

# APPENDIX 1

## LEGISLATION GUIDELINE FOR INVASIVE ALIEN SPECIES

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# LEGISLATION GUIDELINE FOR INVASIVE ALIEN SPECIES

## INTRODUCTION

The two main Acts that contain legal obligations relating to alien and invasive species are the National Environmental Management: Biodiversity Act 10 of 2004 and the Conservation of Agricultural Resources Act 43 of 1983 (which does not use the term “alien and invasive species” but rather refers to “declared weeds” and “declared invader plants”). There are also other legal obligations related to alien and invasive species in various other Acts concerning water, heritage, health and safety and the application of pesticides.

This Guideline deals with the legal obligations in terms of:

- National Environmental Management: Biodiversity Act 10 of 2004
- Conservation of Agricultural Resources Act 43 of 1983
- National Environmental Management Act 107 of 1998
- National Veld and Forest Fire Act 101 of 1998
- National Water Act 36 of 1998
- Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947
- Occupational Health and Safety Act 85 of 1993
- National Forests Act 84 of 1998

This Guideline does not deal with specific regional requirements that may be imposed by, for example, municipal by-laws, but general reference is made to heritage and planning legislation that may be relevant.

# NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT 10 OF 2004, AND THE ALIEN AND INVASIVE SPECIES REGULATIONS

## Purpose of the Biodiversity Act and relevance to alien and invasive species

The National Environmental Management: Biodiversity Act 10 of 2004 (“**Biodiversity Act**”) is administered by the national Department of Environment, Forestry and Fisheries, (“**DEFF**”) and the relevant provincial environmental authorities and delegated organs of state. (For the purposes of this Guideline we refer only to DEFF.) The purpose of the Biodiversity Act is conservation of South Africa’s biodiversity. One of the ways that the Biodiversity Act promotes conservation of biodiversity is by regulating alien and invasive species.

The Alien and Invasive Species Regulations, 2014 (“**AIS Regulations**”) have been published under the Biodiversity Act<sup>1</sup> for the purpose of implementing the specific requirements of the Biodiversity Act relating to alien and invasive species.

## What controls do the Biodiversity Act and the regulations impose in relation to alien and invasive species?

The Biodiversity Act controls the spread of alien and invasive species in South Africa by:

- imposing general obligations on land users to eradicate or control certain invasive species;
- establishing a permitting system for “*restricted activities*” involving alien species or listed invasive species.

Any person wishing to carry out a “*restricted activity*” (discussed further below) involving a specimen of an alien or invasive species must first obtain a permit from DEFF.

“*Specimen*” in relation to plants is defined as:

- any living or dead plant;
- a seed, propagule or part of a plant capable of propagation or reproduction or in any way transferring genetic traits;
- any derivative of any plant; or
- any goods which:
  - contain a derivative of a plant; or
  - from an accompanying document, from the packaging or mark or label, or from any other indications, appear to be or to contain a derivative of a plant.

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<sup>1</sup> Government Notice R598 in *Government Gazette* 37885 of 1 August 2014. Commencement date: 30 September 2014.

## How does the Biodiversity Act define alien and invasive species?

### Alien species

“*Alien species*” is defined in section 1 of the Biodiversity Act as:

- a species that is not an indigenous species; or
- an indigenous species translocated or intended to be translocated to a place outside its natural distribution range in nature, but not an indigenous species that has extended its natural distribution range by natural means of migration or dispersal without human intervention.

### Invasive species

“*Invasive species*” is defined in section 1 of the Biodiversity Act as any species whose establishment and spread outside of its natural distribution range-

- threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species; and
- may result in economic or environmental harm or harm to human health.

A species is an “*invasive species*” for purposes of the Biodiversity Act if it appears on a list published in the *Government Gazette* by the Minister in terms of section 70 of the Biodiversity Act. Currently, the national list of invasive species is published in Government Notice R864 in *Government Gazette* 40166 of 29 July 2016 (“**AIS List**”).

The AIS List distinguishes between four different types of listed invasive species, being Category 1a, Category 1b, Category 2 and Category 3.

The significance of these categories is as follows:

- A Category 1a invasive species is a species that must be combatted or eradicated.
- A Category 1b invasive species is a species that must be controlled.
- A Category 2 invasive species is a species that require a permit for the undertaking of a “*restricted activity*” (explained below).
- A Category 3 invasive species is a species that is subject to certain exemptions, or prohibitions i.e. for which a permit may not be issued and which may remain in prescribed areas or provinces. Further planting, propagation or trade, is however prohibited.

Different controls and obligations apply in respect of each of these categories and are discussed further below.

## Which activities are “restricted activities” in terms of the Biodiversity Act?

The following activities are restricted in terms of the Biodiversity Act in relation to alien and invasive species:<sup>2</sup>

- importing (including introducing from the sea) any specimen of an alien or listed invasive species;
- possessing or exercising physical control over any specimen of an alien or listed invasive species;
- growing, breeding or in any other way propagating any specimen of an alien or listed invasive species, or causing it to multiply;
- conveying, moving or otherwise translocating any specimen of an alien or listed invasive species;
- selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or disposing of any specimen of an alien or listed invasive species;
- spreading or allowing the spread of, any specimen of a listed invasive species;
- the introduction of a specimen of an alien or listed invasive species to offshore islands.

## How do you obtain a permit to undertake a restricted activity?

A permit for a restricted activity is obtained by submitting an application to DEFF. The permit application must be accompanied by a risk assessment carried out by an environmental impact assessment practitioner in accordance with regulations 14 to 17 of the AIS Regulations.

In brief, a risk assessment involves an assessment of the risk of invasion of the species as a result of the issuing of the permit and whether it is desirable, taking account of relevant economic, social and ecological considerations and the risk management measures that could be taken.

In addition to any permit conditions imposed in terms of the Biodiversity Act, the following conditions apply to all permits:<sup>3</sup>

- The permit may not be transferred to any other person; and
- the holder of the permit must take all the necessary steps to prevent the escape and spread of the species, including the growth or spread of seeds or any other specimens of the species, outside the area for which the permit is issued, and must take all necessary steps to control any specimen that escapes or spreads.

DEFF may issue a permit to carry out a restricted activity subject to conditions, including but not limited to, control methods determined by DEFF, including the use of sterile varieties or the concurrent introduction of biological control agents.<sup>4</sup>

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<sup>2</sup> See the definition of “*restricted activity*” in section 1 of the Biodiversity Act and AIS Regulation 6. Note that restricted activities relating to fauna have been omitted.

<sup>3</sup> AIS Regulation 22(1).

<sup>4</sup> AIS Regulation 22(2).

A permit for the import into the Republic, including introduction from the sea, of an alien or listed invasive species is valid for one consignment unless otherwise specified in the permit.

However, note that the Minister has listed various alien species<sup>5</sup> and listed invasive species<sup>6</sup> for which permits for restricted activities involving their specimens may not be issued.

## **Exemptions**

### **Alien species**

The Minister has exempted the following categories of alien species from the requirement of a permit:<sup>7</sup>

Dead specimens of any alien species including dead specimens imported, kept, or removed from one area to another as taxonomic reference specimen and dead specimens used as derivatives in products, including food, cosmetics and detergents.

Alien species that have been legally introduced into South Africa, or were legally introduced into South Africa prior to any legal requirement for such introduction, for agricultural purposes, and any new cultivar, variety, or hybrid of any species legally imported for agricultural purposes (excluding those which are already listed as invasive).

Any alien species, other than an alien species introduced for agricultural purposes that has been legally introduced into South Africa or was introduced into South Africa prior to any legal requirement for such introduction, prior to 30 September 2014.

Any invasive species listed in the AIS List.

Where the Minister has exempted certain alien species but they still require permits, such exempted alien specimen or alien specimen entering the Republic from outside the country, must be accompanied by phytosanitary certificates as official declaration by the exporting authority that the risk of such specimen becoming a potential vector of invasive diseases or pathogens has been managed.<sup>8</sup>

### **Invasive species**

All dead specimens of any listed invasive species are exempted from requiring a permit for any restricted activity.

Some listed invasive species are exempted or partially exempted from the requirement of a permit. The extent of the exemption is indicated in the AIS List.

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<sup>5</sup> In terms of section 67(1) of the Biodiversity Act – See Government Notice R508 *Government Gazette* 36683 of 19 July 2013: Publication of prohibited alien species.

<sup>6</sup> In terms of section 71A(1) of the Biodiversity Act – See the AIS List.

<sup>7</sup> AIS List: Notice 2.

<sup>8</sup> AIS Regulation 7.

## **What specific obligations are imposed by the Biodiversity Act and the AIS Regulations in relation to management of alien and invasive species?**

### **Section 69 of the Biodiversity Act Duty of care in relation to alien species**

A person that is authorised by a permit to carry out a restricted activity involving a specimen of an alien species must:

- comply with the conditions under which the permit has been issued; and
- take all required steps to prevent or minimise harm to biodiversity.

Any person who fails to do so or who carries out a restricted activity without a permit or a restricted activity involving an alien species for which a permit may not be issued (where restricted activities involving specific alien species are totally prohibited by the Minister), may be issued with a directive,<sup>9</sup> directing them to:

- take such steps:
  - as may be necessary to remedy any harm to biodiversity caused by the actions of that person; and
  - as may be specified in the directive.

If that person fails to comply with a directive DEFF may:

- implement the directive; and
- recover from that person all costs incurred in implementing the directive.<sup>10</sup>

Note that if an alien species establishes itself in nature as an invasive species because of the actions of a specific person, DEFF may hold that person liable for any costs incurred in the control and eradication of that species.<sup>11</sup>

### **Section 73 of the Biodiversity Act Duty of care in relation to listed invasive species**

A person authorised by a permit<sup>12</sup> to carry out a restricted activity (explained in detail below) involving a specimen (see definition above) of a listed invasive species must take all the required steps to prevent or minimise harm to biodiversity.

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<sup>9</sup> Biodiversity Act: section 69(2).

<sup>10</sup> Biodiversity Act: section 69(3).

<sup>11</sup> Biodiversity Act: section 69(4).

<sup>12</sup> In terms of section 71(1) of the Biodiversity Act.

A person who is the owner of land on which a listed invasive species occurs must:

- notify DEFF in writing of the listed invasive species occurring on that land;
- take steps to control and eradicate the listed invasive species and to prevent it from spreading (as per the specific obligations listed in the AIS Regulations discussed below); and
- take all the required steps to prevent or minimise harm to biodiversity.

Any person who fails to do so or who carries out a restricted activity in relation to a listed invasive species without a permit may be issued with a directive,<sup>13</sup> directing them to take such steps:

- as may be necessary to remedy any harm to biodiversity caused by:
  - the actions of that person; or
  - the occurrence of the listed invasive species on land of which that person is the owner; and
- as may be specified in the directive.

If that person fails to comply with a directive DEFF may:

- implement the directive; and
- recover all costs reasonably incurred by a competent authority in implementing the directive:
  - from that person; or
  - proportionally from that person and any other person who benefited from implementation of the directive.<sup>14</sup>

## **Specific obligations in relation to listed invasive species contained in the AIS Regulations**

The legal obligation to control or eradicate alien and invasive species depends upon the type of species in question, specifically, the category into which it falls under the national list of invasive species.

### **Category 1a invasive species**

The owner or user of land on which a Category 1a invasive species occurs must:

- Notify the responsible DEFF official in writing about the occurrence of an invasive species on the land.<sup>15</sup>
- Immediately take steps to combat or eradicate the invasive species according to methods that are appropriate for the species concerned and the environment in which it occurs, and which must be executed with caution and in a manner that will cause the

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<sup>13</sup> Biodiversity Act: section 73(3).

<sup>14</sup> Biodiversity Act: section 73(4).

<sup>15</sup> Biodiversity Act: section 73(2)(a).

least possible harm to biodiversity and the environment.<sup>16</sup> The methods used to control and eradicate a listed invasive species must also be directed at the offspring, propagating material and re-growth of such invasive species in order to prevent such species from producing offspring, forming seed, regenerating or re-establishing itself in any manner.<sup>17</sup>

- Comply with the control measures required by any relevant Invasive Species Management Programme that has been adopted by DEFF.<sup>18</sup>
- Generally, take all required steps to prevent or minimise harm to biodiversity.<sup>19</sup>
- Allow authorised officials from DEFF to enter onto land to monitor, assist with or implement the combatting or eradication of the listed invasive species.<sup>20</sup>

### **Category 1b invasive species**

The owner or user of land on which a Category 1b invasive species occurs must:

- Notify the responsible DEFF official in writing about the occurrence of the invasive species.<sup>21</sup>
- Take steps to control the invasive species according to methods that are appropriate for the species concerned and the environment in which it occurs, and which must be executed with caution and in a manner that will cause the least possible harm to biodiversity and the environment.<sup>22</sup> The methods used to control a listed invasive species must also be directed at the offspring, propagating material and re-growth of such invasive species in order to prevent such species from producing offspring, forming seed, regenerating or re-establishing itself in any manner.<sup>23</sup>
- Comply with the control measures required by any relevant Invasive Species Management Programme that has been adopted by DEFF.<sup>24</sup>
- Allow an authorised official from DEFF to enter onto the land to monitor, assist with or implement the control of the listed invasive species, or compliance with the Invasive Species Management Programme.<sup>25</sup>

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<sup>16</sup> AIS Regulation 2(2)(b) read with section 75(1) and 75(2) of the Biodiversity Act.

<sup>17</sup> AIS Regulation 2(2)(b) read with section 75(3) of the Biodiversity Act.

<sup>18</sup> AIS Regulation 2(3).

<sup>19</sup> Biodiversity Act: section 73(2)(c).

<sup>20</sup> AIS Regulation 2(2)(c).

<sup>21</sup> Biodiversity Act: section 73(2)(a).

<sup>22</sup> AIS Regulation 3(2) read with section 75(1) and 75(2) of the Biodiversity Act.

<sup>23</sup> AIS Regulation 3(2) read with section 75(3) of the Biodiversity Act.

<sup>24</sup> AIS Regulation 3(3).

<sup>25</sup> AIS Regulation 3(4).

- Generally, take all required steps to prevent or minimise harm to biodiversity.<sup>26</sup>

### **Category 2 invasive species**

The owner or user of land on which a Category 2 invasive species occurs must:

- Comply with the terms and conditions of the applicable permit.
- Ensure that the specimens of the species do not spread outside of the permitted area. If this occurs, the such plants must be treated as if they were Category 1b invasive species.<sup>27</sup>
- Comply with the control measures required by any relevant Invasive Species Management Programme that has been adopted by DEFF.<sup>28</sup>
- Where specific exemptions exist in relation to specified species that form part of commercial forestry plantations (authorised in terms of the National Water Act) that existed as at 30 September 2014, any person or organ of state must ensure that the specimens of such listed invasive species do not spread outside of the land over which they have control.

### **Category 3 invasive species**

The owner or user of land on which a Category 3 invasive species occurs must:

- Control any specimens that spread into riparian areas as if they were Category 1b listed invasive species.<sup>29</sup>
- Comply with the control measures required by any relevant Invasive Species Management Programme that has been adopted by DEFF.<sup>30</sup>

### **Sale or transfer of alien and listed invasive species**

If a permit-holder sells a specimen of an alien or listed invasive species, or sells the property on which a specimen of an alien or listed invasive species is under the permit-holder's control, the new owner of such specimen or such property must apply for a permit.<sup>31</sup>

The new permit-holder will be subject to the same conditions as the permit-holder who has sold the specimen of an alien or listed invasive species, or the property on which a specimen of an alien or listed invasive species occurs, unless specific circumstances require all such permit conditions to be revised, in which case full reasons must be giving in writing by the issuing authority.

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<sup>26</sup> Biodiversity Act: section 73(2)(c).

<sup>27</sup> AIS Regulations 4(3) and (5).

<sup>28</sup> AIS Regulation 4(4).

<sup>29</sup> AIS Regulation 5(2).

<sup>30</sup> AIS Regulation 5(3).

<sup>31</sup> AIS Regulation 29(1).

The seller of any immovable property must, before the conclusion of the sale agreement, notify the purchaser in writing of the presence of listed invasive species on that property.<sup>32</sup>

## Offences and penalties

The following acts are offences under the Biodiversity Act:

- Carrying out a restricted activity involving a specimen of an alien species without a permit.<sup>33</sup>
- Carrying out a restricted activity involving a specimen of a prohibited alien species (i.e. alien species for which permits may not be granted).<sup>34</sup>
- Carrying out a restricted activity involving a specimen of a listed invasive species without a permit.<sup>35</sup>
- Failing to comply with a directive issued by DEFF (or other competent authority such as a provincial environmental authority) to take certain steps in relation to alien species for which a permit for restricted activities has been obtained.<sup>36</sup>
- Failing to comply with a directive issued by DEFF (or other competent authority such as a provincial environmental authority) to take certain steps in relation to a listed invasive species for which a permit for restricted activities has been obtained.<sup>37</sup>
- In the case of the carrying out of a permitted restricted activity involving the specimen of an alien species, failing to comply with the permit conditions or failing to take all the required steps to prevent or minimise harm to biodiversity.<sup>38</sup>
- In the case of the carrying out of a permitted restricted activity involving the specimen of a listed invasive species, failing to take all the required steps to prevent or minimise harm to biodiversity.<sup>39</sup>
- In the case of a permit-holder, performing the activity for which the permit was issued otherwise than in accordance with any conditions subject to which the permit was issued.<sup>40</sup>

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<sup>32</sup> AIS Regulation 29(3).

<sup>33</sup> Biodiversity Act: section 65(1) read with section 101(1)(a).

<sup>34</sup> Biodiversity Act: section 67(2) read with section 101(1)(a).

<sup>35</sup> Biodiversity Act: section 71(1) read with section 101(1)(a).

<sup>36</sup> Biodiversity Act: section 69(2) read with section 101(1)(c).

<sup>37</sup> Biodiversity Act: section 73(3) read with section 101(1)(c).

<sup>38</sup> Biodiversity Act: section 69(1) read with section 101(2)(a).

<sup>39</sup> Biodiversity Act: section 73(1) read with section 101(2)(a).

<sup>40</sup> Biodiversity Act: section 102(2)(b).

If convicted of any one of the above offences, a person may be sentenced to a fine not exceeding R10 million, or imprisonment for a period not exceeding 10 years or both such a fine and imprisonment.<sup>41</sup>

If a person is convicted of an offence involving a specimen of a listed threatened or protected species, a court may also impose a fine equal to three times the commercial value of the specimen or the activity in respect of which the offence was committed – whichever is the greater.<sup>42</sup>

See further below under the **National Environmental Management Act 107 of 1998**, the discussion of the enforcement of the provisions of the Biodiversity Act using section 31L of NEMA and section 34 of NEMA (imputed liability and additional penalties).

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<sup>41</sup> Biodiversity Act: section 102(1).

<sup>42</sup> Biodiversity Act: section 102(2).

# CONSERVATION OF AGRICULTURAL RESOURCES ACT 43 OF 1983 AND REGULATIONS

## Purpose of CARA and relevance to alien and invasive species

The purpose of the Conservation of Agricultural Resources Act 43 of 1983 (“**CARA**”) is to provide for the conservation of South Africa’s natural agricultural resources, including by the combatting of weeds and invader plants. It is administered by the Department of Agriculture, in particular departmental officials designated as “*executive officers*”.

Section 5(1) of CARA places a general prohibition on any conduct that would result in the dispersal of a weed (declared in terms of section 2(3)), including selling, agreeing to sell, advertising for sale, keeping, advertising, exhibiting, transmitting, sending or delivering, or exchanging weeds.

In terms of section 6 of CARA, the Minister of Agriculture may prescribe control measures regarding, among others, the control of weeds and invader plants. These control measures are contained in regulations<sup>43</sup> (“**the CARA Regulations**”).

An executive officer may issue a direction ordering a land use to comply with a specific control measure (including those relating to the control of declared weeds and invader plants) or to perform any other specified act if it is in his or her opinion, essential in order to achieve the objects of CARA (which includes the combatting of weeds and invader plants). Any direction that has been issued is binding on the land user specified in the direction and his or her successor-in-title.

“*Land user*” is defined as the owner of land, and includes:

“(a) any person who has a personal or real right in respect of any land in his capacity as fiduciary, fideicommissary, servitude holder, possessor, lessee or occupier, irrespective of whether he resides thereon; and

(b) any person who has the right to cut trees or wood on land or to remove trees, wood or other organic material from land”.

“*Owner*” is defined as meaning “in relation to land:

“(a) means the person in whom the ownership in that land is vested or in whose name that land is registered, or if that person is absent from the Republic or his whereabouts are unknown, his authorized representative in the Republic;

(b) which in the opinion of the executive officer has been purchased by any person but has not yet been registered in his name, means such purchaser;

(c) which in the opinion of the executive officer is subject to a usufruct, means the usufructuary”.

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<sup>43</sup> Part II: Government Notice R1048 in *Government Gazette* 9238 of 25 May 1984.

## Which plants are regulated under the CARA Regulations?

The CARA Regulations impose controls in respect of two broad classes of plant, namely:

- declared weeds; and
- declared invader plants.

“*Weed*” is defined as any kind of plant which has been declared in terms of section 2(3) of CARA and “includes the seed of such plant and any vegetative part of such plant which reproduces itself asexually”.

“*Invader plant*” is defined as any kind of plant which has been declared in terms of section 2(3) of CARA and “includes the seed of such plant and any vegetative part of such plant which reproduces itself asexually”.

The actions required with regard to any plant species depend on the category in which the plant appears in Table 3 or 4 of the CARA Regulations and might differ from province to province.

### Declared weeds

A list of declared weeds is provided in Table 3, appended to the CARA Regulations. The list is divided into Category 1, Category 2 and Category 3 plants.

**Category 1 plants** are alien plants that are absolutely prohibited (save for in biological control reserves) that will no longer be tolerated on land or on water surfaces, neither in rural nor urban areas. These plants may no longer be planted or propagated, and all trade in their seeds, cuttings or other propagative material is prohibited. They may not be transported or allowed to disperse.

Plant species were included in this list because their harmfulness outweighs any useful properties they might have. Some of their harmful qualities might be that they pose a serious health risk to humans or livestock, cause serious financial losses to land users, are able to invade undisturbed environments and transform or degrade natural plant communities, use more water than the plant communities they replace or be particularly difficult to control. Most of the plants in this category produce copious numbers of seeds, are dispersed by wind or birds, or have highly efficient means of vegetative reproduction. Whereas some of these plants were introduced inadvertently, have no obvious function to fulfil in South Africa and are generally regarded as undesirable, some of them are popular garden or landscaping plants.<sup>44</sup>

**Category 2 plants** are alien plants with proven potential to become invasive, but which nevertheless have certain beneficial properties that warrant their continued presence under some circumstances. They may be retained in special areas demarcated for that purpose and biological control reserves. Those occurring outside demarcated areas have to be controlled.

Growing Category 2 plants in a demarcated area is considered to be a “*water use*”, namely a “*stream flow reduction activity*”<sup>45</sup> (the use of land for commercial afforestation) in terms of the National Water Act 36 of 1998, discussed further below. Seed or other propagative material of

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<sup>44</sup> CARA Legislation Made Easy, Department of Agriculture, Forestry and Fisheries, 2013: Pages 3–4.

<sup>45</sup> National Water Act: section 21(d) read with section 36(1)(a).

Category 2 plants: may only be sold to, and acquired by, land users of areas demarcated for the growing of that species, or for the establishment of a biocontrol reserve.<sup>46</sup>

**Category 3 plants** are alien plants that are undesirable because they have proven potential of becoming invasive but are popular ornamentals or shade trees that will take a long time to replace.

In terms of regulation 15, Category 3 plants will not be allowed to occur anywhere unless they were already in existence when the CARA Regulations came into effect. The conditions that a land user have to adhere to, in order to retain these plants, are that they do not grow within 30 m from the 1:50 year flood line of watercourses or wetlands and that all reasonable steps are taken to keep the plant from spreading. The executive officer has the power to impose additional conditions or even prohibit the growing of Category 3 plants in any area where he has reason to believe that these plants will pose a threat to the agricultural resources. Propagative material of these plants, such as seeds or cuttings, may no longer be planted, propagated, imported, bought, sold or traded in any way. It will, however, be legal to trade in the wood of Category 3 plants, or in other products that do not have the potential to grow or multiply.<sup>47</sup>

Distinct controls are applied in respect of each of these categories of declared weeds.

### **Declared invader plants**

These are indigenous plants that are regarded as indicators of bush encroachment, listed in Table 4, appended to the CARA Regulations. *“Bush encroachment”* is defined as *“stands of plants of the kinds specified in column 1 of Table 4 where individual plants are closer to each other than three times the mean crown diameter”*.

Plants in this group are not alien plants, but indigenous plants that tend to become abnormally abundant when the area is degraded because of mismanagement, e.g. overgrazing or uncontrolled fires. The plants themselves are not the problem, but they can be regarded as a symptom of poor land management practices. Therefore, CARA does not outlaw these plants, but instead prescribes management practices aimed at preventing bush encroachment, and at combatting it where it already occurs.<sup>48</sup>

## **What are the prohibitions and controls that apply in respect of declared weeds and invader plants?**

### **Category 1 declared weeds**

The rules that apply to Category 1 plants are dealt with in regulation 15A of the CARA Regulations.

Category 1 plants may not occur on any land or inland water surface other than in biological control reserves and land users must take steps to prevent the occurrence of any Category 1 plants on any land or water surface. The land user must do so according to the methods prescribed in the CARA Regulations (explained below).

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<sup>46</sup> CARA Legislation Made Easy, Department of Agriculture, Forestry and Fisheries, 2013: Pages 6–7.

<sup>47</sup> CARA Legislation Made Easy, Department of Agriculture, Forestry and Fisheries, 2013: Page 8.

<sup>48</sup> CARA Legislation Made Easy, Department of Agriculture, Forestry and Fisheries, 2013: Page 11.

A land user may obtain an exemption from this prohibition by applying to the Department of Agriculture.

In addition, no person may:

- establish, plant, maintain, multiply or propagate Category 1 plants;
- import or sell propagating material of Category 1 plants or any Category 1 plants;
- acquire propagating material of Category 1 plants or any Category 1 plants.

### **Category 2 declared invader plants (commercial value)**

The rules that apply in respect of Category 2 plants are dealt with in regulation 15B of the CARA Regulations.

Category 2 plants may not occur on any land or inland water surface other than in a demarcated area or biological control reserves and land users must take steps to prevent the occurrence of any Category 2 plant on any land or water surface. The land user must do so according to the methods prescribed in the CARA Regulations (explained below).

No person shall:

- sell propagating material of Category 2 plants or any Category 2 plants to another person unless such other person is a land user of a demarcated area or of a biological control reserve;
- acquire propagating material of Category 2 plants or any Category 2 plants unless such material or such plants are intended for use in a demarcated area or in a biological control reserve;
- unless authorised in terms of the National Water Act 36 of 1998, no land user shall allow Category 2 plants to occur within 30 metres of the 1:50 year flood line of a river, stream, spring, natural channel in which water flows regularly or intermittently, lake, dam or wetland.

A land user may, however, obtain an exemption from various of these prohibitions by applying to the Department of Agriculture.

### **Category 3 declared invader plants (ornamental value)**

The rules that apply in respect of Category 3 declared weeds are dealt with in regulation 15C of CARA Regulations.

Category 3 plants may not occur on any land or inland water surface other than in a biological control reserve.

Category 3 plants that were in existence when the CARA Regulations came into effect (i.e. 25 May 1984) are permissible. All other Category 3 plants are prohibited and land users must take steps to prevent the occurrence of Category 3 plants on any land or water surface.

However, the executive officer may, after consultation with the land user, issue a direction in terms of section 7 of CARA that Category 3 plants in existence on 25 May 1984 must be controlled by means of the measures prescribed in regulation 15F discussed below.

Land users must also:

- ensure that no Category 3 plants occur within 30 metres of the 1:50 year flood line of a river, stream, spring, natural channel in which water flows regularly or intermittently, lake, dam or wetland; and
- take all reasonable steps to curtail the spreading of propagating material of Category 3 plants.

In addition, except in or for purposes of a biological control reserve no person may:

- plant, establish, maintain, multiply or propagate Category 3 plants;
- import or sell propagating material of Category 3 plants or any Category 3 plants;
- acquire propagating material of Category 3 plants or any Category 3 plants.

### **What are biological reserves and demarcated areas?**

A biological control reserve is an area designated by the Department of Agriculture as an area in which weeds or invader plants may be propagated and maintained for the limited purpose of use as a biological control agent.<sup>49</sup> *“Biological control”* means *“the use of natural enemies of Category 1, 2 and 3 plants to control such plants”*.

A demarcated area is an area that has been designated by the Department of Agriculture as an area in which Category 2 plants are permitted.<sup>50</sup>

A land user may apply to the Department of Agriculture to have an area designated as a demarcated area. An area may only be designated a demarcated area if:<sup>51</sup>

- the Category 2 plants in the area are cultivated under controlled circumstances; and
- the land user concerned has been authorised to use water in terms of the National Water Act 36 of 1998; and
- the Category 2 plants or products of Category 2 plants in the area are demonstrated to primarily serve a commercial purpose, use as a woodlot, shelter belt, building material, animal fodder, soil stabilisation, medicinal or other beneficial function that the executive officer may approve; and
- all reasonable steps are taken to curtail the spreading of propagating material of the Category 2 plants outside the demarcated areas.

An area in respect of which a water use licence for stream flow reduction activities (commercial forestry) has been issued in terms of section 36 of the National Water Act 36 of 1998 (addressed below) is however deemed to be a demarcated area without the need for a designation from the Department of Agriculture.

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<sup>49</sup> CARA Regulation 15D.

<sup>50</sup> CARA Regulation 15B(2).

<sup>51</sup> CARA Regulation 15B(3).

## **What are the required methods for controlling declared weed and invader plants?**

Regulation 15E of the CARA Regulations require that land users use one or more of the following methods to control Category 1, 2 and 3 plants depending on what is most appropriate to the plants and ecosystem concerned:

- uprooting, felling, cutting or burning;
- treatment with a weed killer that is registered for use in connection with such plants in accordance with the directions for the use of such a weed killer;
- biological control carried out in accordance with the stipulations of the Agricultural Pests Act 38 of 1983, the Environment Conservation Act 73 of 1989 and any other applicable legislation;
- any other method of treatment recognised by the Department of Agriculture that has as its object the control of the plants concerned;
- a combination of one or more of the above methods, provided at biological control reserves and areas where biological control agents are effective shall not be disturbed by other control methods to the extent that the agents are destroyed or become ineffective.

These methods must also be applied with regard to the propagating material and the re-growth of Category 1, 2 and 3 plants in order to prevent such plants from forming seed or re-establishing in any manner.

Undertaking any of these methods is not in itself regarded as proof that the objects of the control methods have been achieved. Follow-up operations are mandatory to achieve the appropriate level of combatting.

Any action taken must be executed with caution and in the way that causes the least possible damage to the environment. Where uncertainty exists, a biological control expert must be consulted.

## **Indicators or bush encroachment and measures that must be taken**

A land user in an area where natural vegetation occurs containing communities of “indicator plants” must follow practices to prevent the deterioration of natural resources and to combat bush encroachment in accordance with regulation 16 of CARA.<sup>52</sup>

A plant is an “indicator plant” if it is listed in Table 4 of the CARA Regulations and occurs in the area indicated in the table.

One or more of the following practices must be followed where communities of indicator plants occur:<sup>53</sup>

- uprooting, felling or cutting;
- treatment with a weed killer that is registered for use in connection with such plants in accordance with the directions for the use of such a weed killer;

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<sup>52</sup> CARA Regulation 16(2).

<sup>53</sup> CARA Regulation 16(3).

- the application of control measures regarding the utilisation and protection of veld (see regulation 9 of the CARA Regulations);
- the application of control measures regarding livestock reduction or removal of animals (see regulation 10 and 11 of the CARA Regulations);
- any other method or strategy that may be applicable and that is specified by the executive officer by means of a directive.

## **Offences and penalties**

The following offences in CARA are relevant:

- Failure to comply with any measure required in terms of the CARA Regulations;<sup>54</sup>
- Any land user refusing to receive a direction served on him or her in the prescribed manner;<sup>55</sup> or
- Refusing or failing to comply with a direction binding on him or her.<sup>56</sup>

A person convicted of failing to comply with a control measure or direction served on him or her may be fined an amount not exceeding R5 000 or sentenced to imprisonment for a period not exceeding two years (or both) in respect of a first offence.<sup>57</sup>

In respect of a second or subsequent conviction, a fine of R10 000 or imprisonment for a period not exceeding four years (or both) may be imposed.<sup>58</sup>

A person convicted of refusing to failing to comply with a direction served on him or her may be fined an amount not exceeding R500 or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

## **Liability of employer or principal**

A person whose employee or agent commits an offence under CARA may be prosecuted for that offence<sup>59</sup> (either in place of or together with the offending employee or agent) unless her or she proves that:<sup>60</sup>

- he or she did not permit the offence to occur;
- all reasonable steps were taken to prevent the offence from occurring; and
- that the act or omission amounting to the offence did not fall within the course and scope of the relevant employee or agent's employment or mandate.

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<sup>54</sup> CARA: section 6(5).

<sup>55</sup> CARA: section 7(6)(a).

<sup>56</sup> CARA: section 7(6)(b).

<sup>57</sup> CARA: section 23(1)(a).

<sup>58</sup> CARA: section 23(1)(b).

<sup>59</sup> CARA: section 25(1).

<sup>60</sup> CARA: section 25(2).

The mere fact that the particular act was forbidden will not be sufficient to establish that all reasonable steps were taken to prevent the offence from occurring.<sup>61</sup>

See further below under the **National Environmental Management Act 107 of 1998**, the discussion of section 34 of NEMA (imputed liability and additional penalties).

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<sup>61</sup> CARA: section 25(3).

# NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998

## Purpose of the Act and relevance to alien and invasive species

The National Environmental Management Act 107 of 1998 (“**NEMA**”) is the overarching statute governing environmental management in South Africa. NEMA deals with a range of matters, including environmental impact assessment and approval processes, general obligations relating to the prevention of environmental harm, and general principles relating to criminal liability for environmental offences.

## General duty of care

Section 28(1) of NEMA imposes a general duty on every person who might cause significant pollution or degradation of the environment to take reasonable measures to prevent such harm occurring or continuing or, where the harm is authorised by law, to minimise and rectify it. The potential for significant environmental degradation might be present where an act or an unlawful omission causes a serious infestation of alien or invasive species that is harmful to biodiversity.

This general duty of care may include (but is not limited to) the following steps:<sup>62</sup>

- informing and educating employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant degradation of the environment;
- ceasing, modifying or controlling any act, activity or process causing the degradation of the environment;
- containing or preventing the movement of pollutants or the causant of degradation;
- eliminating any source of the pollution or degradation; and
- remedying the effects of the pollution or degradation.

In the context of alien and invasive species, the duty under this section would attach to the owner or user of land or any other person who performed an activity or process that might lead to or has led to the occurrence of significant environmental degradation, for example, the proliferation of alien/invasive species that then significantly affects a watercourse.<sup>63</sup>

The provincial department responsible for environment in the relevant province may issue a directive requiring the persons responsible for the harm to take such steps as are required to remedy the situation.<sup>64</sup> It is a criminal offence not to comply with such a directive. In the event

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<sup>62</sup> NEMA: section 28(3).

<sup>63</sup> NEMA: section 28(2).

<sup>64</sup> NEMA: section 28(4).

that those persons fail to do so, the provincial authority may itself to take those measures and claim the costs of doing so from the responsible persons.<sup>65</sup>

The following are also offences:

- unlawfully and intentionally or negligently committing any act or omission which causes significant degradation of the environment or is likely to cause significant degradation of the environment;<sup>66</sup> and
- unlawfully and intentionally or negligently committing any act or omission which detrimentally affects or is likely to detrimentally affect the environment.<sup>67</sup>

A person convicted of any of the above offences may be sentenced to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine or such imprisonment. (See further the discussion below on section 34 of NEMA.)

A person carrying out activities related to the control or eradication of alien and invasive species may under certain circumstances need to obtain an environmental authorisation for these activities in terms of NEMA.

### **What is an environmental authorisation and when is it required?**

In terms of section 24 of NEMA, no person may carry out a *“listed activity”* until the potential impacts of that activity have been assessed and an environmental authorisation has been granted for that activity. A *“listed activity”* is an activity contained in a list published by the Minister of Environmental Affairs or the provincial Minister responsible for environment in the *Government Gazette*.

Currently, all listed activities are contained in three notices published under NEMA on 4 December 2014, the third notice containing activities that are province-specific (*“Listing Notice 3”*).<sup>68</sup> Listing Notice 1 includes the following activity that may be triggered by persons engaged in the removal of alien and invasive species in a watercourse:

- the removal of more than 5 cubic metres of soil, sand, pebbles or rock from a watercourse.<sup>69</sup>

There are however, other listed activities contained in Listing Notice 3 which may be triggered, such as the clearance of 300 square metres or more of indigenous vegetation which may happen unintentionally with large-scale alien and invasive species removal.

### **How is an environmental authorisation obtained?**

A person wishing to obtain an environmental authorisation must apply to the provincial department of environmental affairs and must appoint an environmental assessment practitioner to handle the process.

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<sup>65</sup> NEMA: section 28(7).

<sup>66</sup> NEMA: section 49A(1)(e).

<sup>67</sup> NEMA: section 49A(1)(f).

<sup>68</sup> In Government Notices R983, R984 and R985 in *Government Gazette* 38282 of 4 December 2014.

<sup>69</sup> Activity 19.

The application process involves either a basic assessment or a larger-scale environmental impact assessment of the activity, which must be carried out by an environmental impact assessment practitioner. The Environmental Impact Assessment Regulations, 2014<sup>70</sup> contain all the provisions that must be complied with when applying for an environmental authorisation. The process involves the investigation of all negative environmental impacts associated with the proposed activity as well as potential mitigation measures. An environmental authorisation will be granted if it appears that the activity will not produce unacceptable environmental impacts.

Undertaking a listed activity without an environmental authorisation is a criminal offence.<sup>71</sup> A person convicted of any of the above offences may be sentenced to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine or such imprisonment.<sup>72</sup> (See further the discussion below on section 34 of NEMA.)

## Enforcement procedures

NEMA also provides procedures to enforce compliance with its provisions as well as the provisions of any “*specific environmental management act*”.<sup>73</sup> The term *specific environmental management act* is defined in section 1 of NEMA to cover a list of environmental statutes, including the National Environmental Management: Biodiversity Act 10 of 2004 and the National Water Act 36 of 1998 which are covered in this Guideline. Accordingly, these procedures may also be used in instances of non-compliance with the provisions of those Acts.

In terms of section 31L, an environmental management inspector (also known as a “Green Scorpion”) may issue a compliance notice to any person that is contravening a provision of NEMA or any other specific environmental management act.

A compliance notice will specify the conduct constituting the non-compliance; the steps that the person must take to rectify the non-compliance and anything which the person may not do.<sup>74</sup> Failure to comply with the compliance notice may result in the Minister or responsible MEC revoking or varying any permit or authorisation that is the subject of the compliance notice, and taking any necessary steps and recover the costs of doing so from the person who failed to comply.<sup>75</sup>

In practice, a compliance notice is preceded by a pre-compliance notice in respect of which the recipient may make representations as to why a final compliance notice should not be issued.

Failure to comply with a compliance notice is an offence.<sup>76</sup> On conviction a person may be sentenced to a fine of R5 million or to imprisonment for a period not exceeding 5 years, and in

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<sup>70</sup> Government Notice R982 in *Government Gazette* 38282 of 4 December 2014.

<sup>71</sup> NEMA: section 49A(1)(a).

<sup>72</sup> NEMA: section 49B(1).

<sup>73</sup> In terms of section 31A(1), part 2 of chapter 7 (compliance and enforcement) applies to all specific environmental management acts.

<sup>74</sup> NEMA: section 31L(2).

<sup>75</sup> NEMA: section 31N(2).

<sup>76</sup> NEMA: section 49A(1)(k).

the case of a second or subsequent conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, and in both instances to both such fine and such imprisonment.<sup>77</sup>

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<sup>77</sup> NEMA: section 49B(2).

## **Section 34: Additional criminal liability for environmental offences**

Section 34 of NEMA establishes special rules of liability to apply in criminal prosecutions involving an environmental offence. For these purposes, an environmental offence is any offence listed in Schedule 3 of NEMA. The following offences mentioned in this Guideline are also offences in terms of Schedule 3 of NEMA:

- failure to comply with a control measure relating to the control of weeds and invader plants in terms of CARA;
- failure to comply with a direction issued in relation to non-compliance with a control measure in terms of CARA;
- committing an act or omission which detrimentally affects or is likely to detrimentally affect a watercourse (an offence in terms of the National Water Act);
- the undertaking of a restricted activity involving an alien or invasive species in terms of the Biodiversity Act or failure to comply with a directive issued in relation thereto;
- the felling of a protected tree in terms of the National Forests Act; and
- damaging, disfiguring, altering or in any other way developing any part of a protected area unless, at least 60 days prior to the initiation of such changes, he or she has consulted the heritage resources authority which designated the protected area

The effect of these offences being listed in Schedule 3 means that the following provisions of NEMA also apply in respect of those offences.

### **Employer's liability**

If a manager, agent or employee commits any conduct (including an omission) that it was his or her task to do or refrain from doing on behalf of the employer, and this occurred because the employer failed to take reasonable steps to prevent the conduct, the employer will be liable for that offence (but may only be fined and not imprisoned for that offence).<sup>78</sup> However, if the offence was not due to a failure on the part of the employer, the manager, agent or employee will be held liable for the offence as if he or she were the employer.<sup>79</sup>

### **Director's personal liability**

A person who is a director of a corporation or partnership at the time that an environmental offence is committed may be held liable for the offence if it resulted from a failure by that director to take all reasonable steps necessary under the circumstances to prevent the commission of that offence.<sup>80</sup> For these purposes, a director includes a member of a partnership, a member of a close corporation, a member of a board, executive committee or management committee.<sup>81</sup>

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<sup>78</sup> NEMA: section 34(5).

<sup>79</sup> NEMA: section 34(6).

<sup>80</sup> NEMA: section 34(7).

<sup>81</sup> NEMA: section 34(9).

## **Additional costs liability**

If a person is convicted of the above offences, the court may order them to pay the following costs:

- costs incurred by the state in rectifying environmental damage resulting from the offence;<sup>82</sup> and
- costs incurred in prosecuting and investigating the offence.<sup>83</sup>

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<sup>82</sup> NEMA: section 34(1) and (2).

<sup>83</sup> NEMA: section 34(4).

# NATIONAL WATER ACT 36 OF 1998

## Purpose of the Act and its relevance to alien and invasive species

The enactment of the National Water Act 36 of 1998 (“**National Water Act**”) radically altered the legal principles governing use and ownership of water. The Act vests all of South Africa’s water resources in the state and (among other things) establishes a regulatory regime to control access to and the use of water. No person may carry out a “*water use*” listed in the National Water Act unless authorised to do so by the Department of Water and Sanitation (“**DWS**”) or “*responsible authority*”, such as a catchment management agency with the delegated powers. (For the purposes of this Guideline we have only referred to DWS).

The “*water uses*” identified in the National Water Act are not limited to for example, the abstraction or storage of water, they include other non-consumptive activities which have the effect of diminishing or negatively impacting upon available water.

## How might “water uses” be triggered by the management of alien and invasive species?

The following water uses referred to in the National Water Act are potentially relevant to alien and invasive species management:

- “impeding or diverting the flow of water in a watercourse”<sup>84</sup> (“Section 21(c) water use”)
- “altering the bed, banks, course or characteristics of a watercourse”<sup>85</sup> (“Section 21(i) water use”)
- “engaging in a streamflow reduction activity” which is defined as “the use of land for afforestation which has been or is being established for commercial purposes”<sup>86</sup> or has been declared by the Minister to be a “stream flow reduction activity”.<sup>87</sup>

Section 21(c) and/or Section 21(i) water uses will be triggered, for example, if large-scale removal of alien and invasive species using mechanical means is undertaken in a watercourse which “alters the beds, banks or characteristics of a watercourse” or “impedes or diverts the flow of water in a watercourse”. “*Watercourse*” is defined as:

- “(a) a river or spring;
- (b) a natural channel in which water flows regularly or intermittently;
- (c) a wetland, lake or dam into which, or from which, water flows; and

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<sup>84</sup> National Water Act: section 21(c).

<sup>85</sup> National Water Act: section 21(i).

<sup>86</sup> National Water Act: section 21(d) as read with section 36(1)(a).

<sup>87</sup> National Water Act: section 21(d) as read with section 36(1)(b).

(d) any collection of water which the Minister may, by notice in the Gazette, declare to be a watercourse,

and a reference to a watercourse includes, where relevant, its bed and banks”.

“*Wetland*” is defined as “land which is transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil”.

### **How is authorisation for a water use obtained?**

In terms of section 22(1) of the National Water Act a person may only carry out a water use if:

- the water use is a continuation of an “*existing lawful water use*”;
- the water use is permissible in terms of a general authorisation;
- the water use is authorised by a water use licence issued under the National Water Act;
- the DWS has dispensed with the requirement of a water use licence; or
- the water use is permissible in terms of Schedule 1 to the National Water Act (the water uses listed in Schedule 1 are small-scale and incidental water uses not relevant to alien and invasive species management).

### **Existing lawful water use**

An existing lawful water use is a water use that was conducted at any time in the period two years immediately prior to the commencement of the National Water Act (i.e. 1 October 1998).<sup>88</sup> The additional requirement of lawfulness (i.e. the activity was lawful at the relevant time) applies to Section 21(c) and Section 21(i) water uses but not to streamflow reduction activities.

The Minister of Human Settlements, Water and Sanitation may also declare a water use to be an existing lawful water use (either on her own initiative or on the application of an interested person).<sup>89</sup>

A person undertaking an existing lawful water use does not need to apply for any other form of authorisation unless requested to do so as part of a process to verify the existing lawful water use.<sup>90</sup> Therefore, if large-scale alien and invasive species removal involving a Section 21(c) or Section (1) water use was lawfully taking place between 1 October 1996 and 30 September 1998 then it can continue without the need for further authorisation.

### **A general authorisation**

The Act allows the Minister of Human Settlements, Water and Sanitation to grant general authorisation for a particular water use by publishing a notice in the *Government Gazette*.

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<sup>88</sup> National Water Act: section 32(1).

<sup>89</sup> National Water Act: section 33.

<sup>90</sup> National Water Act: section 35.

On 26 August 2016, a general authorisation was published<sup>91</sup> that allows a person to undertake Section 21(c) and/or Section 21(i) water uses without a licence, as long as they comply with the requirements of the general authorisation, subject to the important condition that the Section 21(c) and/or Section 21(i) water use is assessed as low risk by a suitable expert registered with the South African Council for Natural Scientific Professions according to a “risk matrix” in Appendix A of the general authorisation.

The Section 21(c) and/or Section 21(i) water use must still be registered with DWS using a registration form which can be obtained on the website of the DWS or at a regional office.

## **Water use licence**

A water use licence is obtained by applying to DWS. A person must obtain a water use licence if they want to undertake a Section 21(c) and/or Section 21(i) water use where they do not comply with the general authorisation discussed above, for example, if the proposed Section 21(c) and/or Section 21(i) water use is assessed as medium or high risk.

## **Exemption from the requirement of a water use licence**

A person may be exempted from the requirement to obtain a water use licence if the Minister is satisfied that the purpose of the National Water Act would be met by grant of a licence or permit in terms of any other law, for example, an environmental authorisation in terms of NEMA.<sup>92</sup>

## **Process to obtain a water use licence**

The process on how to obtain a water use licence is dealt with in the Water Use Licence and Appeal Regulations<sup>93</sup> published under the National Water Act. These regulations set out in detail the requirements of the application process and the applicable timeframes.

An applicant for a water use licence must appoint a specialist to prepare a technical report addressing the nature and consequences of the proposed water use. The scope of the report is determined in consultation with the regional office of the DWS.

It would ordinarily be possible to complete the application process in less than a year.<sup>94</sup>

## **Enforcement procedures**

In terms of section 53 DWS may issue a written notice to any person who has contravened a provision of the National Water Act or a condition of a water use licence or other permission to use water, directing that person or the owner of the property in relation to which the contravention occurs to rectify the contravention within a time specified in the notice.

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<sup>91</sup> In Government Notice 509 in *Government Gazette* 40229 of 26 August 2016.

<sup>92</sup> National Water Act: section 22(3).

<sup>93</sup> Government Notice R267 in *Government Gazette* 40713 of 24 March 2017.

<sup>94</sup> The prescribed time periods for each step in the application process are set out in Annexure A to the regulations.

If the recipient does not comply with the notice, DWS may itself rectify the contravention and recover its reasonable costs from the person on whom the notice was served.<sup>95</sup>

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<sup>95</sup> National Water Act: section 53(2).

## Offences and penalties

It is an offence under the National Water Act to:

- use water without lawful permission, for example, undertaking Section 21(c) or Section 21(i) water uses without authorisation;<sup>96</sup>
- to commit an act that detrimentally affects or is likely to detrimentally affect a watercourse<sup>97</sup> or fail to do something that results in a watercourse being detrimentally affected or likely to be detrimentally affected;
- fail to comply with a notice issued in terms of section 53.<sup>98</sup>

The penalty in respect of these offences is a fine or a period of imprisonment not exceeding five years (or both) in respect of a first offence, and in respect of a second offence, a fine or a period of imprisonment not exceeding five years (or both).<sup>99</sup>

Note however, that if convicted of an offence for committing an act that detrimentally affects or is likely to detrimentally affect a watercourse<sup>100</sup> or failing to do something that results in a watercourse being detrimentally affected or likely to be detrimentally affected, that the provisions of section 34 of NEMA, discussed above, are applicable, (imputed liability and additional penalties).

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<sup>96</sup> National Water Act: section 151(1)(a).

<sup>97</sup> National Water Act: section 151(1)(j).

<sup>98</sup> National Water Act: section 151(1)(d).

<sup>99</sup> National Water Act: section 151(2).

<sup>100</sup> National Water Act: section 151(1)(j).

# NATIONAL FORESTS ACT 84 OF 1998

## Purpose of the Act and relevance to alien and invasive species management

The National Forest Act 84 of 1998 (“**National Forests Act**”) provides that certain trees can be declared as protected – also known as “champion trees”. On 6 December 2006 the Minister declared<sup>101</sup> particular trees and particular group of trees “*Champion Trees*”. The effect of the declaration is that<sup>102</sup> no person may cut, disturb, damage or destroy any protected tree or possess, collect, remove, transport, export, purchase, sell, donate or in any other manner acquire or dispose of any protected tree or any forest product derived from a protected tree, except with a licence granted by the Minister to an applicant and subject to such period and conditions as may be stipulated in the licence, or if it has been exempted<sup>103</sup>. Examples of declared trees include a *Eucalyptus camaldulensis* (River red gum) planted in 1880, located in Bergzicht market square, Stellenbosch, Western Cape, which is described as a “[p]rominent tree providing shade for an entire informal market”.

Persons engaged in alien and invasive species removal should, before removing a tree, confirm that that tree does not appear on the list of protected trees accessible on the website of the Department of Agriculture.

## Offences and penalties

It is an offence to cut down a protected tree<sup>104</sup> and a person convicted of this offence may be sentenced to a fine or imprisonment for a period up to three years (or both).<sup>105</sup>

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<sup>101</sup> In terms of sections 12 (1) (a) and (b) of the National Forests Act.

<sup>102</sup> National Forests Act: section 15(1).

<sup>103</sup> In terms of section 15(1)(b)(ii) of the National Forests Act.

<sup>104</sup> National Forests Act, section 62(2)(c).

<sup>105</sup> National Forests Act, section 58(1).

# FERTILIZERS, FARM FEEDS, AGRICULTURAL REMEDIES AND STOCK REMEDIES ACT 36 OF 1947

## Purpose of the Act and relevance to alien and invasive species management

The purpose of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 (“**Farm Feeds Act**”) is to regulate the labelling, marketing and administration of fertilizers, farm feeds, agricultural remedies and stock remedies. The chemicals and other substances used for alien and invasive species management are regarded as agricultural remedies. “Agricultural remedy” is defined in the Farm Feeds Act as “any chemical substance or biological remedy... to be used for the destruction, control, repelling, attraction or prevention of any undesired... plant”. The Minister has declared certain substances and remedies to be agricultural remedies<sup>106</sup> and promulgated various regulations relating to agricultural remedies.<sup>107</sup>

The Farm Feeds Act is therefore relevant to persons or businesses engaged in alien and invasive species management that make use of agricultural remedies.

The following obligations in the Farm Feeds Act are relevant:<sup>108</sup>

- Agricultural remedies must be registered with the Registrar of Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies (i.e. unless a supplier has duly registered the agricultural remedy with the Registrar, it may not legally be sold).<sup>109</sup>
- No person may use agricultural remedies unless they are registered as a “*pest control operator*” with the Registrar of Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies.<sup>110</sup>
- No person may use or recommend the use of agricultural remedies for a purpose or in a manner that is contrary to what is specified on the label on a container thereof.<sup>111</sup>
- All handling, storage and disposal requirements of the South African National Standards must be complied with.<sup>112</sup>

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<sup>106</sup> Government Notice R383 of 25 February 1983.

<sup>107</sup> See in particular, Regulations Agricultural Remedies Regulations, Government Notice R935 in *Government Gazette* 29225 of 22 September 2006.

<sup>108</sup> Farm Feeds Act: section 3.

<sup>109</sup> Farm Feeds Act: section 7(2)(a)(i)

<sup>110</sup> Farm Feeds Act: section 7(2)(a)(ii).

<sup>111</sup> Farm Feeds Act: section 7(2)(a)(i).

<sup>112</sup> Agricultural Remedies Regulations, Government Notice R935 of 2006: regulation 22.

## Offences and penalties

It is an offence to:

- Sell agricultural remedies that are not registered.
- Use agricultural remedies without being registered as a pest control officer.
- Use or recommend the use of agricultural remedies for a purpose or in a manner that is contrary to what is specified on the label on a container thereof.
- Not comply with the handling, storage and disposal requirements of the South African National Standards.<sup>113</sup>

A person convicted of an offence under the Farm Feeds Act is liable to a fine not exceeding R1000 or imprisonment for a period not exceeding two years or to both or imprisonment or both.<sup>114</sup>

Any person who refuses or fails to comply with handling, storage and disposal requirements of the South African National Standards shall be guilty of an offence and liable on conviction to a fine or imprisonment or to both a fine and imprisonment.

In addition, the prosecutor may apply to the court convicting a person who is the owner of or has in his or her possession such agricultural remedy, to declare such agricultural remedy forfeited to the state.<sup>115</sup>

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<sup>113</sup> Agricultural Remedies Regulations: regulation 26.

<sup>114</sup> Farm Feeds Act: section 7(2)(a)(ii) read with Agricultural Remedies Regulations: section 18.

<sup>115</sup> Farm Feeds Act: section 18(2).

# OCCUPATIONAL HEALTH AND SAFETY ACT 85 OF 1993 AND REGULATIONS FOR HAZARDOUS BIOLOGICAL AGENTS

## Purpose of the Act and relevance to alien and invasive species management

The purpose of the Occupational Health and Safety Act 85 of 1993 (“**OHSA**”) is to promote the health and safety of employees in the workplace. Regulations for Hazardous Biological Agents<sup>116</sup> (“**HBA Regulations**”) were published under the OHSA in order to regulate the handling of hazardous biological agents. A “*hazardous biological agent*” (“**HBA**”) is defined in the HBA Regulations as “any micro-organism, cell culture or human endoparasite, including any which have been genetically modified, which may cause an infection, allergy or toxicity, or otherwise create a hazard to human health”.

The HBA Regulations are relevant to persons or businesses engaged in alien and invasive species management who are employers and whose employees come into contact with hazardous biological agents as part of their work functions.

## Employers’ obligations in terms of the HBA Regulations

An employer to whom the HBA Regulations apply must:

- Classify HBAs according to their level of risk.<sup>117</sup>
- Ensure that the exposure of employees to HBA is either prevented or, where this is not possible, adequately controlled.<sup>118</sup>
- Where reasonably practicable, ensure that the exposure of employees to HBAs is controlled by means of the following measures:<sup>119</sup>
  - limiting the amount of HBA used;
  - limiting the number of employees who might be exposed to it;
  - introducing engineering control measures which may include:
    - process separation, automation or enclosure;
    - installation of local extraction ventilation systems;
    - access control to prevent unauthorised access to places where exposure may occur;

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<sup>116</sup> Government Notice R1390 in *Government Gazette* 22956 of 27 December 2001.

<sup>117</sup> HBA Regulation 3.

<sup>118</sup> HBA Regulation 10(1).

<sup>119</sup> HBA Regulation 10(2).

- immediate personal disinfection;
  - introduction of appropriate work protocols that employees must follow in circumstances where there is a risk of exposure to HBAs, including protocols in relation to safe handling, use and disposal; proper and effective maintenance and cleaning of equipment and ventilation systems;

ensuring that emissions are compliant with relevant air quality legislation;

displaying a biohazard sign and other warning signs where appropriate.
- Provide detailed information and training to staff that may be exposed to hazardous biological agents regarding:<sup>120</sup>
  - the content of the HBA Regulations;
  - the nature of the potential health risks;
  - the measures to be taken by the employer and the employee to protect an employee against any risk, including the wearing of protective clothing and respiratory protective equipment and the need for, correct use, maintenance and potential of safety equipment;
  - the importance of good housekeeping at the workplace and personal hygiene requirements;
  - the precautions to be taken by an employee to protect him or herself against the health risks associated with exposure to an HBA, including the wearing and use of protective clothing and respiratory protective equipment;
  - the necessity, correct use, maintenance and potential of safety equipment, facilities and engineering control measures provided;
  - the necessity of medical surveillance;
  - the safe working procedures regarding the use, handling, storage, labelling, and disposal of HBA at the workplace;
  - the procedures to be followed in the event of exposure, spillage, leakage, injury or any similar emergency situation, and decontaminating or disinfecting contaminated areas; and
  - the potential detrimental effect of exposure on the human reproductive process.
- Ensure that a risk assessment is undertaken at two-yearly intervals to determine the likelihood that any employee has been exposed to HBAs. In this regard, the employer must:<sup>121</sup>
  - Ensure that the risk assessment is conducted on the basis of all information, including:
    - the relevant classification of the HBA according to its level of risk of infection;

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<sup>120</sup> HBA Regulation 4.

<sup>121</sup> HBA Regulation 6.

- recommendations from the manufacturer, supplier or a competent person regarding the control measures necessary in order to protect the health of persons against such the HBA as a result of their work;
- information on diseases that may be contracted as a result of the activities at the workplace;
- potential allergenic or toxic effects that may result from the activities at the workplace;
- knowledge of diseases from which any employee might be suffering and which may be aggravated by conditions at the workplace;

Keep a record of the risk assessment and take account of findings relating to:

- the nature and dose of the HBA to which an employee may be exposed and the suspected route of exposure;
- where the HBA might be present and in what physical form it is likely to be;
- the nature of the work, process and any reasonable deterioration in, or failure of, any control measures;
- what effects the HBA can have on an employee;
- the period of exposure;

Ensure that the risk assessment is reviewed if there is reason to believe that it has become invalid.

- Ensure that a suitable system is in place to monitor the exposure of employees to hazardous biological agents in accordance with a procedure that is standardised and proven to be effective in: ensuring adequate control over the exposure of employees to HBAs; and generally protecting the health of employees.<sup>122</sup>

- Ensure that an employee is under medical surveillance if:<sup>123</sup>

the results of the required risk assessment indicate that an employee might have been exposed to HBA; or

the exposure of the employee to any HBA hazardous to his or her health is such that an identifiable disease or adverse effect to his or her health may be related to the exposure, there is a reasonable likelihood that the disease or effect may occur under the particular conditions of his or her work and there are techniques such as pre-clinical biomarkers where appropriate for detecting sensitisation to allergens or an inflammatory response associated with exposure to diagnose indications of the disease or the effect as far as is reasonably practicable; or

an occupational health practitioner recommends that the relevant employee should be under medical surveillance;

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<sup>122</sup> HBA Regulation 7.

<sup>123</sup> HBA Regulation 8(1).

- Provide employees with an opportunity<sup>124</sup> to undergo an initial health evaluation within 14 days before or after commencing employment; periodic medical examinations and tests in cases where the relevant HBA is known to be capable of causing persistent or latent infections which:
  - in the light of present knowledge, are undiagnosable, until signs or symptoms develop;
  - can have particularly long incubation periods;
  - can result in an illness which is recurrent in spite of treatment; and
  - are known to have serious long-term effects.
- Investigate and record all incidents that result or might result in infections or the death of an employee.<sup>125</sup>
- Ensure where necessary that employees are provided with suitably respiratory protective equipment (in the case of airborne HBA) and/or impermeable personal protective equipment (in the case of HBA that may be absorbed through the skin) and properly trained on its use. And ensure that:
  - protective equipment is:
    - fit for purpose;
    - correctly selected and properly used;
    - kept in good condition and efficient working order; and
  - further ensure that:
    - used personal protective equipment is not issued to an employee unless it is capable of being decontaminated and sterilised prior to use;
    - separate containers or storage facilities are provided for personal protective equipment and protective clothing when not in use;
    - all personal protective equipment is stored in a demarcated area with proper access control;
    - no person removes dirty or contaminated personal protective equipment and personal protective clothing from the premises;
    - all personal protective equipment is cleaned and handled as follows:
      - ✓ care must be taken to prevent contamination during handling, transporting and cleaning;
      - ✓ where clothing is sent off premises for cleaning purposes, clothing must be placed in an impermeable and tightly sealed colour-coded container

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<sup>124</sup> HBA Regulation 8(2).

<sup>125</sup> HBA Regulation 8(3).

identified with a biohazard label and it must be ensured that the contractor is familiar with the requirements of the HBA regulations;

- Regularly test personal protective equipment and other apparatus designed to control exposure to HBAs to ensure that they are in good working order and retain records of such testing for a period of 40 years.<sup>126</sup>
- Ensure that no person:
  - uses compressed air to remove HBA from any surface or person;
  - eats, drinks, smokes, keeps food or beverages or applies cosmetics in an HBA workplace;
  - leaves a controlled area without prior removal of protective or contaminated clothing and equipment.
- Ensure that:<sup>127</sup>
  - all HBAs under his or her control in storage, transit or being distributed, are properly contained and controlled to prevent the spread of contamination from the workplace;
  - the colour-coded containers in which HBA are transported are clearly marked with a biohazard sign as depicted in Annexure D to the HBA Regulations and other relevant warning signs that identify the contents; and
  - the driver is trained in and equipped with a certificate in emergency procedures.

## **Offences and penalties**

An employer that fails to comply with an obligation under the HBA Regulations is liable to a fine or to imprisonment for a period not exceeding 12 months and in the case of a continuing offence (i.e. an offence is not based on a single action but rather an ongoing situation) an additional fine of R200 per day that the offence continues or additional imprisonment of one day for each day that the offence continues.<sup>128</sup>

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<sup>126</sup> HBA Regulation 12.

<sup>127</sup> HBA Regulation 14.

<sup>128</sup> HBA Regulation 18.

# NATIONAL HERITAGE RESOURCES ACT 25 OF 1999

## Purpose of the Act and relevance to alien and invasive species management

The National Heritage Resources Act 25 of 1999 (“**NHRA**”) provides for systems and processes to protect South Africa’s heritage resources. The NHRA is relevant to alien invasive species management in so far as alien trees are occasionally subject to protection under the NHRA and may not be cut or felled without a permit issued by the relevant heritage resources authority (which may be the South African National Heritage Resources Agency (“**SAHRA**”) or the relevant provincial heritage resources agency).

Although this Guideline does not deal with the requirements of local authorities, it should be noted that local authorities have powers to administer matters related to heritage and certain municipalities impose planning restrictions in this regard, which affect trees. An example is the City of Cape Town Zoning Scheme Regulations, which provides for a “*Heritage Protection Overlay Zone*”. No tree may be removed in an area where there is a Heritage Protection Overlay Zone in place without first applying to the city council for approval.

## Overview

### Heritage sites

The NHRA provides for the declaration of grade I, grade II and Grade III heritage sites. Grade I heritage sites are administered by SAHRA, Grade II heritage sites are administered by the relevant provincial heritage resources authority, and Grade III heritage sites are administered by local authorities.<sup>129</sup>

A “*heritage site*” is defined in section 1 of the NHRA as “a place declared to be a national heritage site by SAHRA, or a place declared to be a provincial heritage site by a provincial heritage resources authority”.

A heritage site may be declared for a variety of reasons, including that it contains “landscapes and natural features of cultural significance”.<sup>130</sup>

### Protected areas

The NHRA also provides for the designation by SAHRA of private land as a “*protected area*” if it is reasonably necessary to ensure the protection and enjoyment of national or provincial heritage site.<sup>131</sup> This can only be done with the consent of the landowner.

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<sup>129</sup> NHRA: section 8(1).

<sup>130</sup> NHRA: section 3(2)(d).

<sup>131</sup> NHRA: section 28.

## How does the NHRA impact upon tree removal?

No person may deface or alter any “*heritage site*” without a permit issued by the relevant heritage resources authority.<sup>132</sup> Thus the felling of trees within a heritage site (depending on the nature of both the site and the tree) might breach this prohibition. If the particular tree is aesthetically or otherwise significant, it would be advisable to consult the relevant heritage resources authority before any removal is undertaken.

With respect to a protected area, section 28(3) provides that no person may damage, disfigure, alter, or in any other way “develop” any part of a protected area unless he or she has consulted the relevant heritage resources authority at least 60 days prior to the initiation of the changes.

The term “*development*” is defined in the NHA as “any physical intervention, excavation, or action, other than those caused by natural forces, which may in the opinion of a heritage authority in any way result in a change to the nature, appearance or physical nature of a place, or influence its stability and future well-being, including any change to the natural or existing condition or topography of land; and any removal or destruction of trees, or removal of vegetation or topsoil”.

## Offences and penalties

It is an offence to destroy, damage, deface, excavate or alter a heritage site without a permit and a person found guilty of this offence is liable on conviction to a fine or imprisonment for a period not exceeding five years (or both).<sup>133</sup>

It is likewise an offence to damage, disfigure, alter or in any way develop within a protected area without consulting the relevant heritage resources authority in accordance with section 28(3) of the NHA. A person found guilty of this offence is liable on conviction to a fine or to imprisonment for a period not exceeding three years (or both).<sup>134</sup>

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<sup>132</sup> NHRA: section 27(18).

<sup>133</sup> NHRA: section 51(1)(a) read with schedule 1.

<sup>134</sup> NHRA: section 51(1)(c) read with schedule 1.

# NATIONAL VELD AND FOREST FIRE ACT 101 of 1998

## Purpose of the Act and relevance to alien and invasive species management

The purpose of the National Veld and Forest Fire Act 101 of 1998 (“**NVFFA**”) is to prevent and combat veld, forest and mountain fires in South Africa. It is relevant to alien and invasive species management in so far as it imposes certain restrictions on the handling of flammable matter that might be associated with alien and invasive management activities (for example, alien and invasive plant matter that has been extracted and is awaiting removal).

Note that most municipalities will also impose obligations or restrictions in relation to fire hazards in their by-laws. For example, section 34(1) of the City of Cape Town’s Community Fire Safety Bylaw prohibits the storage of any combustible material in quantities or in a position likely to cause or create a fire hazard. This Guideline does not, however, deal with the requirements of local authorities.

## Relevant obligations

Section 12(1) of the NVFFA imposes an obligation on every owner of land on which a veldfire may start or burn or spread to maintain a firebreak on the boundary between his land and any adjoining land. “*Veldfire*” is defined as “a veld, forest or mountain fire”.

Firebreaks must be kept free of flammable material.<sup>135</sup> This means that no alien and invasive species plant matter may be stored on the fire break once it has been extracted and is awaiting removal from the property.

## Offences and penalties

Failure to comply with the above restriction is not *per se* an offence under the NVFFA but a landowner who creates a fire risk in this manner may nonetheless expose himself to civil liability.

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<sup>135</sup> NVFFA: section 13(c).