

TO: The Portfolio Committee on Environmental Affairs
Ms T Madubela
tmadubela@parliament.gov.za

18 April 2018

Dear Ms Madubela

Re: Supplementary written comments on the National Environmental Management Laws Amendment Bill [B14 -2017].

Introduction

I submitted my comments on the 2015 NEMLA Bill in a letter 4 April 2018. It has since emerged that amendments to the definition of control, which I thought were cosmetic, could fundamentally alter the purpose of Chapter 5 of National Environmental Management Biodiversity Act 2004 (“NEMBA”).

My original submission did not take this possibility into account. The purpose of this supplementary submission is correct this oversight.

My original submission still stands in that:

1. My submissions regarding 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 remain unchanged.
2. My submissions regarding the proposed amendments to the NEMBA which are set out in sections 37 to 45 of the 2015 NEMLA Bill also remain save that I want to weave into them the additional concerns that arise as a result of the change in the definition of control and the addition of a new definition of “eradication”.

I was party to the preparation of the submission of the Consortium of Interested and Affected Parties (the Consortium) that was sent to you yesterday. I make also make common cause with

SIMPLICITY IN LAW

that submission and in particular what the Consortium has to say about noncompliance with the SEIAS¹ guidelines.

Changing what is meant by eradication and control.

Note:

[] Words in bold type in square brackets indicate omissions from existing enactments. Words underlined with a solid line indicate insertions in existing enactments.

The following amendments are proposed in relation to the meaning of “control”:

“**control**”, in relation to **[and alien or]** invasive species, means-

- (a) **[to combat or eradicate an alien or invasive species]** the systematic removal of all visible specimens of an alien or invasive from within a specified area or the of or the whole of the Republic; or
- (b) where such systematic removal **[eradication]** is not possible, to prevent, as far as may be practicable, the recurrence, re-establishment, re-growth, multiplication, propagation, regeneration or spreading of an alien or invasive species.

The following new definition of eradicate is inserted in section 1 of NEMBA:

"eradicate" means the complete removal of an alien or invasive species from within the Republic, including all living parts of that species.

When I looked at these new definitions originally I thought that they were minor amendments of a technical nature intended to more closely align the definition of the meaning of control and eradicate with what is set out in COP 6 Decision VI/23² of the United National Convention on Biological Diversity.

This interpretation was reinforced by:

1. The explanatory memorandum to the 2015 Draft NEMLA Bill which said the following of the proposed changes to the definitions:
“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.”
2. The absence of any reference in the so called Final Impact Assessment 30 June 2015 to the massive socio economic impacts that will result from this amendment.

I thus interpreted the reference to “alien or invasive from within a specified area” as being to the area within which a species had been listed as invasive.

I according concentrated on the impact on the proposed changes to section 73 of NEMBA which were not dealt with in the explanatory memorandum at all.

¹ <http://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/SEIAS-Guidelines.aspx>

² <https://www.cbd.int/decision/cop/?id=7197>

It was only when I participated in a workshop arranged by the Consortium that I realised that the amendment to the definition of control could allow the Minister:

1. not only to list a species as invasive in an area; but
2. also enable the Minister to specify areas in which listed invasive species must be either controlled or eradicated.

This fundamentally changes the purpose of Chapter 5.

1. Presently MBA obliges landowners to take steps to eradicate and control all listed invasive species. This complies with South Africa's obligations in term of the CBD.³
2. If amended landowners will no longer have to take steps to eradicate or control all listed invasive species. They will only have to be eradicated or controlled in areas specified by the Minister. This will mean that South Africa will no longer comply with its obligations in term of the CBD.

Landowners who make beneficial use of species that should not be listed as invasive under NEMBA as presently drafted will if NEMBA is amended be in the uncertain position of having to apply for a permit to use these species. But section 91(c) of NEMBA states that such permits can only be granted if "the relevant species has been found to have negligible or no invasive potential". This begs the following questions:

1. If a species has been listed in an area as invasive, how can it be said that it has negligible or no invasive potential in that area?
2. How can the Minister lawfully list a species as invasive in an area if it has a negligible or no

³ COP 6 Decision VI/23 of the CBD states under: D. Mitigation of impacts

Guiding principle 12: Mitigation of impacts

Once the establishment of an invasive alien species has been detected, States, individually and cooperatively, should take appropriate steps such as eradication, containment and control, to mitigate adverse effects. Techniques used for eradication, containment or control should be safe to humans, the environment and agriculture as well as ethically acceptable to stakeholders in the areas affected by the invasive alien species. Mitigation measures should take place in the earliest possible stage of invasion, on the basis of the precautionary approach. Consistent with national policy or legislation, an individual or entity responsible for the introduction of invasive alien species should bear the costs of control measures and biological diversity restoration where it is established that they failed to comply with the national laws and regulations. Hence, early detection of new introductions of potentially or known invasive alien species is important, and needs to be combined with the capacity to take rapid follow-up action.

Guiding principle 13: Eradication

Where it is feasible, eradication is often the best course of action to deal with the introduction and establishment of invasive alien species. The best opportunity for eradicating invasive alien species is in the early stages of invasion, when populations are small and localized; hence, early detection systems focused on high-risk entry points can be critically useful while post-eradication monitoring may be necessary. Community support is often essential to achieve success in eradication work, and is particularly effective when developed through consultation. Consideration should also be given to secondary effects on biological diversity.

Guiding principle 14: Containment

When eradication is not appropriate, limiting the spread (containment) of invasive alien species is often an appropriate strategy in cases where the range of the organisms or of a population is small enough to make such efforts feasible. Regular monitoring is essential and needs to be linked with quick action to eradicate any new outbreaks.

Guiding principle 15: Control

Control measures should focus on reducing the damage caused as well as reducing the number of the invasive alien species. Effective control will often rely on a range of integrated management techniques, including mechanical control, chemical control, biological control and habitat management, implemented according to existing national regulations and international codes.

invasive potential in that area?

It also belies the statement that the proposed changes to NEMBA were minor that Dr Guy Preston made to me in an e mail to me 14 December 2016⁴.

It is difficult to reconcile the scope and effect of this amendment with what was said by Dr Preston or what is contained in the explanatory memorandum or in the impact assessment. However as incredible as this may sound, this interpretation does assist DEA in its attempts to legitimise its improper and unlawful application of Chapter 5 of NEMBA.

This is very worrying. DEA is seeking additional discretionary powers to enforce what are increasingly harsh penal laws but cannot comply with its own obligations when making laws. Any system that allows the State to act outside of the law but requires the people to comply with the law is inherently unjust.

So if this is correct, and it seems increasingly likely that it must be true, then it means that:

1. DEA has deliberately set about misleading and even deceiving the people of South Africa and indeed Parliament itself.
2. The process that has brought the 2015 NEMLA Bill to Parliament is fatally flawed and thus any laws that follow are liable to be set aside as unlawful.
3. Urgent remedial action is required to redress the resultant failure of government.

Conclusion

This emphasises the importance of halting further changes to NEMBA until processes are put in place to:

1. undertake a proper and inclusive policy making process is undertaken; and
2. remedy the unlawfulness of laws that are already in place.

Yours Faithfully

Sent electronically and therefore unsigned

Cox Attorneys

⁴ The e mail is attached marked "A" to the Consortium's representations that were submitted yesterday.