

Part 18

What does it mean to control invasive species?

By Ian Cox

Chapter 5 of the National Environmental Management Biodiversity Act (NEMBA), started out in 2004 as a very simple law. The Minister of Environmental Affairs (the Minister) could list species that were invasive throughout South Africa. MEC's could do the same in the provinces. Species that were invasive in parts of the country or a province but not in others could not be listed as invasive.

This had the effect of limiting the power of the Minister to list species as invasive. The need for this limitation was clear. Invasive species had to be controlled as in eradicated or, if that was not possible, prevented from reproducing or spreading.

Chapter 5 of NEMBA (Chapter 5) requires local authorities and other organs of state to develop and implement expensive invasive species monitoring and control plans. As we have seen (see "Invasive Species") this is not possible if a large number of species are listed as invasive.

This limited scope of what can lawfully be listed as invasive did not suite the Department of Environmental Affairs (DEA). It wanted to list many more species than the law allowed for. It wanted to list species that benefitted human beings rather than harmed them. This is because it applies a much wider definition of invasive than that referred to in Chapter 5. It wanted to regulate the beneficial use of this extended category of "invasive species" by permitting restricted activities. This is probably why DEA delayed listing species as invasive for eight years.

Chapter 5 was amended in July 2013 so that species can be listed as invasive by area and even by category or in relation to people. This opened the door to listing species as invasive by area which allowed for many more species to be listed as invasive than was originally the case.

DEA thought it could introduce the management regime it wanted to apply to beneficial species that it intended to nonetheless list as invasive by using the Minister's delegated power to make regulation. The Minister therefore introduced the concept of a category 2 invasive species into the 2014 Alien and Invasive Species Regulations (AIS Regulations). It was hoped that this would override the obligation of control imposed by Chapter 5.

The AIS Regulations require species to be listed as invasive in categories 1(a), 1(b), 2 or 3. The first two categories are unexceptional. They describe species that must be eradicated (1(a)) or controlled (1(b)). The last one, namely category 3, is confusing, but also otherwise unexceptional. It deals with those situations where restricted activities pertaining to invasive species are subject to exemptions.

The problem lies with category 2. The Minister's power to make regulations under NEMBA is limited by NEMBA. The Minister cannot regulate on matters not dealt with in the Act. Thus the purpose of listing a species as invasive is only so that those species can be controlled, then the Minister cannot make regulations for any other purpose.

But that is what she tried to do by regulating for a regime of managing invasive species by allowing for their beneficial use through the permitting of restricted activities. But as I have already pointed out, restricted activities may only be permitted as part of a general scheme of control. Species

cannot be lawfully listed as invasive in areas where beneficial use is contemplated in place of control.

It is also unprecedented. No other country in the world tries to manage invasive species this way. Even the United Nations Convention on Biological Diversity says that invasive species must be controlled.

The list of invasive species is not a wish list of species DEA would like to control if it could. The list is meant to be an action list of species that must and can be controlled. The list needs to be reduced so that it aligns with this reality. The AIS regulation will continue to be an unlawful unworkable mess until this is done.

The proposed amendment to NEMBA that is presently before Parliament will change the definition of control if it is made law. However, it does not alter the underlying purpose of Chapter 5, which even if amended, will still be species must only be listed so that they may be eradicated or controlled, It also does not change the expensive monitoring and control regime that is imposed local authorities and other organs of state.

If the amendment becomes law, eradication will be defined separately to mean the complete removal of a species from the Republic. Control we be defined to cover everything else that was in the old definition.

It may be that DEA hopes that it can now manage those listed invasive species for which no control measures have been prescribed. But this notion misses the point that DEA has tried to avoid ever since NEMBA was promulgated, namely that that species should only be listed as invasive if they can and must be controlled. As I have said, DEA's attempts to do otherwise have turned what should be a straightforward law into a huge unworkable mess.

This harsh reality will continue until DEA reduces the list of invasive species to those that can and must be controlled.
