



**Representations to the Portfolio Committee on Environment - National Assembly
with regard to the 2015 National Environmental Laws Amendment Bill**

1. The Chairperson of the Portfolio Committee on Environment
National Assembly
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2. Secretary to the Chairperson of the Portfolio Committee on Environment:
National Assembly
Ms Tania Kleinhans
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3. The Secretary of the Portfolio Committee on Environment:
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Dear Mr Mapulane

1. These representations are made jointly by Trout South Africa (TSA)¹ and the Federation of Southern African Flyfishers (FOSAF)².
2. These representations focus on the proposed amendments contained in section 20 of the 2015 National Environmental Laws Amendment Bill (the NEMLA Bill) that propose amendments to

¹ Trout South Africa (TSA) is a formally constituted commodity group formed in 2013 and recognised by the DAFF. It represents the trout value chain comprising trout aquaculture, trout production and processing, trout fishing, trout tourism including fishing venues, hospitality and accommodation facilities both community-based and commercial, trout related academia and any other service providers related to trout tourism, tackle dealers, manufactures.

² The Federation of Southern African Flyfishers (FOSAF) is a non-governmental organisation formed in 1985 to promote the sport of fly fishing and the interests of flyfishers throughout Southern Africa, in order to represent their interests to official organs of state for consultation and liaison in matters of policy, governance and the law, to the mutual benefit of all. FOSAF is a member of TSA.

section 73(2)³ of the National Environmental Management Biodiversity Act, No 10 of 2004 (NEMBA).

3. The Department of Environment Affairs (DEA) has advised us that it regards the amendment as inconsequential and that a parliamentary hearing is not necessary. We dispute that. The amendment goes to the heart of the control mechanism⁴ that underlies the purpose of listing a species as invasive.
4. The proposed amendment fundamentally changes the law.
 - 4.1 At the level of strict legislative interpretation it does so because it takes a peremptory requirement that is key to the proper functioning of the invasive species provisions of NEMBA and replaces this with a ministerial discretion⁵.
 - 4.2 This fundamental change is exacerbated because the DEA is not applying these provisions in a lawful way. It has ignored both the legal definition of invasive species and the strict requirement that invasive species must be controlled in pursuit of its own idea of what should be listed as invasive and how these species should be dealt with.⁶

³ Section 72(2) reads – “A person who is the owner of land on which a listed invasive species occurs must-
 (a) notify any relevant competent authority, in writing, of the listed invasive species occurring on that land;
 (b) take steps to control and eradicate the listed invasive species and to prevent it from spreading; and
 (c) take all the required steps to prevent or minimise harm to biodiversity.”

⁴ Control in relation to an alien or invasive species, is defined in NEMBA to mean-
 “(a) to combat or eradicate an alien or invasive species; or
 (b) where such eradication is not possible, to prevent, as far as may be practicable, the recurrence, re-establishment, re-growth, multiplication, propagation, regeneration or spreading of an alien or invasive species;”

The NEMLA Bill defines control so as to separate “eradicate” which is redefined to mean to eradicate completely from the Republic from “control” where the requirement of eradication is replaced with “the systematic removal of all visible specimens of an alien or invasive from within a specified area or the whole of the Republic.” the definition of control remains unchanged. We disagree with DEA that this amendment is cosmetic.

⁵ The existing section 72 says landowners must notify any relevant competent authority, in writing, of the listed invasive species occurring on that land and must take steps to control and eradicate the listed invasive species and to prevent it from spreading. The amendment says that this need only be done as prescribed by the Minister. Section 72(2) as amended will read:

“(2) A person who is the owner of land on which a listed invasive species occurs must-

- (a) Deleted
- (b) take steps to control or eradicate the listed invasive species as prescribed by the Minister ; and
- (c) take all the required steps to prevent or minimise harm to biodiversity.

(2A) The Minister may prescribe circumstances when a competent authority must be notified in writing of the presence or occurrence of a listed invasive species.”

⁶ This obligation of notification and control set out in section 76 obliges every organ of state to prepare an Invasive Species Monitoring, Control and Eradication Plan for land under their control, as part of their environmental plans required in terms of the National Environmental Management Act, No. 107 of 1998 (“NEMA”). Municipalities are required to incorporate these plans into their integrated development plans. These plans are onerous and resource hungry so much so that no municipality has complied with this obligation despite the fact that 3 years have elapsed since the AIS Regulations were first promulgated.

5. This has resulted in the complete failure⁷ of the Alien and Invasive Species Lists and Regulations that were promulgated in 2014⁸ and later amended in 2016⁹.
6. The proposed amendment:
 - 6.1 anticipates the likelihood of this failure, indeed it is likely that DEA knew from the very beginning that the AIS Regulations would fail¹⁰; and
 - 6.2 will if made law:
 - (a) Dilute the obligation to control invasive species and thus, to some degree, ameliorate the extent of the failure to control them.
 - (b) Though we dispute that this is in fact the case, this will from DEA's perspective, further advance the incremental changes which DEA is trying to make to the purpose of listing of species as invasive under NEMBA.
 - (i) We say so because we think that DEA hopes that this amendment will legitimise its unlawful attempts to manage the beneficial use of listed invasive species in the face of the peremptory requirement for control (eradication) through the permitting of restricted activities.
 - (ii) We dispute this interpretation saying that the overriding purpose that invasive species must be eradicated or controlled remains. Thus we contend that, if one applies NEMBA properly as amended, the Minister will only be able to list species as invasive if she prescribes the manner of their control at the same time as the listing. This will render the current list of invasive species unlawful.
7. This speaks in our view to the fundamental disconnect between what NEMBA says must be done with regard to invasive species and what DEA would like to do.

⁷ This failure was recently confirmed in the discussion draft report: "The status of biological invasions and their management in South Africa in 2017" that the South African National Biodiversity Institute (SANBI) must prepare every two years in terms of section 11 of the AIS Regulations. The draft Report reveals that:

1. the reports required of landowners have only been received in respect of 0.001% of South Africa's approximately 6 million registered land titles; and
2. that Cape Town is the only municipality in South Africa that has prepared invasive species monitoring, control and eradication plans and those plans only apply to parts of the city.

⁸ Gn 598 published in government gazette 37885 on 1 August 2014 and Gn 599 published in government gazette 37886 on 1 August 2014.

⁹ Gn 864 published in government gazette 37886 on 29 July 2016.

¹⁰ The Deputy Director General of Environmental Affairs said the following at paragraph 53 in an affidavit dated 13 December 2013 that was filed in the Kloof Conservancy Case:

"If you take the Kloof area alone ...it would be virtually impossible for landowners to know which of the approximately 337 listed invasive species occur on their land. We have to have a prioritised systematic, achievable, targeted approach."

- 7.1 If one interprets NEMBA properly then species should only be listed as invasive if they can be eradicated or controlled. They should only be eradicated or controlled if they not only threaten ecosystems habitats or species but also if this threat to ecology causes or threatens harm to the economy or human health and wellbeing¹¹. The net effect of this two part test for invasiveness is that:
- (a) The ecological threat must be significant and
 - (b) it must threaten human health and wellbeing in such a way as it triggers an obligation on the part of the state to take reasonable legislative steps and other measures to prevent this environmental harm.
- 7.2 It is in this context of a human centred approach, and bearing in mind the scarce state capacity and resources, competing needs and the beneficial use of such species, that the problem evident in the current approach of DEA becomes manifest. We argue that the State should use its resources wisely and tackle the significantly harmful species rather than creating an unworkable edifice of control that will not be capable of implementation and that will stifle South Africa's need for sustainable development in a tissue of unnecessary red tape.
- 7.3 This regime of control carried out in order to protect of human health and wellbeing is the purpose of listing a species as invasive under NEMBA. It is not to control the beneficial use of a species by a system of permitting restricted activities.
- 7.4 This obligation of control necessarily results in a relatively short list of invasive species as not many of the listed species actually cause or threaten significant harm to human health and wellbeing. This approach would be commensurate with the limited resources available to control these species.
- 7.5 The DEA's approach, thinking and values do not align with this human centred constitutional approach. It adopts a nature first as opposed to a people first perspective, to identifying species as invasive. This results in species being listed as invasive based on a

¹¹ Invasive species are defined in NEMBA as: "any species whose establishment and spread outside of its natural distribution range-

- (a) threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species; and
- (b) may result in economic or environmental harm or harm to human health;"

The use of the conjunctive **and** between the two sub sections must be emphasised as must the fact that environment is defined in NEMA from a human first perspective as "the surroundings within which humans exist and that are made up of-

- (i) the land, water and atmosphere of the earth;
- (ii) micro-organisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; **and**
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being;" (emphasis added)

It follows that South Africa's definition of the environment reflects a people first approach because nature (as described in (1) to (ii) is defined in relation to its influence on human health and wellbeing. It follows that the environmental harm referred to in the definition of invasive is a reference to the effect of such threats to nature, (i.e. ecology) have on human health and wellbeing. This interpretation is in line with the human centred focus of section 24 of the Constitution and the National Environmental Management Principles set out in section 2 of NEMA.

definition that is different to one described in NEMBA. This alternative definition focuses on harm to nature rather than harm to human beings caused by significant threats to nature. This alternative approach has resulted in a much longer list of species being listed as invasive by the Minister of Environmental Affairs.¹²

- 7.6 It is important to highlight the fact that we have on many occasions, as part of the informed public consultation required under both NEMA and NEMBA, requested the full rationale and reasons relied upon, so that we could understand what informed the Minister's decision to list these species. To date no such information has been forthcoming from the DEA on behalf of the Minister. We have instead been refused that information on the basis that it is beyond DEA's resources to provide this. This further bolsters the view that the wrong considerations have in fact informed the listing of such species.
- 7.7 This nature first approach ignores the people first essence of the environmental right and the NEMA principles and will result in a situation where an increasingly long list of biological resources will be subject to unnecessary and impractical permitting by DEA because DEA believes that this is required in order to protect nature from and to control human beings.
8. We say that DEA is abusing its authority to force through its nature first approach despite the law requiring a people first focus.
- 8.1 It adopts a "see you in court approach" and tells the public that it is rewriting NEMBA thus placing any litigation at risk of becoming moot as a result of changes in the legislation¹³.
- 8.2 This coupled with a Stalingrad approach to litigation (the Kloof Conservancy Case¹⁴ and the Rhino Horn Moratorium Case¹⁵ are both examples of this) discourages most ordinary citizens from challenging what are obviously unlawful attempts to misuse NEMBA by holding DEA and/or the Minister accountable in court.

¹² DEA ignored the legal definition of NEMBA and instead used this definition set out in its National Strategy for Dealing with Biological Invasions in South Africa that was published on 27 March 2014 (the Strategy Document). It chose instead to apply the definition of control contained in that Strategy Document:

"species that sustain self-replacing populations over several life cycles, produce reproductive offspring, often in very large numbers at considerable distances from the parent and/or site of introduction, and have the potential to spread over long distances."

The application of this definition resulted in 559 species being listed as invasive in 2014. This list was reduced to 554 species as a result of amendments to the invasive species lists in 2016.

¹³ We have been told by DEA that it will see us in court over its abusive application of NEMBA insofar it applies to invasive species. We have also been told that NEMBA is going to be replaced with new legislation aimed at invasive species.

¹⁴ The court made a penal award of cost against DEA as a mark of its displeasure regarding the way this litigation was conducted.

¹⁵ DEA took this matter all the way to the Constitutional court even though it knew that its case had no prospects of success.

9. We are concerned that this overriding need amongst environmental authorities to be in control¹⁶ is impacting negatively on the economy, is detrimental to sustainable development and to human health and wellbeing.
 - 9.1 This approach is in fact the opposite of the “reasonable legislative and other measures” that are required to ensure an environment that is not harmful to our health and wellbeing.¹⁷
 - 9.2 This approach does not enjoy public support which is why DEA and its attempts to implement environmental legislation its way rather than in the manner the Constitution and law requires is becoming increasingly unpopular and is honoured in the breach by most South Africans.
10. The trout value chain which we represent has become the canary of the coal mine in this process.
 - 10.1 An agreement was reached at the Operation Phakisa Oceans’ Economy Lab between the trout value chain and DEA in terms of which, trout would not be declared invasive where they occur outside certain nature reserves. The trout value chain supported this compromise though trout are not in fact invasive as the term is defined in law.
 - 10.2 DEA recently reneged on this agreement saying that it intends listing trout as invasive throughout South Africa on terms that are in fact stricter than those that apply to other alien aquatic species like bass or carp.
 - 10.3 DEA who apply a nature first approach insist these species are in fact invasive. DEA wants to eradicate trout in some areas and subject the trout value chain to strict and expensive permitting regimes in others.
 - 10.4 This idea that trout can be listed as invasive and managed by permitting restricted activities for beneficial use is not lawful, though the Minister has tried to introduce a regulation that purports to make it so. This “category 2 regulation” is contrary to the purpose of listing invasive species and is ultra vires and self-contradictory. If restricted activities pertaining to trout can lawfully be permitted in an area because they have a negligible impact on biodiversity and no harm to human health and wellbeing is established then the species should not be listed as invasive in that area. Accordingly there should be no need for such listing in the first place.
 - 10.5 DEA’s actions both in trying to list trout as invasive and in reneging on its promise not to do so has seriously affected the health and growth of this value chain to the detriment of the

¹⁶ This is not an isolated case. All alien species (i.e. any species introduced into South Africa by human beings at any time during our existence are defined as alien) cannot lawfully be used without a permit unless the species has been exempted by the Minister. Amendments to section 81 of NEMBA in 2009 dealing with bioprospecting mean that any commercial use of indigenous species is similarly unlawful without a permit unless the species has been exempted by the Minister.

¹⁷ Section 24(b) of the Constitution of the Republic of South Africa Act, No. 108 of 1996.

economies of towns like Dullstroom, Underberg and Rhodes not to mention the trout value chain itself.

11. What is happening to the trout value chain is the tip of the iceberg. DEA's nature first approach and the unlawful way it is going about achieving this purpose is harmful to the people centred environment right that is defined in South African law. It is also contrary to the environmental principles set out in section 2 of NEMA and is harmful to human health and wellbeing.

Conclusion:

12. These representations have been made as an introduction to the issues raised therein. We can back up all these representations with more detailed facts and legal arguments should this be required and requested. These have been omitted from these representations in the interest of brevity.
13. We ask that public hearings be held so that these important issues can be ventilated and discussed.
14. Should you have any queries arising from these representations, kindly feel free to contact us and we will endeavour to address these.

Yours faithfully

The image shows two handwritten signatures in black ink. The signature on the left is a cursive, somewhat circular scribble. The signature on the right is a more elongated, horizontal scribble with a distinct tail.

Ilan Lax and Ian Cox
For Trout SA and FOSAF