, list a species or a category of species as invasive either across the whole country or in terms of a specific area and in addition do so by reference to particular people or a category of people.

8.2. The Minister will in addition be able to:

- specify those particular areas within an area for which a species has been listed as invasive where that species must be subject to a process of eradication or control;

8.2.1. determine what steps must be taken to:

- eradicate (as in completely eliminate from South Africa); or
- control (as in systematically remove or prevent from breeding and/or spreading) listed invasive as invasive within these areas so specified.

9. This will fundamentally change how Chapter 5 of NEMBA currently works by replacing a statutorily dictated regime directed at eradicating or controlling invasive species with one that replaces this statutory regime with one which gives the Minister *carte blanche* to decide not only what species may be listed as invasive and where, but also what is to be done with those species once they have been listed as such.

10. It is not clear if this is what is intended. One would expect DEA to have fully disclosed and explained a change in law of this magnitude. But DEA have in fact done the opposite.

11. In addition, the explanatory memorandum that accompanied the Bill gives no hint of a change of this magnitude. That memorandum does not deal with the proposed changes to section 73 at all. It describes the proposed amendments to the definition of control in these terms:

> "This clause provides textual amendments to the definition of "control" and inserts a new definition of "eradicate" in order to provide clarity on the actions, measures or methods to be undertaken when dealing with listed invasive species".

12. This is also not what DEA is saying. For example, Dr Preston wrote to Mr. Cox on 14 December 2016 saying:

> "This is not the NEMLA Bill, which sets out proposed **minor** amendments that will be going to Parliament next year."[5]

13. However, it is our respectful view that an interpretation along these lines is an attempt to go some way to legitimising what up until now has been DEA's improper and unlawful application of Chapter 5 of NEMBA. One cannot therefore discount the intolerable possibility, that DEA has deliberately set about misleading the public and parliament as to the true nature of these amendments.

D. Policy Considerations - the lack of policy, compliant processes and SEIAS shortcomings

14. There is also no hint of a change of this magnitude in the perfunctory report document entitled "Final Impact Assessment 30 June 2015". This document does not comply with the SEIAS guidelines that came into force on 1 October 2015. These guidelines[6] aim:

[5] The full text of this e mail is annexed to this letter marked ANNEXURE A. Cox has mentioned the difference of opinion he and Dr. Preston had over the interpretation of section 66 of NEMBA which was referred by DEA to senior council for an opinion. Senior council agreed that DEA could not lawfully apply section 66 of NEMBA as it proposed to do.

[6] http://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/SEIAS-Guidelines.aspx

- "To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes

- To anticipate implementation risks and encourage measures to mitigate them"

with a view to determining the cost and benefits of the legislation. This is intended to avoid the unintended consequences of legislation by addressing, *inter alia*, inefficient implementation measures, the excessive cost of compliance and overall underestimating of the risks or benefits and the likelihood of success. None of these issues are addressed in the "Final Impact Assessment".

15. One key set of considerations required by the SEIAS is the consideration of alternatives to the proposed legislation. In this regard we are unable to comment on the alternatives considered by the DEA to the proposals envisaged by the NEMLA Bill. This is an important omission in the context of the draft SANBI report.

16. The failure to publish a report compliant with the SEIAS guidelines and in particular the failure to consult the stakeholders with regard to any changes before publishing the draft bill, is another material defect that is fatal to the legality of the process. The fact that this failure is part of what appears to be a process designed to mislead stakeholders and parliament as to the true purpose and intent of the amendment compounds the seriousness of this illegality. We believe that this deceit would be sufficient grounds in and of itself to justify a court setting the proposed law aside.

17. After all, laws should not be passed in terms of processes that are irregular. Parliament should not legitimise such processes by passing laws that have been introduced in terms of a non-compliant process. This would amount to an egregious betrayal of the public trust that is necessary for the effective operation of the institutional arrangements of the state.

18. Not to censure these irregular approaches, tempts officials to regulate for their convenience and in accordance with their beliefs rather than as is required to effectively achieve the objectives of NEMBA. A glaring example of this is the very large number of species that have been listed as invasive and officials' attempts to substantially enlarge this list to include a number of economically important species in terms of the recently published draft 2018 AIS List and Regulations.

19. The current situation has been brought about by DEA's unlawful implementation of Chapter 5 of NEMBA and is undesirable. It has resulted in a regulatory regime that is hugely complex, unnecessarily onerous, massively expensive and fundamentally unworkable. The draft SANBI AIS status report (refer to Cox letter of 4 April 2018) confirms this.

20. The proposed amendments do not remedy this fatal defect whichever way you interpret them. They in fact make matters worse. This is because the Minister will no longer just have the discretion to list species as invasive for the purpose of eradication or control only. An already failing system will be made considerably worse if the Minister is given the additional power to list species as invasive just because officials in the department believe that they are harmful.

21. DEA has consistently failed to:

    - provide information/reasons why a species must be listed as invasive;
    - explain the circumstances in which the beneficial use of a species may be permitted; or
    - explain the circumstances or give reasons when, why, where or how listed alien or invasive species must be eradicated or controlled.

22. These failures significantly increase the risk of utilising species that are listed as invasive. This in turn significantly impacts on the social and economic viability of the value chains that already utilise species that either are listed as invasive or which DEA intends to list as invasive.

23. This is especially troubling given that:

    - none of these impacts are dealt with or even acknowledged in the SEIA report;
    - there has been no consultation or engagement with stakeholders despite their repeated complaints of the negative social and economic effects of these impacts especially in rural areas.

24. This speaks to the underlying problem which is raised in the Cox submission, namely that neither NEMBA nor these proposed NEMLA amendments were subjected to any completed policy development process. We have instead seen a process of incremental change, in terms of which the "people first" approach that informs our environmental right in section 24 of the Constitution, is being replaced with a vague "nature first" discretionary system that puts the protection of native[7] species before people.

25. Stakeholders such as FOSAF have for many years drawn to the attention of DEA and other environmental agencies to the fundamental lack of a proper policy that was adopted after a public consultation process as required to guide and underpin NEMBA's implementation. This lack of policy undermines many aspects of NEMBA and allows officials to "make it up as they go along". This results in bureaucratic over-reach and unintended consequences and weakens public confidence in the DEA, the regulatory system and the rule of law.

E. Conclusion

26. It is clear that the Department is engaging in a process of incremental changes to NEMBA and other environmental laws. This is happening behind closed doors and without a proper consultation and policy development process. In addition, the non-compliance with the SEIAS guidelines compounds this lack of due process. We are aware of numerous regulatory and legislative provisions that have been published for public comment. Stakeholders have, at their own cost, made representations, comments and objections with regard thereto. DEA has failed to take cognisance of these representations, comments and objections despite enquiries from the stakeholders. Such matters then find their way into subsequent legislation / regulation without sufficient information or acknowledgement of the prior representations.

[7] Native is a scientific term internationally recognised to describe a species that is indigenous not only to a country but also to a particular area within that country

27. This tendency often results in changes being made to laws that compromise the public's ability to meaningfully participate in law making. For example, DEA proposes replacing the peremptory requirements of section 100 of NEMBA that presently govern consultation with stakeholders, with new provisions in the Biodiversity Bill which only contain a vague requirement that such consultation must be "appropriate".

28. Trusted and thus effective laws must be lawfully brought into existence. This is not the case with NEMBA. None of the proclamations and regulations made under NEMBA comply with the prescribed consultation processes. This NEMLA Bill also does not comply with the prescribed processes. Diluting these peremptory processes in an attempt to legitimize the unlawful actions of government is harmful to our rights-based system of democratic and participatory government. It also destroys trust in government. In this case it is doing a great deal of harm to value chains that contribute significantly to the economy and the general health and wellbeing of South Africans especially in rural areas.

29. It is also frustrating attempts to grow these economies through the development of tourism and agriculture including aquaculture, game and wildlife ranching. These problems are reflected in the various Phakisa lab reports and the National Development Plan which are intended to address the problems referred to above. The failure to implement these outcomes is a matter of deep concern to the Consortium.

30. We respectfully submit that it is undesirable for the proposed legislation, let alone proposals as significant as these, to be implemented without a legally compliant policy, formulated in terms of a proper policy development process. In fact, we respectfully suggest that the absence of a compliant policy development process encourages this sort of malfeasance by government.

31. Compliant policy development processes prevent bad governance and law-making because they are inclusive. By admitting a diversity of ideas and concerns, this enables a much better informed, inclusive and thus trusted law-making process than those developed internally to meet the particular needs and desires of officials.

32. The situation that pertains at present is one of a complete breakdown in trust between the value chains represented by the Consortium and other stakeholders, and DEA. These disjunctures not only compromise participatory governance but also impact negatively on the co-operation between the different spheres of government.

33. In this policy vacuum and incoherence, DEA is able to present a materially different picture that appears to intentionally mislead stakeholders as to what DEA's true intentions are. A proper policy development process will go a long way to remedying these shortcomings and re-building the trust required for proper co-operative governance.

34. As indicated above it should be patently clear that NEMBA is not working at present and that the proposed amendments envisaged by the NEMLA Bill will not contribute to finding solutions or addressing the shortcomings. This is thus an opportune time for DEA to work with all stakeholders and the public to reconsider appropriate alternatives to the current situation and through a proper policy development process build a better framework. This will allow for the rights enshrined in Section 24 of the Constitution to be better promoted and achieved.

We respectfully request that:

I. the powers resulting from proposed amendments to sections 31 J and K of NEMA should be abandoned unless there is some justifiable purpose for their application. In that event, these proposed amendments should be referred back to DEA with an instruction that they be redrafted having regard to the above judgement and to the approach adopted in the 2017 amendment to the comparable section 45B of the Financial Intelligence Centre Act, No. 38 of 2001.

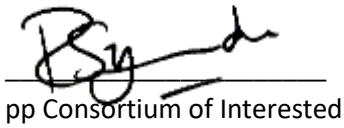
II. the proposed amendments to NEMBA be postponed pending the completion of a proper policy development process;

III. the 2015 NEMLA Bill be postponed pending proper compliance with the SEIAS guidelines;

IV. and thereafter, the NEMLA Bill be subjected to a new and compliant public consultation process.

We suggest that the current situation of a failing and unworkable law is doing more harm than good. The proposed amendments will not address this harm, and therefore needs to be abandoned pending the processes noted above.

Yours Faithfully



pp Consortium of Interested and Affected Parties

From: Guy Preston [mailto:GPreston@environment.gov.za]
Sent: 14 December 2016 01:54 AM
To: Ian Cox
Cc: Ilan Lax; Andre Share; Andre Share; Desiree Madlala; Heinrich Muller; Khathutshelo Nelukalo; Linda Garlipp; Nicolette De Kock; Nomahlubi Sishuba; Radia Razack; Shashika Maharaj; Brian John Huntley; Gerrie van der Merwe; Philip Ivey (P.Ivey@sanbi.org.za); Guy Preston
Subject: RE: Proposed regulation of trout as an alien species.

Dear Mr Cox

DEA's and your interpretations of sections 65 and 66 of NEM:BA are clearly different. DEA is not extending any powers. It is simply providing an exemption for specific species and/or persons as provided for in section 66, with conditions – which conditions include that you do not need a Permit provided certain requirements are fulfilled as set out in Notice 2. This was explained in the letter.

The amendments to NEM:BA to which you refer are still in preparation. They relate to a general overall review of NEM:BA as a whole, including the AIS chapter. (This is not the NEMLA Bill, which sets out proposed minor amendments, that will be going to Parliament next year.) When a draft Bill is ready for the public comment process, it will (as with all other amendments) be fully consulted.

Yours sincerely

Guy Preston

ANNEXURE B

List of supporting organisations:

Aquaculture South Africa

Aquaculture Association of Southern Africa

Wildlife Producers Association (WPA)

Trout South Africa (TSA)

The Federation of Southern African Flyfishers (FOSAF)

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 of SA

Bivalve Shellfish Association of SA

Mpumalanga Tourism Association

MLP Media

Professional Hunters SA (PHASA)

Wildlife Ranching SA (WRSA)

International Wildlife Ranching and Conservation Alliance (IWRCA)

List of ACRONYMS

NEMA	National Environmental Management Act, No. 107 of 1998
NEMBA	National Environmental Management Biodiversity Act, No. 10 of 2004
SEIAS	Socio-Economic Impact Assessment System
SEIA	Socio-Economic Impact Assessment
DEA	Department of Environmental Affairs
AIS	Alien and Invasive Species
SANBI	South African National Biodiversity Institute
DPME	Department of Planning Monitoring and Evaluation
FOSAF	The Federation of Southern African Flyfishers
TSA	Trout South Africa