Part 17

Amending NEMBA and how government deals alien invasive species

By Ian Cox

I wrote a couple of articles ago about the catastrophic failure of the alien and invasive species lists and regulations. I pointed out that DEA had only received the required reports on the presence of invasive species from 0.001% of South Africa's approximately 6 million land parcels.

But if one looks at the 2017 National Environmental Management Laws Amendment Bill (2017 NEMLA Bill) it seems DEA had foreseen the likelihood of this failure some time ago. How else do you explain doing away with the requirement that South Africans are no longer required to identify invasive species on their properties or take steps to control them?

DEA describes this change to the law as cosmetic. This claim is false. The proposed change fundamentally affects how the National Environmental Management Biodiversity Act (NEMBA) works in relation to invasive species.

NEMBA, as presently drafted, says that listed invasive species must be controlled. NEMBA does not permit listed invasive species being propagated or managed for beneficial use. It consequently assumes that species will only be listed as invasive if the Minister reasonably believes that the harm caused by the species or the likely threat of that harm requires that the species be controlled.

Control means eradicate or, if eradication is not possible, prevent from spreading and propagating.

A species can only lawfully be listed as invasive if it is (1) alien; (2) its spread threatens or has a demonstrable potential to threaten ecosystems, habitats or other species; and (3) this may result in economic or environmental harm (in the sense the abovementioned threats harm ecosystem services) or harm human health. This is the purpose of listing species as invasive.

Permits are required in respect of restricted activities pertaining to listed invasive species because the harm that the species causes or is likely to cause justifies it being subjected to this extreme type of control.

The proposed amendment destroys this purpose. It will give rise to a situation where some species are listed as invasive which do not require to be controlled and others that require to be controlled only because the Minister says so.

But, why must a species be listed as invasive if it does not need to be controlled. If control is not necessary how can it be said that the species harms or threaten harm to human health or wellbeing or the economy as is contemplated in the definition of invasive species?

These are all good questions but unfortunately none of them is relevant to what DEA actually did when it listed 559 species as invasive or the problems that have arisen from it doing so.

The trouble is that DEA did not have regard to the legal definition of "invasive species" when the Minister listed 559 species as invasive in 2014. This definition was also not applied when these lists were amended in 2016. The Minister listed species as invasive merely because they could exist

naturally in the wild and could spread. It seems it was assumed, incorrectly as it turns out, that the threat of harm followed naturally if an alien species met the criteria DEA used to identify species as invasive.

DEA is now seeking to amend NEMBA to correct its failure to properly apply this law in the first place. It is trying to do so by changing the law rather than correcting its own mistaken behaviour.

This is wrong at both a legal and ethical level.

The important task of controlling species which truly threaten harm to human health and wellbeing should not be compromised by a departmental desire to cover up its malfeasance. South Africans should not be subjected to a permitting regime that has no inherent purpose other than to enable government to exercise power over people through a penal system of permitting.

There is also a significant constitutional failing inherent in what DEA proposes. The legislature cannot lawfully delegate its primary legislative authority to the Minister. It cannot give the Minister carte blanche to make laws through the exercise of delegated authority. That delegation must be limited to giving effect to what the legislature has enacted through legislation by prescribing the necessary administrative detail.

NEMBA presently gives that necessary direction through the definition of invasive species and the required regime of control. These two requirements of harm and control define the boundaries within which the Minister may exercise delegated authority. The proposed amendment removes one of these boundaries by doing away with the purpose of listing a species as invasive. It gives the Minister carte blanche not only to list species as invasive but also to decide what must be done with species once they have been listed as such. It opens the permitting system to abuse.

This amounts to an impermissible delegation of original legislative power by Parliament to the Minister. It leaves the Minister with an unfettered discretion to make up the law as she goes along. Parliament cannot and should not divest itself of its constitutional legislative obligation in this way.
