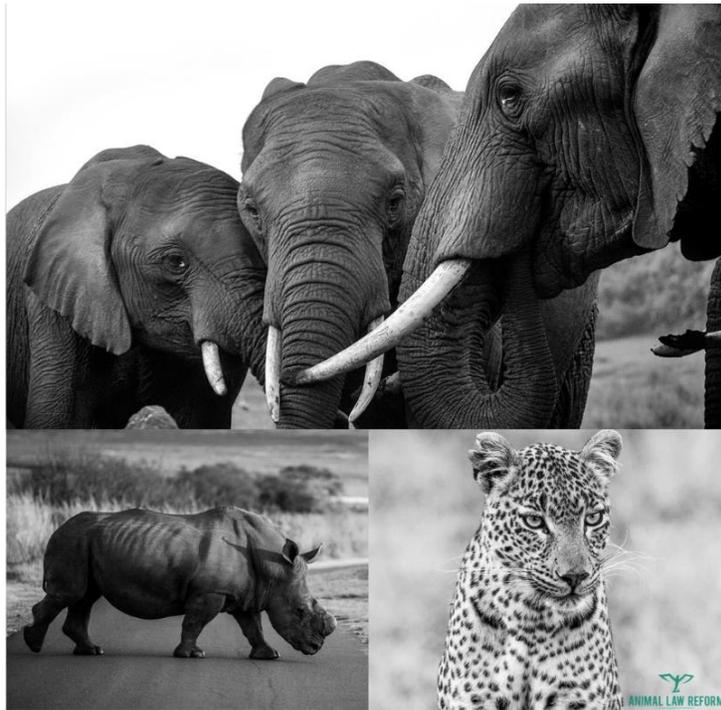


**OBJECTION TO THE PROPOSED
HUNTING/EXPORT QUOTA FOR ELEPHANT,
RHINOCEROS AND LEOPARD HUNTING
TROPHIES FOR THE 2021 CALENDAR YEAR
(GN 1295, GG43971)**



8 November 2021

Submitted by:





8 November 2021

ATT:
Mr Mpho Tjiane
Department of Forestry, Fisheries and The Environment
The Director-General
Delivered per email: cites@environment.gov.za

Dear Minister Creecy and Mr Tjiane

OBJECTION TO THE PROPOSED HUNTING/EXPORT QUOTA FOR ELEPHANT, RHINOCEROS AND LEOPARD HUNTING TROPHIES FOR THE 2021 CALENDAR YEAR (GN 1295, GG43971)

1. We write to you as Animal Law Reform South Africa (“ALRSA”) in response to the Department of Forestry, Fisheries and the Environment’s invitation for written representations on or objections to the Proposed Hunting/Export Quota for Elephant, Rhinoceros and Leopard Hunting Trophies for the 2021 Calendar Year (“proposed 2021 quota”), published on 8 October 2021.
2. ALRSA is South Africa’s first and only dedicated non-profit animal law organisation, working to connect issues of law, animal wellbeing and social justice. ALRSA’s vision is a society whose laws, policies and practices recognise and protect the interests of both humans and non-human animals.
3. Below, we set out the legal grounds for our objection to the Proposed Hunting/Export Quota for Elephant, Rhinoceros and Leopard Hunting Trophies for the 2021 Calendar Year. We note at the outset that the procedural flaws elaborated upon below have impeded stakeholders’ ability to meaningfully analyse and engage with the proposed 2021 quota, therefore the submissions contained in this objection are non-exhaustive and we reserve the right to raise further grounds of objection.



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4. In sum, ALRSA submits that the consultation process on the Department’s proposed 2021 quota is invalid and stands to be set aside on the grounds that the process contravenes the Constitution of the Republic of South Africa, National Environmental Management Biodiversity Act 10 of 2004 (NEMBA) and its regulations, and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Substantive constitutional grounds

5. ALRSA objects to the proposed 2021 quota on the ground that that the government’s continued authorisation of the practice of trophy hunting is unconstitutional as it contravenes section 24 of the Constitution. In the 2016 case of *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*¹, the Constitutional Court recognised that animal welfare and conservation together reflect intertwined values as part of the Section 24 constitutional right to have the “environment protected ... through legislative and other means” The judgment emphasised that “showing respect and concern for individual animals reinforces broader environmental protection efforts”. This interpretation of section 24 by South Africa’s apex court, termed the “integrative approach”² cannot be squared with the continued authorisation of trophy hunting of South Africa’s iconic Big 5 species, which entails the hunting of these animals purely for sport or for “fun”.
6. ALRSA has set out the unconstitutionality of the practice of trophy hunting in relation to these and other species extensively in its submission made together with the EMS Foundation on the

¹ [2016] ZACC 4.

² The term “integrative approach” in relation to Section 24 was put forward by Professor David Bilchitz. See: D Bilchitz, ‘Exploring the Relationship Between the Environmental Right in the South African Constitution and the Protection of Animals’ Interests’ (2017) South African Law Journal 134 740-777. The Constitutional Court embraced the integrative approach in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46 (‘2016 NSPCA case’).



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HLP process³ and our submission to the Department on the Draft Policy Position on the Conservation and Ecologically Sustainable Use of Elephant, Lion, Leopard and Rhinoceros (“Draft Policy Position”).⁴ ALRSA was also a signing member of the submissions of the Wildlife Animal Protection Forum South Africa (WAPFSA) on the Determination of the 2019 Leopard Hunting Quota⁵ and the 2019 Non-Detriment Finding on the Black Rhinoceros.⁶

7. In response to the Department’s Draft Policy Position, ALRSA and other organisations working on animal welfare issues, including the EMS Foundation, FOUR PAWS, and WAPFSA all submitted that the Draft Policy Position’s continued provision of trophy hunting is an inherent contradiction in the Draft Policy Position as it its objection and that the final version of the Policy Position should in fact ban trophy hunting of lion, leopard, elephant and rhinoceros. Decisions pertaining to any hunting of these species should not be taken until such time as the Policy Position been finalised to take into account all submissions from the public.
8. The integrative approach was applied directly by the High Court in the context of the setting of annual quotas for the export of lion bone in the 2019 case of *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others*⁷ in which the Court set aside the quotas set on the ground that, among other factors, our constitutional and legal obligations that arise from Section 24 and NEMBA require the consideration of animal welfare issues.⁸

³ Joint Submission to the HLP with the EMS Foundation dated 15 June 2020 available at <https://emsfoundation.org.za/submission-in-respect-of-deff-high-level-panel-the-ems-foundation-and-animal-law-reform-south-africa/> (see pages 84-100).

⁴ ALRSA submission on the Draft Policy Position on the Conservation and Ecologically Sustainable Use of Elephant, Lion, Leopard and Rhinoceros, 28 July 2021, available at: <https://www.animallawreform.org/wp-content/uploads/2021/07/Submission-on-the-DFEE-Draft-Policy-Position.pdf>. (see pages 24-26).

⁵ <http://wapfsa.org/wp-content/uploads/2020/01/WAPFSA-SUBMISSION-RE-DETERMINATION-OF-THE-2019-LEOPARD-TROPHY-HUNTING-QUOTA.pdf>.

⁶ <http://wapfsa.org/wp-content/uploads/2020/01/Forum-on-NDF-Black-Rhinoceros-Final.pdf>.

⁷ <http://www.saflii.org/za/cases/ZAGPPHC/2019/337.html>.

⁸ Id at para 74.



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9. It should be noted this objection submission does not move to analyse the quota figures provided in Table 1 and 2 of the Gazetted Notice given that:
- (i) ALRSA submits that the trophy hunting of these species is unconstitutional in that it contravenes section 24 of the Constitution as set out above therefore no permissible quota figure can be set; and
 - (ii) the gazetted notice fails to set out the scientific justification that led the Department to arrive at these figures therefore it has not been possible to examine it as insufficient information has been placed before stakeholders, as explained further below. We reserve the right to supplement our submissions in this regard.

Practical and procedural grounds for objection

Unreasonable and irrational timing of the consultation

10. A calendar year is defined as the twelve-month period between January and December of a given year. It is of concern that a public consultation regarding the hunting/export of elephant, leopard and rhinoceros trophies for the “2021 Calendar Year” has been initiated in the October, the tenth month of this Calendar year. This leaves less than two months of the 2021 calendar year remaining after the closure of the public consultation period, after which the Minister is required to give “due consideration” to the public representations received.⁹ No explanation for this choice of timing has been provided. This timing is out of step with the CITES recommendations, which provide that nationally established export quotas should “as far as possible, should be communicated at least *30 days before the start of the period* to which the export quota relates”.¹⁰ [Emphasis added] The publication of a quota for the 2021 calendar year so late in the year is unreasonable and irrational,

⁹ NEMBA, Section 100(2)(c)

¹⁰ See: *Management of Nationally Determined Export Quotas*, <https://cites.org/eng/res/14/14-07R15.php>



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and a further ground for the setting aside of the current consultation process under section 6(2)(h) of PAJA in addition to those set out below.

Non-compliance with National Environmental Management Biodiversity Act 10 of 2004 (“NEMBA”) and its regulations

11. As stated in the gazetted notice, the invitation for the submission of representations on the proposed 2021 quota was issued in terms of sections 99 and 100 of NEMBA. These provisions set out the public consultation requirements for the Minister’s exercise of power under NEMBA.
12. Section 100(2)(b) sets out that notice of a public participation process under section 99 of NEMBA must contain “*sufficient information to enable members of the public to submit meaningful representations or objections*”.
13. The Gazetted Notice of consultation on the 2021 proposed quota contains only quota figures, without attaching or including information on rationale, scientific or otherwise) that led the Department to arrive at these figures. The Gazetted Notice itself simply states that the proposed quotas for leopard and black rhinoceros have been determined “as per the recommendations of the Scientific Authority” without including or attaching any information on these recommendations, while no justification at all is provided for the determined figure for the quota pertaining to elephants and their tusks. In the absence of the inclusion of the findings of the Scientific Authority and the rationale for the elephant quota, it is impossible for any member of the public to meaningfully interrogate or engage with the proposed 2021 quota. This is both a material flaw in terms of section 100(2)(b) of NEMBA and under PAJA (as explained below).
14. Further, the findings of the Scientific Authority (referred to but not provided in the Gazetted Notice) should set out a finding of non-detriment in relation to CITES Appendix I or Appendix II species which asserts that a restricted activity (such as trophy hunting and export) will not be



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detrimental to the survival of the species in question. Leopards and Black Rhinoceros are listed under CITES Appendix I while African Elephant populations in South Africa are listed under CITES Appendix II. All three species are also listed in the Lists of Threatened and Protected Species (TOPS) under the Threatened and Protected Species Regulations¹¹ published in terms of section 56 of NEMBA (with leopards being listed as “vulnerable”; black rhinoceros as “endangered” and African Elephant as “protected”. As a result, section 62 of NEMBA which refers to the publication of “Annual non-detriment findings” which must be published in the Government Gazette applies to all three of these species.¹² This is in line with the CITES recommendation that “a non-detriment finding should be made whenever an export quota is established for the first time or revised, and reviewed annually”.¹³ However, no non-detriment findings in relation to these three species were published in either the 2020 or the 2021 Government Gazette. The most recent gazetted non-detriment finding was the non-detriment finding on the Aloe published in December 2020. It is of material concern that hunting/export quotas for elephant, leopard and rhinoceros have been set in the absence of a current gazetted non-detriment finding in relation to these species in the current or preceding calendar year.

15. TOPS Regulation 72 also provide that annual hunting “off-take” limits on a country and provincial level must be determined for each year by Septebmer of the preceding year in respect of threatened or protected species. We submit that, in the absence of the establishment of such off-take limits,

¹¹ GN R151 and GN R152, February 2007.

¹² Section 62 of NEMBA reads as follows:

Annual non-detriment findings

62. (1) The scientific authority must publish in the Gazette any annual non-detriment findings on trade in specimens of listed threatened or protected species in accordance with an international agreement regulating international trade in specimens of listed threatened or protected species which is binding on the Republic.

(2) Any interim findings of the scientific authority must be published in the Gazette for public information within 30 days after the decision has been made.

¹³ See **Management of nationally established export quotas** Res. Conf. 14.7 (Rev. CoP15) Res. Conf. 18.6 available at : <https://cites.org/eng/res/14/14-07R15.php>.



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the proposed 2021 quota could not have taken into account all relevant considerations in arriving at the figures determined for each species.

Invalid administrative action

16. In light of the considerations set out above, this consultation process constitutes unlawful, procedurally unfair, unreasonable and irrational administrative action in terms of PAJA. As the protection of South Africa's wildlife is a matter of public interest, the Minister's exercise of power in setting these quotas and initiating a flawed public consultation process constitute a breach of the South African public's right to adequate public participation in matters that affect them, the right to just administrative action in terms of section 33 of the Constitution and the right to have the environment protected through legislative and other means in terms of section 24 of the Constitution. The proposed quota and the consultation process should therefore be withdrawn.

Conclusion

17. As demonstrated above, we submit that:

- (i) Trophy hunting of these species is fundamentally at odds with a proper interpretation of Section 24 of the Constitution, therefore the Department's decision to set quotas authorising trophy hunting is unconstitutional in and of itself.
- (ii) The consultation process surrounding the setting of the Proposed Hunting/Export Quota for Elephant, Rhinoceros and Leopard Hunting Trophies for the 2021 Calendar Year is materially procedurally flawed and stands to be set aside under PAJA.

We therefore submit that the Proposed Hunting/Export Quota for Elephant, Rhinoceros and Leopard Hunting Trophies for the 2021 Calendar Year should be withdrawn.



18. Should you have any questions in relation to these submissions, please do not hesitate to contact us by email at larawallis@animallawreform.org.

Sincerely

A handwritten signature in black ink, appearing to read 'L Wallis', enclosed within a hand-drawn oval.

Lara Wallis

Executive Director

Animal Law Reform South Africa NPC