



**URGENT**

**The Minister for Environment, Forestry  
and Fisheries**

Date: 16 March 2019

The Honourable Ms Barbara Creecy

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Dear Minister

**PROPOSED PUBLICATION OF AMENDED THREATENED OR PROTECTED SPECIES REGULATIONS AND LISTS**

**Introduction and request for further public consultation**

We act for the EMS Foundation, a registered non-profit organisation concerned among other things with the protection of wild animals.

We are instructed that amendments to the *Threatened or Protected Species Regulations, 2007*, (“the TOPS Regulations”) made under the National Environmental Management: Biodiversity Act, 2004

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**Expertise grounded in experience**

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(NEM:BA) and to the associated *List of critically endangered, endangered, vulnerable and protected species* (“the List”) are due to be published for implementation imminently.

This letter sets out our client’s concerns with the public participation process followed by your Department with respect to the proposed amendments.

**In summary**, we submit that:

1. substantial amendments have been made both to the TOPS Regulations and the List; and
2. five years have elapsed

since the last public consultation on the proposed amendments; and that a further consultation with the public is therefore required by law prior to implementation of the proposed amendments.

In the event that you do not see fit to conduct a further consultation, our client’s comments on the proposed amendments are recorded in this letter.

### **Applicable law**

The DEFF Minister’s power to list species that are threatened or in need of protection derives from section 56(1) of NEM:BA. Section 57 of the Act regulates further the restricted activities defined in section 1.

Section 97(1) of NEM:BA empowers the DEFF Minister to make regulations regarding, among other things –

- “the facilitation of the implementation and enforcement of sections 57 (1), 57 (1A) or any notice published in terms of section 57 (2)”;
- “the carrying out of a restricted activity involving a specimen of a listed threatened or protected species”;
- “the circumstances in which restricted activities involving threatened or protected species may not be carried out”;
- “any other matter that may be prescribed in terms of this Act”;
- “any other matter that may be necessary to facilitate the implementation of this Act”; and
- “any matter that is necessary or expedient to achieve the objectives of the Act.”

Accordingly, the making of the TOPS Regulations and the publication of the List or an amended List falls squarely within the ambit of section 97(1).

Section 97(3) requires that “[b]efore publishing any regulations in terms of subsection (1), or any amendment to the regulations, the Minister must follow a consultative process in accordance with



sections 99 and 100.” An exception is made where “a non-substantial change” is made to the regulations.<sup>1</sup> “Non-substantial” is not defined in the Act and must be interpreted in terms of its ordinary meaning. For the reasons set out in the next section of this letter, the exception does not apply to the present case.

Section 99(1) requires that before amending regulations the Minister must follow an “appropriate consultative process in the circumstances.” In terms of section 99(2) this requires that the Minister

“must, in terms of subsection (1)—

(a) consult all Cabinet members whose areas of responsibility may be affected by the exercise of the power;

(b) in accordance with the principles of co-operative governance set out in Chapter 3 of the Constitution, consult the MEC for Environmental Affairs of each province that may be affected by the exercise of the power; and

(c) allow public participation in the process in accordance with section 100.

The provisions of section 100(1) and (2) are peremptory:

“(1) The Minister must give notice of the proposed exercise of the power referred to in section 99—

(a) in the Gazette; and

(b) in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.

(2) The notice must—

(a) invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power; and

(b) contain sufficient information to enable members of the public to submit meaningful representations or objections.

We submit therefore that in amending the TOPS Regulations and List in a substantive manner the Minister must firstly follow a consultative process that is appropriate in the circumstance and secondly that she must consult the public in the manner prescribed in section 100.

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<sup>1</sup> Section 97(4).



We do not dispute that draft amendments to the TOPS Regulations were published for comment in 2013 (“the 2013 draft regulations”) and 2015 (“the 2015 draft regulations”).<sup>2</sup> We have been provided with a copy of “Regulations Pertaining to Threatened or Protected Terrestrial Species and Freshwater Species” (“the 2019 draft regulations”) which, according to a letter signed by yourself and dated 18 November 2019, are intended to replace the TOPS Regulations, 2007 entirely and which were to be presented to the NCOP for approval.

On 23 August 2019, you replied to a question in Parliament that “substantial amendments” were being made to the TOPS Regulations.<sup>3</sup> Indeed, an analysis of the version of the Regulations indicates substantive changes from the version published for comment in 2015. These are set out in the next section of this letter. The amended List was not included in the documents attached to the letter. A request from ourselves to your Department for copies of the final version of the Regulations and List on 4 March 2020 was refused.<sup>4</sup>

Even if the 2019 version of the regulations had been identical to the version published in 2015, which is not the case, a period of almost exactly 5 years has passed since the public was last consulted on the regulations. In the interim there have been substantial changes to the conservation status of many of the listed species, in the captive breeding industry and to public attitudes to the commercial exploitation of wildlife. In the past five years substantial information has come to light about the links between the captive breeding of lions, the lion bone trade and wildlife trafficking and public attitudes to captive breeding and the lion bone trade have shifted substantially as these issues are now firmly in the public consciousness.

An appropriate consultation process would take this into account and provide for the opportunity for the public to review and comment on the changes prior to implementation in the light of very different circumstances in South Africa and globally in 2020. On this basis alone, NEM:BA requires a further consultation process.

### **Comparison between the 2015 draft Regulations and List and the 2019 draft Regulations**

#### ***The List***

Your letter of 18 November 2019 also indicated that Lists of Threatened or Protected Terrestrial Species or Freshwater Species would be forwarded to the NCOP, yet no list was attached to the letter, so it is impossible for us to comment in much detail. However, the last time such a list was published was in 2015 and it included both terrestrial and marine species. It appears that marine species are no longer included on the list. Accordingly, the list has changed substantively.

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<sup>2</sup> GN 388 in GG 36375 of 16 April 2013; and GN 255 in GG 38600 of 31 March 2015, respectively.

<sup>3</sup> NW1449E QUESTION 457, 23/08/2019.

<sup>4</sup> Email communication S Kvalsvig of Cullinan & Associates to Magdel Boshoff of DEFF on 4 March 2020.



In addition to this, the presentation to the Select Committee on 18 February makes it clear that amendments to the List “involved inclusion and deletion of species, and horizontal movement of species.” This is also a substantive amendment. For example, lion, an iconic species under threat from hugely increased captive breeding has been “down-listed from “vulnerable” to “protected”, as has the black-footed cat and the leopard, also an iconic species.

### ***The Regulations***

There are substantive changes between the 2015 published amendments and the 2019 amended Regulations, including that the 2019 draft regulations have:

- removed the African Elephant, lion and leopard from additional information requirements related to hunting permits effectively making it easier for these permits to be issued on the basis of less information;<sup>5</sup>
- expanded on the information required when applying for various permits;<sup>6</sup>
- amended the circumstances in which a risk assessment is necessary in relation to the application for a TOPS permit;<sup>7</sup>
- introduced an additional factor to be taken into account by the issuing authority for a permit, specifically related to captive breeding facilities;<sup>8</sup>
- introduced additional factors to be taken into account by the issuing authority when considering an application for an export permit in respect of a rhinoceros hunting trophy;<sup>9</sup>
- introduced a new circumstances in which a permit application must be refused;<sup>10</sup>
- prohibited the hunting of lion using dead bait which was previously allowed in limited circumstances;<sup>11</sup> and
- allowed the hunting of serval with spotlights which was previously not permitted;<sup>12</sup>

These amendments can in no way be considered “non-substantial” within the ordinary meaning of the word.

### **Comments**

In the event that, notwithstanding the above, you decide not to initiate a further consultation process as required by sections 99 and 100, our client has the following comments on the 2019 regulations, which it wishes to place on record.

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<sup>5</sup> Regulation 10(5)

<sup>6</sup> Regulation 10

<sup>7</sup> Regulation 16.

<sup>8</sup> Regulation 21(3).

<sup>9</sup> Regulation 19.

<sup>10</sup> Regulation 21(3).

<sup>11</sup> Regulation 73(g).

<sup>12</sup> Regulation 73(i).

1. No mention is made in the revised regulations of animal welfare despite both the finding of the Constitutional Court in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* that conservation and welfare are two intertwined values. The Court in that case referred favourably to the decision of the Supreme Court of Appeal in *S v Lemthongthai* which endorsed the intrinsic value of animals with reference to the Constitution, stating that our “Constitutional values dictate a more caring attitude towards fellow humans, animals and the environment”. This case was referred to with approval in a new case brought by the NSPCA in the North Gauteng High Court this year in which the Court, referring to captive lions stated that “[e]ven if they are ultimately bred for trophy hunting and for commercial purposes, their suffering, the conditions under which they are kept and the like **remain a matter of public concern** and are inextricably linked to how we instil respect for animals and the environment of which lions in captivity are an integral part.<sup>13</sup>” [emphasis added] This is also reflected in the core principles of the National Biodiversity Framework (published in GN1109 of 19 October 2018), one of which is that “[b]iodiversity has intrinsic value and but [sic] also constitutes critical natural capital” (page 16). The word “intrinsic” in this context means that biodiversity has value in and of itself, outside of its commercial value. This rationale is not reflected in any way in the proposed changes to the TOPS Regulations.
2. The draft amendments do not do anything to put into effect the resolution adopted by the National Assembly in December 2018 that your Department should investigate legislation to close down the captive breeding of lions.
3. While the requirement in draft regulation 21(3) that the issuing authority must refuse to issue a permit for the breeding of specimens of large listed predators, black rhinoceros or white rhinoceros, unless the applicant can demonstrate how the breeding in captivity of these specimens will contribute to its conservation is to be welcomed. However, no guidance is given as to what the term “contribute to its conservation” means or how this important factor must be evaluated.
4. Our client has been raising awareness regarding the public and occupational health risks of the lion bone trade for some time. We refer you to our client’s letter to you of 3 February 2020, a copy of which is attached for information. Subsequent events have proven our client’s concerns justified. It is globally accepted now that COVID-19 is zoonotic in nature and originated in a wild animal market. Public opinion around the world is therefore moving strongly against the consumption of products from wild animals which as our client has

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<sup>13</sup> *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others [2019] ZAGPPHC 337.*



pointed out, has severe public health, occupational health and animal welfare implications and promotes and facilitates other criminal activity. The Chinese government has already moved to shut down permanently the trade in and consumption of wild animals. Given the likely severe effects of the COVID-19 pandemic on everything from human health to the world economy, the risks of allowing the lion bone trade to continue in South Africa are completely unjustified. Any revision to the TOPS Regulations must take account of this.

We have not seen the updated List which is intended to be published for implementation. Accordingly it has not been possible for our client to comment meaningfully or comprehensively on what the changes in the Regulations will mean for individual species. All our client's rights to submit further or different comments are therefore reserved.

#### **Conclusion**

Since the last public consultation on proposed amendments to the TOPS Regulations and the List:

1. substantial amendments have been made both to the TOPS Regulations and the List; and
2. five years have elapsed.

A further consultation with the public is therefore required by law prior to implementation of the proposed amendments.

Please acknowledge receipt of this letter.

We look forward to hearing from you as soon as possible.

Yours faithfully

A handwritten signature in black ink, appearing to read "Sarah Kvalsvig".

CULLINAN & ASSOCIATES INC

per: Sarah Kvalsvig