

10 March 2017

The Director-General
Department of Environmental Affairs
Attention: Ms Magdel Boshoff
submitted by email to: mboshoff@environment.gov.za

RE: DEA NOTICE 74 OF 2017 ON DRAFT REGULATIONS FOR THE DOMESTIC
TRADE IN RHINOCEROS HORN, OR PART, PRODUCT OR DERIVATIVE OF
RHINOCEROS HORN

Dear Ms Boshoff,

Please find attached our comments on, and objections to, the proposed regulations for the domestic trade in rhinoceros horn, and products or derivatives of rhinoceros horn.

The proposed regulations have come as a shock to the local and international community and the adoption of these regulations will not only turn South Africa into a pariah State but it will lose any credibility in the conservation and enforcement arena.

Please note that as a member of the Species Survival Network the EMS Foundation also supports and endorsed the detailed comments they have sent in to DEA on these draft regulations.

We urge DEA to take well-considered cognisance of our objections and comments.

Yours Sincerely,



Smaragda Louw
Director and Chairperson
Ban Animal Trading



Michele Pickover
Director
EMS Foundation

EMS FOUNDATION AND BAN ANIMAL TRADING COMMENTS ON AND OBJECTIONS TO THE PROPOSED REGULATIONS FOR THE DOMESTIC TRADE IN RHINOCEROS HORN, AND PRODUCTS OR DERIVATIVES OF RHINOCEROS HORN, DEA NOTICE 74 OF 2017 (GG No. 40601)

Introduction

The proposed regulations have come as a shock to the local and international community particularly given the fact that the Committee of Inquiry set up by the South African Government advised against commercial trading of rhino horns and, at the 2016 CITES COP the MAJORITY of world governments firmly opposed legalising international trade in rhino horn.

The proposed regulations establish a system for permits to be issued for a person to “*sell or otherwise trade in, give, donate, buy, receive, accept as a gift or donate, or in any way dispose of or acquire, a rhinoceros horn*”. While this system appears to be targeting so-called ‘domestic’ trade in rhino horn within the borders of South Africa, it is highly likely that such legal trade will be exploited to smuggle rhino horn to the key Asian markets where consumers are willing to pay top dollar for it.

In addition, the proposed regulations also establish a permitting process for the export of rhino horn for “*personal purposes*” – this term has not been defined, making it easy for criminal syndicates to exploit such a massive loophole. Further, the regulations also specify that a foreigner who “*owns a rhinoceros*” in South Africa can “*export the horn of such rhinoceros of which he or she is the owner*”.

According to the proposed regulations, rhino horn can now also be sold by auction to the highest bidder, emphasising the commercial value of rhino horn rather than encouraging the public to value live rhinos in the wild.

Overall, the regulations establish a complicated and confusing regulatory mechanism with layers of bureaucracy and paperwork again raising concerns as to how criminal syndicates may exploit this system, particularly given the lack of resources among provincial authorities to enforce current wildlife laws and rampant corruption entrenched in the existing institutional framework.

While the regulations envisage reciprocal permits being issued by countries of import, this could prove to be a slippery slope because main demand countries for rhino horn – Vietnam and China – currently prohibit trade in rhino horn. If South Africa is intending to encourage these massive wildlife destinations to open up trade in rhino horn, this would have serious ramifications for the survival of the last remaining wild rhinos in Africa and Asia.

The EMS Foundation and Ban Animal Trading are concerned that the regulations proposed by South Africa undermine the CITES international trade prohibitions which protect rhino populations globally. A legal domestic trade in rhino horn provides an avenue for laundering illegal rhino horn, thereby increasing the burden of law enforcement authorities responsible for combatting rhino horn trafficking.

Further, the proposed regulations also seriously undermine campaigns to reduce demand for rhino horn and instead legitimise its consumption as a commodity.

Comments

1. The *EMS Foundation* and *Ban Animal Trading* strongly oppose the draft regulations.
2. South Africa holds approximately 70% of the world's rapidly declining rhino population. Poaching for their horns, which fetch high prices in illegal Asian markets, is the biggest threat currently facing rhinos. In South Africa alone, more than 6,000 rhinos were brutally killed by poachers between 2008 and 2015, to supply horn to Vietnam, China and other Asian countries where it is used in traditional medicine and as a high-end gift and status symbol. Rhino poaching is also on the rise in Namibia, Zimbabwe and Kenya.
3. Yet South Africa's government, under pressure from private rhino owners, who own roughly a quarter of South Africa's rhinos and want to sell their stocks of rhino horn, is proposing a new regulation which would legalise domestic trade and allow foreigners to buy horns within South Africa and export them to their home countries as 'personal items'. If it goes ahead, South Africa's proposal could further threaten the world's remaining rhinos by creating a massive loophole that will enable organised criminal syndicates to get rhino horns out of South Africa and into illegal markets, fuelling demand.
4. The draft regulations show that South Africa is in actual fact deliberately (and without conscience) stimulating demand for rhino horn. There are many good arguments for ending the stockpiling of rhino horns and for destroying current stockpiles. Yet South Africa is allowing its stockpile and the stockpile of private owners to mushroom. Given that this is not happening, we should ask who it is that has an interest in ensuring the perpetuation of a demand for rhino horn. Vendors, traffickers and poachers, of course, have an interest in the market continuing. A 2012 report in the *Oxford Review of Economic Policy* made the intriguing and worrying suggestion that a speculator lawfully stockpiling large quantities of wildlife commodities might have an interest in "depressing" wild stock in order to maximise profit: banking on extinction in the wild, in other words. Having a monopoly on supply is one way of controlling a market, but maintaining demand is also crucial. Who is currently speculating in rhino horn stockpiles, and why? Confronting and correcting the belief that modern faddish behaviour and the peoples who engage in it are a modern, traditional, or incapable of

change, would be helpful in reducing demand for rhino products, but those who farm and stockpile might have reason to present rhino horn consumption in countries such as Vietnam as a more established and venerable practice than it in fact is.

5. South Africa has a huge poaching problem. Legalising trade and export is likely to collapse international attempts to protect rhinos. If these draft regulations become law, the decline and possible extinction in the wild of rhinos will be in the interest of rhino breeders, who will then control the world market.
6. The publication of these draft regulations are bewildering and baffling as the Minister is still engaged in litigation about domestic rhino horn trade and the matter is before the Constitutional Court. It is therefore an irrational, inconsistent, unsound and contradictory step to take.
7. Although the lack of public participation by the Minister is a problem for the Constitutional Court, DEA should also be arguing that, in light of the crisis rhinos are facing in South Africa, it does not mean the moratorium should be lifted and that the government should be given a chance to consult without lifting the moratorium.
8. The draft regulations open the door to a legal rhino horn trade within South Africa, and would allow foreigners, including those from rhino horn consuming countries such as China or Vietnam, to travel to South Africa, buy horn here, and export it for “personal” purposes back to their home countries.
9. The draft regulations seek to justify the trade through the fiction that it may only be traded for personal purposes, but leaves out what “personal” may mean. In terms of Article III of the CITES Convention, as long as the import is “not for commercial purposes”, import and export permits are allowed. If the purpose is “personal” there is no limit to the number of specimens involved. There is also the exception (for residents) allowing for export of personal and household effects (Article VII). By requiring exports to be for ‘personal purpose’ (whatever that means) the DEA is obviously trying to create the impression that it is not contravening CITES by permitting trade for commercial purposes.
10. The draft regulations appear to have been hastily drafted, and contain numerous inconsistencies and ambiguities, including but not limited to:
 - a. The regulations seem to limit the number of horns that can be exported by foreign visitors who do not own rhinos in South Africa to two per person; but is this per year or per lifetime?
 - b. Is there any limit for foreigners who do own rhinos?
 - c. As for South African citizens and residents, it is not clear whether they can export any horns at all, or whether they can export as many as they like.
 - d. Further, what is to stop people from hiring others to export horn for them, as was the case in the recent past when criminals hired Thai prostitutes to pose as “trophy hunters” to get permits to shoot rhinos, whose horns were then

smuggled out of the country. South Africa certainly does not hold a sterling track record in this regard.

- e. Is the two-per-person a red herring because it only applies to “a person from a foreign state”. South Africans wanting to buy or sell rhino horn, on obtaining a permit, would have no such restriction and could trade and export as much horn as they pleased. Foreigners owning rhinos could also do so because the two-horn restriction refer to “a person contemplated” in another part of the regulations, it was easy to miss the key point that the “person” referred to was only a foreign national not domiciled in South Africa or not owning a rhino. No such restriction is placed on locals.
11. We are very concerned that, if these regulations are promulgated, this trade will be poorly regulated in South Africa and will almost certainly not be controlled in many importing countries who do not monitor horn after its importation, creating new laundering opportunities that will lead to increased rhino poaching and illegal trade in horn.
12. There is a demonstrable link between the sale of farmed wildlife and poaching. Lifting the trade ban would serve to stimulate almost limitless Asian markets through the sale of limited goods which would not take long to bleed into illegal procurement through poaching.
13. The effect, if the regulations become law, is that South Africa will be an almost open market for trading and even exporting rhino horn. This is a slap in the face for the overwhelming majority of countries that voted against the trade in horn at the CITES CoP17 meeting in South Africa in 2016.
14. The Regulations are contrary to South Africa’s international obligations. For example, the State Parties to CITES have identified international trade in rhino horn as being detrimental to the conservation status/ survival of rhinos. The draft Regulations will legalise a (limited) trade in rhino horn which the parties to CITES are seeking to prevent. Furthermore, as a contracting party to the Convention on Biological Diversity, South Africa is required, as far as possible and as appropriate, to adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity (article 10). Farming rhinos for their horns and trading in horns have an adverse impact on the conservation status of rhinos and hence on biological diversity.
15. In order to ensure the long-term protection of wild rhinos it will be necessary to reduce the demand for rhino horn and so the price of rhino horn in order to eliminate or substantially reduce the incentive to poach. This has been recognised by the parties to CITES, the CITES Secretariat and INTERPOL. Section 3(3) of these proposed Regulations is arbitrary and needs to be explained. Furthermore, it effectively opens international and commercial trade and will open the door to widespread laundering of rhino horns.

16. It is a violation of CITES for a Party to allow international trade in rhino horn for primarily commercial purposes. The majority of CITES Parties, including the majority of rhinoceros range states, have voted against allowing any legal commercial trade in rhino horn on the grounds that it will be detrimental to the conservation of rhinos in the wild. At the most recent CITES meeting in 2016, held in South Africa, a proposal by Swaziland to allow a legal international trade in rhino horn was defeated by a vote of 100 Parties against to 26 votes in favour. South Africa decided that it was not ready to submit a similar proposal. Therefore, the DEA's draft regulations undermine both its own decision and the recent decision of the CITES Parties.
17. The illegal trade in rhino horn in China and Vietnam is well-documented. Indeed, at the request of the CITES Parties, major consumer countries like Vietnam have been making progress in lowering the demand for rhino horn in their countries including by raising awareness of their citizens, and strengthening their country's law enforcement and legislation; thus this move by our country will send the wrong message to the international community in general, and to the government and people of these consumer countries in particular. Efforts to protect rhinos from poachers and reduce demand for rhino horn in consumer countries such as China and Vietnam are beginning to show good signs of progress. South Africa's proposals would undermine these efforts. South Africa needs to work side by side with these countries to reduce the demand for rhino horn, not to undermine their efforts by encouraging consumption of rhino horn.
18. Stipulating that the trade in rhino horn is for personal purposes is not only flawed but importantly there is no realistic way of ensuring that the two horns per person do not end up being traded. It has been shown that authorities in other countries are unable to follow up on trophy horns to check that they have not sold them on. South Africa will be placing an impractical, unnecessary, unenforceable and unimplementable burden on other countries. So the ability of importing countries to ensure that rhino horn imported as a result of South Africa's new regulations will be used only for 'personal' purposes, and not sold or bartered, is also highly doubtful. The regulations contain no requirement to scrutinize their ability to do so beyond requiring a letter that "adequate" regulatory legislation exists (but not whether it is implemented or enforced).
19. Allowing any domestic trade in rhino horn or the export of rhino horn for whatever purpose will stimulate demand for rhino horn, make enforcement much more difficult and consequently have an adverse impact on rhino populations because poachers will continue to have access to lucrative markets. Consequently it is unreasonable and contrary to the State's role as trustee of biological diversity to pass legislation that legalises such trade.
20. Legalising trade in rhino horn is extremely risky, is not based on sound science or sound economics, and is contrary to the recommendations made by the advisory group appointed by the Minister to advise her on this issue. It is also contrary to the principle

in section 2(4)(a)(vii) of NEMA which states that sustainable development requires the consideration of all relevant factors including: "*that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions;*"

21. Confining rhinos in small areas to farm them for their horn removes their ecological relationships and prevents them from playing their specific roles and functions within ecosystems. This means that commercial rhino farming in confined spaces (as opposed to game farms) results in a degradation of the ecosystems from which the rhinos have been removed which will have a negative impact on biological diversity and ecosystem functioning (i.e. disrupt the ecological integrity of the ecosystem in which rhinos occur) and cause significant environmental degradation. This means that farming rhinos for their horns is not ecologically sustainable.
22. The environmental right in section 24 of the Constitution imposes a duty on the State (and indeed everyone in South Africa) to protect the environment (including wildlife) for the benefit of present and future generations, by taking reasonable legislative and other measures that (a) prevent ecological degradation; (b) promote conservation and (c) ensure that if natural resources are required for the purposes of justifiable economic and social development, then that use and development is undertaken in a manner that is ecologically sustainable.
23. This means that the Constitution:
 - a. does not establish either a duty or a right to use wildlife; and
 - b. does not prohibit the use of wildlife but imposes a duty on both the user and the State to take reasonable measures to ensure that no ecologically unsustainable use occurs.Consequently the State is not under a duty to promote the use of wildlife (e.g. by facilitating the farming of rhinos for horn and trade in rhino horn), only to ensure that any use that does occur is ecologically sustainable, humane and otherwise lawful.
24. The draft Regulations are inconsistent with the environmental right in section 24, among other reasons because they will result in detrimental impacts on biological diversity and the environment and do not:
 - a. secure the ecological sustainable use of natural resources (wildlife);
 - b. protect the environment for the benefit of current and future generations; or
 - c. promote conservation.

25. If there is any legal rhino horn in circulation, enforcement (both in South Africa and internationally) becomes much more difficult. Passing these Regulations will undermine the efforts of other countries to combat illegal trade in rhino horn and the illegal activities that it funds, and harm South Africa's relationships with the international community which is against rhino horn trade. (For example the Minister proposes banning the powdering of rhino horn in South Africa to prevent the draft Regulations from being unenforceable but since a similar ban does not exist in countries

to which the horn will be exported, it will render enforcement in such countries virtually impossible). At a time when the future survival of rhinos is at stake it is irrational to undermine and weaken national and international law enforcement initiatives to prevent illegal trade in rhino horn.

26. South Africa is unable to ensure that the horns will not enter the illegal international markets.
27. South Africa's ability to regulate domestic trade in rhino horn is in doubt. The recent series of prosecutions involving the spurious use of hunting permits to facilitate smuggling of rhino horns out of South Africa by foreign nationals demonstrate that unscrupulous people are ready and willing to take advantage of any new options for removing horn from the country, are ingenious at coming up with ways to do so, and in many cases are connected with well-funded foreign syndicates able to deal with corrupt officials in end-market countries. It is almost certain that such people will try to take advantage of the export mechanisms in the draft regulations, and highly likely that they will succeed in doing so despite any mechanisms the draft regulations may contain. Horn from poached rhinos might be offered at the same or even lower prices than horn from 'farmed' rhinos, and the 'legal' market might consist mostly of illegal horn.
28. South Africa does not have the enforcement capacity to ensure that illegally obtained rhino horn will not be exported as legally obtained rhino horn (e.g. using forged documents). The South African government does not have the ability to police the legal and illegal trade simultaneously. Re-opening of a domestic trade in rhino horn would make it even harder for already overstretched law enforcement agents to tackle trafficking of rhino horn. How will an already stretched and under-funded regulatory and policing force cope with monitoring internal trade?
29. There are serious concerns about the challenges that law enforcement and permitting officers would face in trying to manage parallel legal and illegal trade. The South African government needs to retain the moratorium and focus its efforts on disrupting the organised criminal syndicates involved in rhino horn trafficking.

Conclusion

The draft Regulations must be scrapped and in order to give effect to its duty under section 24 of the Constitution and taking account of the best available scientific and other information, the Minister must enact legislation to prohibit the sale, donation, exchange of rhino horn in any form and the possession of any rhino horn (other than in an approved storage facility in which all stock has been DNA tested and inventoried).