

**Lists and Regulations published by the Minister of Water and Environmental Affairs
for public comment pursuant to
the National Environmental Management: Biodiversity Act No. 10 of 2004**

Supplementary Comments

on the proposed

Alien and Invasive Species List

and Regulations

Submitted on behalf of

Trout SA

And

The Federation of Southern African Fly Fishers

(FOSAF)

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1. Executive summary

- 1.1 The need for this supplementary submission arises because the DEA notified the parties that it had purported to extend the time for submitting representations after the parties had filed their main submission on 13 March 2014.
- 1.2 This submission supplements the main submission and focuses on:
- (a) the legality of the so called notices that were published in the Gazette on 12 February 2014 and the City Press on 8 March 2014 (the notices); and
 - (b) the legality of the fish sanctuary areas that are referred to in the Regulations.
- 1.3 The parties could not address the fish sanctuary areas in any detail in the submission because they were only shown the maps which demarcate these areas on 24 March 2014.
- 1.4 The parties submit that the notices are unlawful and that as a consequence the consultation process which the DEA is currently engaged in is fatally flawed, because:
- (a) The Minister has not given any information outside the lists and the Regulations themselves that give sufficient information to enable members of the public to submit meaningful representations on the proposed lists and Regulations. The Minister must do this in terms section 100(2)(b) of the NEM:BA.
 - (b) The notices also do not comply with the provisions of sections 99 and 100 of the NEM:BA because:
 - (i) The notice that was published in the Gazette was not published in a newspaper as is required by Section 100(1)(b) of the NEM:BA.
 - (ii) The notice that was published in the City Press:
 - was not published by the Minister as is required by Section 100(1); and
 - is not the same notice as that which appeared in the Gazette on 12 February 2014; and
- thus does not comply with section 100.
- 1.5 The fish sanctuary areas do not exist in law because they have not been identified as such in terms of section 51 of the NEM:BA or any other law. The Minister cannot use the power to list invasive species contained in section 70 of the NEM:BA to create fish sanctuary areas.
- 1.6 The demarcation of fish sanctuary areas in the Regulations by reference to the so called fish sanctuary area maps contained Water Research Commission report TT500/11 is unlawful because those maps:

- (a) have not been published in the Gazette as is required by Section 19 of the Interpretation Act, No. 33 of 1957 (the Interpretation Act);
- (b) do not demarcate fish sanctuary areas;
- (c) are not produced in sufficient detail to show which properties fall inside the fish sanctuary areas; and
- (d) are unintelligible.

1.7 The Minister has not consulted with the individual landowners whose rights will be affected if their properties are included in fish sanctuary areas as is required under section 4 of the PAJA.

2. Introduction

2.1 Acronyms used in the submission have the same meaning in this supplementary submission.

2.2 The parties attended an informal stakeholder meeting (the informal stakeholder meeting) which was convened by the DEA on 6 March 2014.

2.3 As a result of questions posed by the parties at that meeting the DEA revealed that it had not published the notice which appeared in the Government Gazette inviting public comment in a newspaper as is required in terms of section 100 the NEM:BA.

2.4 In addition the parties and other stakeholder groups elicited certain undertakings from the DEA which were summarised at the end of the workshop and recorded by the parties in an email sent by FOSAF chairperson Ilan Lax to Dr Guy Preston on 7 March 2014. A copy of this email is annexed to this supplementary submission marked "A". To date there has been no adequate reply to the email.

2.5 The parties nonetheless submitted a 68 page submission to the Minister by email on 13 March 2014 but pointed out at paragraph 3 of their submission that the process was fatally flawed. In particular the parties pointed out:

- (a) *The parties submit that the process currently under way is fatally defective and will need to be started again in order for the Minister to comply with the public participation process required in terms of section 99.*
- (b) *The parties also submit that that the Minister must, when republishing the Notices, also make available the fish sanctuary area maps and the reasons for each proposed listing. A failure to do means that the Notices will not contain sufficient information to enable members of the public to submit meaningful representations or objections as is required by section 100(2)(b) of the NEM:BA.*

2.6 On the last day for filing submissions, namely 14 March 2014, The DEA advised attendees of the informal stakeholder meeting that *the afore-mentioned notice was published in the*

City Press on 9 March 2014 with a new submission deadline of 8 April 2014 for stakeholder comments. A copy of that email and the advertisement are annexed to this supplementary submission marked “B” and “C” respectively.

- 2.7 Attendees were notified in the same email that *the DEA is working on publishing the maps referred to in Regulations on the DEA website and communication will be sent to all attendees as soon as these are available on the DEA website.*
- 2.8 Ian Cox who attended the informal stakeholder meeting on behalf of Trout SA sent an email to Ms Sishuba on 17 March 2014 advising that the advertisement that appeared in the City Press was not the notice that must be published in a Newspaper and complaining that the process was fatally flawed. A copy of that email is annexed marked “D”.
- 2.9 Linda Garlipp of the DEA responded on 24 March 2014 and Ian Cox replied on 4 April 2014. Those letters are annexed marked “E” and “F” respectively. The annexures to Ian Cox’s letter have been omitted in order to avoid repetition. A table has been substituted for those annexures that cross references them to annexures in this supplementary submission.
- 2.10 A further email was sent to attendees on 24 March 2014 advising that the link to the electronic version of the maps was published in an advertisement that appeared in the City Press on 23 March 2014. A copy of that advertisement is annexed to this supplementary submission marked “G”.
- 2.11 Finally FOSAF chairperson Ilan Lax sent a further email to Dr Guy Preston on 4 April 2014 noting that of the matters agreed to at the informal stakeholder meeting and confirmed in Annexure A, the record of that meeting and the Minister’s reasons for the proposed exercise of power had still not been made available, the other matters were the subject of other correspondence (Annexures D, E and F respectively) and that the consultation process would need to be restarted once all the correct information had been made available by the Department. A copy of that email is annexed marked “H”.

3. The DEA’s undertakings

- 3.1 The DEA has not complied with the undertakings it gave at the informal stakeholder meeting. In particular it has failed:
- (a) To make the recording of the informal stakeholder meeting available to attendees of the meeting despite being asked to do so.
 - (b) To provide the Minister’s reasons for every proposed listing of invasive species including all relevant factors and, the considerations and evidence applied as well as the reasoning by which each decision was arrived at.
 - (c) To ensure that the 30 day consultation process only started once proper notices had been published, the map references were available and the above reasons had been given.

3.2 It is important to note that the DEA does not deny that these undertakings were given. It merely contends in a letter addressed by the DEA's Linda Garlipp to Ian Cox on 24 March (Annexure "E") that it has done enough to comply with the process required in terms of sections 99 and 100 of the NEM:BA.

4. The notices

4.1 Introduction

- (a) **The parties submit that the notices are fatally defective in a number of respects both in substance and in form and that consequently any attempt by the Minister to make the lists or Regulations law will be fatally defective.**
- (b) The parties deal extensively with the obligation to consult in paragraph 8 of the submission. The obligation to consult under the NEM:BA has to be seen in the context of the Constitutional and legislative scheme outlined in that paragraph.
- (c) Proper notification of the proposed exercise of power is a vital incident of that process as is the right to be sufficiently informed so as to be able to make meaningful representations or objections. Thus sections 99 and 100 state:

99 Consultation

- (1) *Before exercising a power which, in terms of a provision of this Act, must be exercised in accordance with this section and section 100, the Minister must follow an appropriate consultative process in the circumstances.*
- (2) *The Minister must, in terms of subsection (1)-*
 - (a) *consult all Cabinet members whose areas of responsibility may be affected by the exercise of the power;*
 - (b) *in accordance with the principles of co-operative governance set out in Chapter 3 of the Constitution, consult the MEC for Environmental Affairs of each province that may be affected by the exercise of the power; and*
 - (c) *allow public participation in the process in accordance with section 100.*

100. Public participation

- (1) *The Minister must give notice of the proposed exercise of the power referred to in section 99-*
 - (a) *in the Gazette; and*

(b) *in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.*

(2) *The notice must-*

(a) *invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power; and*

(b) *contain sufficient information to enable members of the public to submit meaningful representations or objections.*

(3) *The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person delegated by the Minister.*

(4) *The Minister must give due consideration to all representations or objections received or presented before exercising the power.*

4.2 Strict compliance

(a) **The language of these sections is peremptory. This is what one would expect of laws intended to secure rights enshrined in the Constitution.** Thus:

(i) The Minister must, *inter alia*,

- give notice; and
- allow a public participation process;

as required by section 100 before promulgating lists or Regulations.

(ii) The Minister must give notice of the intention to exercise that power in the Gazette and in at least one newspaper.

(iii) The notice must:

- *invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power; and*
- *contain sufficient information to enable members of the public to submit meaningful representations or objections.*

(b) **As Ian Cox pointed out in his email to Ms Sishuba on 14 March 2014:**

- (i) **The section says *must*, not may or should have a jolly good try. Must means just that. The Minister either complies or she does not. Getting close is not good enough.**
- (ii) **Compliance with these requirements is the legal bedrock of South Africa's democracy as proper consultation cannot take place without it.**
- (c) **Any attempt to exercise power in the absence of that strict compliance would be unlawful and us such unenforceable and liable to be set aside.**

4.3 The City Press advertisement

- (a) The publication of a notice in the Gazette is not sufficient because the NEM:BA says that the notice must be published in the Gazette as well.
- (b) The advertisement that appeared in the City Press on 8 March 2014 is not the notice referred to in Section 100(1)(b) of the NEM:BA.
 - (i) As Ian Cox points out in his letter to Ms Garlipp dated 4 April 2014, that advertisement was not published by the Minister as is required by section 100(1) of the NEM:BA. That section says that the *Minister must give notice*. But the parties now know that the Minister did not do so. Ms Garlipp has informed Ian Cox that the DEA published the advertisement that appeared in the City Press. The Minister had nothing to do with it.
 - (ii) Section 100 requires that the same notice be published in both the Gazette and in a newspaper. Section 100 refers to one notice. Section 100(1) states *The Minister must give notice*. Section 100(2) states that *the notice* (i.e. the notice referred to in 100(1)) must be published in the Gazette and in a newspaper. The advertisement that was published in the City Press on 8 March 2014 is patently not the notice that was published in the Gazette on 12 February 2014. It only makes reference to an address or URL at which the real notice can be accessed on the internet.
 - (iii) The notice that appears in the Gazette calls for representations to be submitted within 30 days of its publication. This is what is required in terms of section 100(2)(a) of the NEM:BA. The advertisement gives 14 April as the date by which submissions must be made. That is not the date contemplated by section 100(2)(a) of the NEM:BA.
 - Firstly it calls for representations to be made by 8 April 2014 with is more than 30 days after the publication of the notice in the Gazette.

- Secondly it is not the same date as the date referred to in in the Gazette.

4.4 The DEA's defence

The DEA sought to defend this notice on the basis that the 30 day period was a minimum period and not a maximum period. (See Ms Garlipp's letter of 24 March 2014. (Annexure "E"). Thus it is claimed that the DEA may extend the deadline.

4.5 The parties respond

- Section 100(2)(a) states that the notice must invite members of the public to submit representations to the Minister, *within 30 days of publication of the notice in the Gazette*.
- That is patently not a reference to a minimum period. The use of the word "within" clearly makes the thirty days a maximum period.
- Moreover, the intention of the Legislature is obvious. By stating a maximum period the legislature has created a safe harbour for the Minister who cannot be criticised for stipulating the maximum period permissible under statute for consultation. If the determination of maximum period lies in the discretion of the Minister as Ms Garlipp suggests then the flood gates would be opened to a range of objections premised on the argument that insufficient time had been given.
- The suggestion that it can be interpreted as referring to a minimum period is thus patently absurd.
- The Minister does not have the power to extend the deadline. This is because nothing in the NEM:BA gives the Minister this power. In any event the Minister does not purport to do so. Officials in the DEA have purported to extend the deadline even though they have no authority to do so.

5. The fish sanctuary area maps

5.1 Introduction

- The parties submit that the maps are defective in a number of respects both in substance and in form and that consequently any attempt by the Minister to make them law will be unlawful.**
- The parties have had insufficient time to deal properly with the fish sanctuary area maps and the consequences these maps have for the trout industry. What follows is what could be cobbled together in the two weeks that were available to the parties.

- (c) **These representations are therefore preliminary in nature and the parties reserve the right to further supplement this submission should further and better information become available.**
- (d) The parties representations regarding the maps will focus on four main areas:
 - (i) First, the parties will look at the maps themselves. (Paragraph 5.2)
 - (ii) Second, the parties will look at the impact listing trout as invasive in these areas will have on the trout industry. (Paragraph 5.3 and 5.4)
 - (iii) Third, the parties will complain about the insufficiency of the time members of the public have been given to make representations or objections. (Paragraph 5.5)
 - (iv) Fourth, the parties will look at some of the legal and technical difficulties that are inherent in seeking to create fish sanctuary areas in the manner this has been done in the Regulations. (Paragraph 5.6 to 5.11)

5.2 The maps

- (a) **The fish sanctuary area maps and the report that contains them are a tool to aid government in its planning and law and policy making. They are not law nor do they constitute policy in themselves.**
- (b) The fish sanctuary area maps cannot be seen in isolation as they form part of the report which must be read in conjunction with the two other reports that support it. These are:
 - (i) the Technical Report for the Freshwater Ecosystem Priority Areas Project (WRC Report No. 1801/2/11) (the technical report); and
 - (ii) the Implementation Manual For Freshwater Ecosystem Priority Areas. (WRC Report No. 1801/1/11).
- (c) The Regulations make no mention of these reports. Their significance only becomes apparent once one reads the report. The pack of three reports makes up 361 pages of what is often dense technical writing. A proper understanding these reports and the maps are therefore a vital component of the consultation process and the public's ability to make meaningful representations or objections.
- (d) **The fish sanctuary area maps and the report are unclear and confusing.** Given this and that they are unaccompanied by sufficient information giving them context and meaning, has caused considerable consternation since they were first revealed to the public. This confusion and consternation is growing as more and more as South Africans learn of them and their implications and consequences.

- (e) The report contains two sets of maps that purport to identify fish sanctuary areas.
 - (i) The fish priority area maps that appear at pages 14 to 33 of the report; and
 - (ii) the fish sanctuary areas map that appears at page 42.
- (f) **The Regulations refer to the former but that map does not demarcate fish sanctuary areas.**
 - (i) A fish sanctuary should have precise boundaries that precisely show the boundary between those areas and the areas adjacent to them.
 - (ii) Red and black fish placed on a map does not achieve this purpose.
 - (iii) The purpose of the maps to which the regulation refers is not to demarcate a fish sanctuary area but to locate threatened fish species on a map.
- (g) The map that is depicted on page 42 a copy of which is annexed marked “I”:
 - (i) Is entitled “fish sanctuary areas” but it is not the map referred to in the Regulations.
 - (ii) It does not demarcate the fish sanctuary areas referred to in the Regulations.
 - (iii) It is also too indistinct to be intelligible.
- (h) **The fact of these two, apparently contradictory, map sets has caused huge confusion in the public with the result that no one who has been alerted to the significance of these maps, not even the parties, can tell where the so called fish sanctuary areas actually are.**
- (i) The reference to the fish sanctuary areas in the Regulations is accordingly unclear and confusing and thus unenforceable on this ground alone.
- (j) **There is also a lack of any information in either the fish sanctuary area maps or in the report as to why an area has been demarcated as a fish sanctuary area.**
 - (i) It is not possible, for example, to determine which threatened fish species is allegedly found in a particular area. There is no reference to the research that establishes this.
 - (ii) Though the economic usefulness of species such as trout is recognised in passing there has been no attempt to balance this against the need to preserve a particular species in particular areas. The assumption seems

to be that the health and wellbeing of an indigenous species must always outweigh the economic and social benefits offered by trout.

- (iii) There also seems to be no recognition of the fact that trout have inhabited the waters concerned for a very long time, in many cases up to 125 years. The fact that other species are still found in these waters suggests that trout and these species have found a natural balance.
 - (iv) What the DEA proposes to do is to re-engineer that balance by a process of human intervention to try and recreate a historical scenario that may or rather is presumed to have occurred prior to the introduction of trout. An environmentalist previously in the employ of Ezemvelo KZN Wildlife described this goal as an attempt to restore our rivers to their pre-colonial state.
 - (v) This is justified on the basis that it is necessary to protect threatened indigenous biodiversity. The DEA admits that this is impossible. It has even gone so far as to raise this impossibility as a defence to calls made on it, such as from the Kooi Conservancy, to implement the NEM:BA. However, the DEA does not explain why it is still necessary to make the attempt even if this involves the destruction of the trout industry and its positive contribution to human health and wellbeing.
- (k) Electronic versions of the fish sanctuary area maps were made available at the request of attendees at the informal stakeholder meeting on line at <http://www.invasives.org.za/item/587-fish-sanctuaries-map-for-south-africa.html>. However those attendees were only advised of this on 24 March 2014.
- (i) It must be emphasised that the electronic maps are not the maps referred to in the Regulations and thus have no status in law.
 - (ii) It is not possible to proclaim laws electronically at present because the Interpretation Act requires that laws be published in the Gazette.
 - (iii) These electronic maps are not easy to access or to interpret.
 - The electronic maps are not readily accessible to the public. One requires a high speed internet connection. A special viewer must be downloaded in order to access the maps and a considerable degree of skill is required to interpret them.
 - This was confirmed by a GIS mapping expert who informed a meeting that Trout SA convened of Mpumalanga trout industry stakeholders held on 2 April 2014, that the electronic maps would be incomprehensible to anyone lacking GIS mapping expertise. This has been confirmed by many interested and

affected parties who have complained to the parties that they cannot make head or tail of the electronic maps.

- (iv) These electronic maps are however the only way the parties have been able to identify which areas fall within the fish sanctuary areas.
- Even this is not easy. The maps have to be adjusted before they can be viewed as required. This is not easy to do.
 - The maps once adjusted do not contain any easily recognisable reference points such as towns or roads. The user must work out how to add these in.
 - The layer of the map that shows the fish sanctuary areas does not, for example, depict river names or any roads at all which makes it difficult to locate particular areas.
 - The legend (shown at right) describes two types of fish sanctuaries, those demarcated in pink orange and red and those demarcated in various iterations of green. It is not clear if one or both of these are fish sanctuary areas as contemplated in the Regulations. There is no legend on the maps which appear at page 42 of the report.
 - It is unclear from the electronic maps what is meant by the reference to (1) (2) or (3 – 7) in the legend. The instructions refer to symbols such as red fish, black fish and letters like CR and EN that do not appear on the online maps. One has to study the report and the technical report to work out what this means. The definition of the fish sanctuary maps does not extend to these other reports.
- 
- (v) The parties sent an email to Linda Garlipp of the DEA seeking clarification immediately these maps became available, but she has not responded. A copy of that email is annexed marked "J".
- (vi) The map that was made available online on 24 March 2014 is not the same as the fish sanctuary area map referred to in the Regulations. They are visually dissimilar.

5.3 The extent of the impact of fish sanctuary areas on the trout industry.

- (a) The parties have had insufficient time to study the fish sanctuary maps in any detail. **Most of the important trout waters in South Africa have been indicated as fish sanctuary areas** and include:
- (i) Most of the trout waters in the Belfast, Dullstroom and Lydenberg districts are demarcated as fish sanctuary areas according to the electronic maps. This includes Lunsklip which is one of South Africa's largest trout farms as well as countless trout tourism destinations. Verlorenkloof, Millstream and Walkersons are but three examples, but there are dozens more.
 - (ii) The same is true of most of the trout waters around Waterfall Boven as well as the fisheries in Badplaas and Carolina.
 - (iii) The famous trout waters of the 100 year old Haenertsburg Trout Association and indeed the whole Magoebaskloof and Wolkberg areas.
 - (iv) The economically important KwaZulu Natal Midlands trout waters are all demarcated as fish sanctuary areas. This includes most of the water operated by the Natal Fly Fishers Club as well as that of the Natal Fly Fishers Association and the trout tourism fishery run by Wild Fly . Also included in this is the Umngeni Catchment including the Inhluzane and the iconic trout waters situated in that area. This includes the trout fishing resorts Tillietudnum, Star Dam, Lyndhurst as well as syndicated waters such as Heatherdon, Rainbow Lakes, Hastings and Innesfin.
 - (v) Most of the tourism rich Underberg Himeville district is also demarcated as a fish sanctuary area as is the entire Drakensberg fishery with the exception of a tiny patch of the Bushman's river.
 - (vi) A large part of the east Griqualand and Swartberg trout waters have also been demarcated as fish sanctuary areas.
 - (vii) The Rhodes and Barkley east districts with the trout tourism fishery run by Wild Trout Association have also been declared fish sanctuary areas as has Lady Grey.
 - (viii) The trout fisheries around Grahamstown including the important aquaculture research and facility that is University of Rhodes trout farm have also been declared a fish sanctuary area.
 - (ix) The trout fisheries in the Western Cape including the trout hatcheries that exist there have also been declared fish sanctuary areas.
- (b) **Most of the large commercial trout farms in South Africa are found in these areas.** Other trout farms that do not lie within these areas are surrounded by them which mean that permits have to be obtained before trout can be

transported in or out of the trout farms. Trout farm owners who have been contacted by the parties regarding these maps, have expressed disbelief regarding their contents.

- (i) They complain that no one has consulted them regarding these maps and that say that they will be threatened with closure if trout are listed as invasive in the fish sanctuary areas.
 - (ii) **This will destroy South Africa's largest freshwater aquaculture industry. Also because most of South Africa's trout fisheries are sustained by continued restocking most trout fisheries will also cease to exist.**
- (c) **The parties have had insufficient time to investigate the full impact that listing trout in fish sanctuary areas will have on the trout industry but it is clear that it will be catastrophic.**
- (i) Landowners in these areas will be legally obliged to combat and control the trout in their area. As has already been pointed out this obligation is incompatible with the maintenance and commercial exploitation of those fisheries. Stocking cannot be allowed under the NEM:BA in these areas meaning that these fisheries will ultimately close down.
 - (ii) There is also the very high risk that is associated with carrying on a trout business in an area where trout are listed as invasive. The DEA have made it very clear that they will financially ruin or even imprison any landowner who contravenes his or her permit or whose trout happen to escape from the area they must be confined to.
- (d) It is not just the DEA who threaten this. The Kloof Conservancy have taken the DEA to court complaining that the DEA is taking too long to list species as invasive. In the latest replying affidavit filed by the Kloof Conservancy they state:
- NEMBA makes no mention of either an "Invasive Species Management Programme" or the concept of "containment".The only conceivable way to achieve this is to eradicate them, which is precisely what NEMBA requires and what the draft regulations purport to defeat by deferring indefinitely the duty to control and eradicate them, which deferral flies directly in the face of NEMBA's core peremptory requirements.¹*
- (e) **As the parties have pointed out in paragraph section 73 of the submission, NEM:BA gives members of the public powerful rights to intervene in cases where invasive species are not being controlled through a regime of eradication or prevention. This case is therefore just the tip of what is a very large iceberg.**

¹ Paragraph 26 of the February 2014 Replying Affidavit

5.4 The roadshows – early indications of significant economic harm

- (a) The parties immediately began the process of identifying and engaging with landowners in affected areas upon receiving the electronic maps on 24 March 2014. It is impossible to do justice to this in the two weeks available to the parties given the complexity of the maps and the thousands of landowners involved.
- (i) The parties are conducting roadshows to better gauge the situation but at time of writing this submission have learnt that:
- No studies have been undertaken of the economic impacts of this proposal. There has been none of the careful planning referred to in the passage in the technical report which is quoted in paragraph 6.1.
 - None of the landowners contacted by the parties had been told that their properties lie within a fish sanctuary area by the DEA.
 - The DEA had not consulted with them regarding either the mapping process or the consequences of demarcating their properties as fish sanctuary areas.
 - There is a very real concern that listing trout as invasive as proposed will result in the closure of their businesses with the resultant economic harm and job losses.
- (ii) Only one roadshow could be held in the time that is available. The parties were able to make a presentation to stakeholders in the Mpumalanga trout industry. The meeting was attended by 35 representatives of trout farms and trout tourism venues from the Dullstroom and Lydenberg districts.
- Those present represent businesses that have billions of rands invested in trout related property and infrastructure.
 - The number of attendees was remarkable given the short notice.
 - They confirmed that their businesses either fall inside fish sanctuary areas or supply customers in the trout industry that do.
 - Attendees unanimously endorsed the Trout SA and FOSAF submissions and assured both organisations of their full support.

- **They said that the impact of listing trout in these areas would be so severe that opposing this is a matter of survival. They will challenge this listing if it is promulgated by the Minister.**

(iii) Further roadshows are being planned for KZN, Limpopo and the Eastern Cape. These will only take place after the deadline for submissions.

5.5 The lack of sufficient time to make meaningful representations

(a) “fish sanctuary areas” are referred to in the Regulations as:

the fish sanctuary areas demarcated in the National Freshwater Ecosystem Priority Area maps published by the Water Research Commission in Report TT500/11 as amended from time to time.

(b) The parties were not able to make meaningful representations about the nature or extent of the fish sanctuary areas maps in its submission or the effect these would have on the trout industry because they did not have the Water Research Commission report TT500/11² referred to in the Regulations (the report) when the submission was made. This is because:

(i) Neither the Water Research Commission report TT500/11 (the report) nor were the fish sanctuary area maps published in the Gazette.

(ii) The report couldn’t be accessed by searching the Water Research Commission web site. This is dealt with in Ian Cox’s letter to Linda Garlipp dated 4 April 2014 (Annexure “F”). The screenshot showing that the report still cannot be found by searching that site is annexed to this supplementary submission marked “K”.

(c) The parties were only able to access the report online with the assistance of a Professor in the Department of Ichthyology at Rhodes University on 25 April 2014. It still isn’t accessible to the public.

(d) The maps demarcate a huge proportion of South Africa’s trout waters as fish sanctuary areas. Many of the areas so demarcated are major fishing areas of vital importance to the viability and continued survival of the trout industry.

(e) **But the significance of the fresh water sanctuary maps and the relevance of these reports have been concealed from the public.**

² Ian Cox was given a copy of a document entitled ATLAS OF FRESHWATER PRIORITY AREAS IN SOUTH AFRICA at the informal stakeholder meeting but was told that the maps published in it were not the fish sanctuary area maps referred to in the regulation. It was only when the URL to the report was made available that he realised that the Atlas was the report.

- (f) As Ian Cox pointed out in his letter to Ms Garlipp dated 4 April 2014 (Annexure “F”) the public is being told that a very different story to that contained in these reports.
- (g) Despite the fact that these maps demarcate nearly all South Africa’s trout waters as fish sanctuary areas, Dr Preston is quoted in the Sunday Tribune and Sunday Independent of 23 March 2014 as saying:

“In most parts of the country - where the species already occur - there will be no restrictions on the farming of trout species in dams. Trout will also be allowed to be fished in most parts of the country, including catching and releasing the species, without a permit”

That report was widely read with the result that the public has been misled as to the DEA’s true intentions and the full implications of the proposed lists and Regulations.

- (h) **Individual landowners many of whom are owners in resorts where hundreds of millions of rands have been invested on the basis of the trout fishing that is offered have not been informed that their rights will be seriously affected by this.**
- (i) **There has similarly been no attempt to consult with other affected parties such as Trade Unions, landowners, trout tourism, the tackle industry or recreational fishing. The technical report shows that FOSAF was not included as one of the interested parties that were consulted on the compilation of the maps that form part of the report and neither were representatives from the abovementioned industries.**
- (j) Indeed as Ian Cox pointed out in his letter to Ms Garlipp:
- (i) Dr Preston wrote to Mr Lax on 10 January supplying FOSAF with draft lists regulations and maps on a confidential basis for comment. Similar documents were supplied to other stakeholders. This is what he said about those maps.

The second key component is that the transfer / introduction of any invasive fresh-water fish species into any Fish Sanctuary Area as shown in the map, or into any of four Protected Areas (National Parks, Provincial Nature Reserves, Mountain Catchment Areas or Forestry Reserves), is prohibited, except for the existing permits mentioned in the Transitional Arrangements in #1. There are a caveat here. The map on page 59 is an interim map, and I shall be finalizing it tomorrow. That said, it is our intention to develop these maps further, together with stakeholders, and incorporating concepts from the maps done by Dr Swartz with the industries, within the next two years.

- (ii) The map is annexed to this supplementary submission marked “L”. If that map was:
- Intended to depict the fish priority area maps contained in the report; or
 - was to be adjusted to look like the map that appears at page 42 of the report the following day;

then Dr Preston knowingly misled FOSAF by sending it the map which is annexure “L”.

- (iii) The delay in making the fish sanctuary area maps available takes on a sinister aspect when viewed in this light.
- (iv) The updated maps were not made available despite the parties asking for them. The map was omitted from the draft regulations and as the parties have pointed out, the Water Research Commission report which had been published some two years earlier was not readily available.

- (k) **As a result of the above very few people who are likely to be affected by this are aware of the existence of these fish sanctuary areas or the effect of listing trout as invasive in them.**
- (l) **There is also a very serious concern that the economies of the affected areas will be badly harmed as a result of this.**
- (m) The fact that their publication was delayed until less than two weeks before the termination of the 8 April 2014 deadline imposed by the DEA means that interested parties have not had sufficient time to consider those maps so that they can make meaningful submissions or objections.
- (n) This is true both in fact and law. Even now in the week before the due date for filing, the parties are learning of interested parties who are unaware that their rights will be affected.
- (o) This fact alone renders this entire process fatally defective and will make any lists or regulations published pursuant to these lists unlawful.

5.6 Incorporation by reference

The Regulations demarcate fish sanctuary areas by reference to maps that are have not published in the Gazette as part of the Regulations or any other law. This is unlawful.

- (a) Section 16 of the Interpretation Act requires laws, regulations and notices of the kind contemplated in section 70 of the NEM:BA to be published in the Government Gazette.
- (b) This means the whole law and this is made clear by section 16A(1) which states:

If the President is satisfied that the publication of the Gazette cannot be effected or is likely to be seriously delayed as a result of circumstances beyond the control of the Government Printer, he may by proclamation published in the manner directed by him, make such rules as he may deem fit for the publication, during any period specified in the proclamation, of laws or notices required or authorized by law to be published in the Gazette

- (c) The President has not published any such rules.
- (d) The constitutional underpinnings for the requirement that laws be published in the Government Gazette is to be found in section 101(3) which states that:

Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.

- (e) Neither the maps nor the regulations are readily accessible to the public. Publication of the maps on the internet does not make them readily accessible. Many South Africans, especially those who live in fish sanctuary areas or whose livelihood depends on them do not have access to the internet.

5.7 The problem with “as amended from time to time”

- (a) The regulation describes the maps as being those described in the fish sanctuary area maps contained in the report *as amended from time to time*.
- (b) Literally interpreted means that the Water Research Commission can list trout or indeed other species as invasive or delist them for that matter merely by amending the maps. That is an unlawful delegation of powers.
- (c) The Water Research Commission does not have the power to make or amend law.
- (d) The lists of invasive species can only be amended by the Minister and then only after following the consultation process prescribed by sections 79, 99 and 100 of the NEM:BA.

5.8 The power to create fish sanctuary areas

- (a) **The reference to fish sanctuary areas is misleading as there is no law outside the Marine Living Resources Act No. 18 of 1998 that allows the establishment of such an area. The term fish sanctuary area has no legal meaning and the Minister’s adoption of the term in the Regulations does not change this. It is slang used to give substance to something that does not legally exist.**
- (b) The report does not mean to create fish sanctuary areas. It is entitled “*Atlas of Fresh Water Ecosystem Priority Areas in South Africa*”. The report states at page 1 that it is intended to *inter alia* inform the listing of threatened species.

- (c) This report was not produced as a result of any public consultation process. It was never advertised so that members of the public could comment on it nor was any landowners informed that their rights would be affected as is required by section 4 of the PAJA.
- (d) This is because the document was never intended to have the force of law. It is a just a piece of research that may as the report suggests inform the listing of an invasive species.
- (e) The NEM:BA legislates a process for protecting threatened or protected ecosystems and species that is set out in Parts 1 and 2 of Chapter 4 of the NEM:BA.
- (f) Section 52 of the NEM:BA gives the Minister and a provincial MEC the power to declare ecosystems that are endangered and are in need of protection. The Minister can do so in relation to one or more of the categories listed in section 52(2).
- (g) Sections 53 and 54 allows the Minister to identify threatening processes or activities and obliges authorities to take this into account in their environmental management plans developed and implemented in terms of the National Environmental Management Act or the NEMA and their integrated development plans in terms of the Local Government: Municipal Systems Act, 32 of 2000.
- (h) The notice referred to in paragraphs 5.8(f) and 5.8(g) above requires the same consultative process as that required in respect of the invasive species lists referred to in section 70 of the NEM:BA.
- (i) The Minister has not listed any ecosystem in terms of section 52, so no fish protected areas such as the so called sanctuary areas exist under the NEM:BA.
- (j) The Minister has no power to list trout as invasive as a means of protecting a threatened ecosystem. The Minister's power to protect such ecosystems is limited to identifying threatening processes and activities which must then be managed under the NEMA and the Municipal Systems Act.

5.9 The power to list threatened species

- (a) **There is no legal basis for identifying threatened species by reference to a fish sanctuary area map. Threatened species need to be identified as such under the NEM:BA.**
- (b) Section 56 of the NEM:BA allows the Minister to publish national lists of species that are threatened and are in need of protection. This right is not extended to MEC's under the NEM:BA. The NEM:BA was amended on 24 July 2012 to allow these lists to be further defined, inter alia, by area.

- (c) Section 57 prohibits restricted activities in relation to listed threatened or protected species without a permit and authorises the Minister *to prohibit the carrying out of any activity which is of a nature that may negatively impact on the survival of a listed threatened or protected species; and which is specified in the notice, or prohibit the carrying out of such activity without a permit issued in terms of Chapter 7.*
- (d) The Minister listed 10 species in terms of section 56 in 2007. Though draft lists have been published for comment, no further species have been identified. The Minister has not delineated any species by area nor has the Minister identified any threatening activities.
- (e) The Minister cannot add to this list outside the processes contemplated in Chapter 4 by the stratagem of listing species as invasive.
- (f) The report on the other hand lists some 43 species as being threatened. It does so in terms of the International Union for Conservation of Nature (IUCN) 5 category process. So:
 - (i) 5 species are listed as critically endangered;
 - (ii) 11 are listed as endangered;
 - (iii) 6 are listed as vulnerable;
 - (iv) 5 are listed as near threatened; and
 - (v) the rest, 16 are either data deficient or not threatened.
- (g) The list of threatened species described in the report is not the same as those listed as threatened under the NEM:BA.
- (h) The report is not intended to list species as protected. (see paragraph 5.8(b) to 5.8(d))
- (i) The process of identifying areas in need of protection must follow that set out in chapter 4 of the NEM:BA. The Minister cannot evade this obligation via the device of listing a species as invasive by area on account of the fact that threatened species are found there.

5.10 The power to list species as invasive by area.

- (a) Section 70(4)(a)(i) was amended in July 2014 by the addition of subsection 4 which provides that:

A notice in terms of subsection (1) may apply general throughout the Republic or a province, as the case may be, or only in a specified area or a specified category of areas.

- (b) The purpose of this amendment is to enable the Minister to list a species as invasive with regard to a particular area or category of areas rather than just nationally as was the case before the amendment came into force.
- (c) The section was not amended to enable the Minister to protect allegedly threatened ecosystems or species that have not been listed as such.
- (d) The process of identifying areas or species in need of protection must follow that set out in chapter 4 of the NEM:BA. The Minister cannot evade this obligation via the device of listing a species as invasive by area.

5.11 The abuse of the invasive species category

- (a) Both parts 1 and 2 contain special provisions for the protection of threatened ecosystems and species. Neither part contemplates listing species as invasive merely because they threaten such ecosystems or habitats.
- (b) The DEA incorrectly assumes that a species such as trout is invasive merely because the DEA believe that such species may threaten ecosystems or species. The DEA gives no consideration to the fact that a species is only invasive if the DEA can show that it causes economic harm or environmental harm or harm to human health and wellbeing.
- (c) The notion that trout must be listed as invasive in most of South Africa's premier trout fishing areas merely because of this belief is absurd but then so too is the notion that trout are invasive as that term is defined under the NEM:BA.

5.12 **The failure to give reasons**

5.13 **The failure to give reasons for listing trout or indeed other species is a central theme in the Trout SA and FOSAF submission. The parties record in paragraph 2.5 of the submission that the DEA agreed that the Minister's failure to supply any reasons for each listing amounted to a failure in the consultation process.**

5.14 Despite the DEA giving an undertaking that reasons would be given Ms Garlipp responded (Annexure "E") to Ian Cox's email of 14 March 2014 by saying:

Secondly the regulations and the lists are sufficiently detailed to enable members of the public to provide comprehensive comments on the issue, which is evidenced by your lengthy 68 page comment document which you have sent to the Department. It is not economically possible or feasible to expect the Department to publish all the background information and reasoning which gave rise to the draft regulations and this is not the intention of the section. However, as we confirmed at the recent stakeholder workshop, we will in the interest of openness and transparency make available specific documents or any scientific rationale which you would require in respect of the listed species which relate to your industry, in order to assist with commenting on the draft lists and regulations.

- 5.15 The fact that the parties submitted a 68 page representation is not proof of compliance. If one reads the parties' submission one will see that it deals entirely with legal and governance matters. This is because the parties did not have the information to deal with non-legal issues.
- (a) The parties did not have the all-important fish sanctuary area maps.
 - (b) As the parties have repeatedly pointed out, no policies or norms and standards have been formulated with regards to freshwater environments or how the NEM:BA will be applied. One has no context within which to deal with the assertion that trout are invasive in a particular area or with reference to how or why a particular category has been decided upon or why (in our case) trout have been categorized accordingly.
 - (c) Section 100(2)(a) stipulates that the notice must contain sufficient information to enable members of the public to submit meaningful representations or objections. The DEA say that it is not economically feasible do this but that is what the NEM:BA requires.
 - (i) With the greatest respect if Government lacks the means to publish its reasons for seeking to exercise power then it must lack the means to exercise that power.
 - (ii) Thus either the proposed exercise of power is irrational or the DEA's excuse for the failure to give reasons is irrational or both the above are irrational.
 - (d) The DEA seems to think that it can ignore the NEM:BA when it suites it to do so.

6. The great fallacy

6.1 The technical report that supplements the report states:

Although some of the worst invasive alien fish are also economically valuable (for aquaculture and recreational angling), with careful planning it is possible to support their associated economies and conserve indigenous fish species.

6.2 **This notion is the foundation on which all the DEA's research and planning as regards the implementation of the NEM:BA has been built. The notion is fundamentally flawed. It is a great fallacy that seriously impacts on the quality of much of the research that has been done in relation to so called invasive species.**

6.3 **This is dealt with in the submission but it needs to be restated here. If the DEA cannot show that a species harms human health and wellbeing then a species is not invasive.**

6.4 The notion is incompatible with the obligation of control which means to combat or eradicate or where that 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.

6.5 **The DEA's pursuit of this great fallacy in the face of what is prescribed under the NEM:BA explains why the DEA and the Minister have been unable to implement this law and gives context to the farce which is their attempt to promulgate the lists and regulations.**

6.6 **The fact that the DEA and the Minister are prepared to flout South Africa's laws while demanding that the public obey their dictats is a horrible irony but nonetheless a valuable indication of what happens when officials in a department ignore their legal duties in pursuit of personal agendas that do not form part of public policy or legal requirements.**

7. Conclusion

7.1 The parties make this supplementary submission on the proposed lists and Regulations fully aware that previous submissions have been largely ignored by the Minister and the Department. This is evident from the form and content of the lists and Regulations as published and the subsequent replies received from various officials of the Department. Many of the matters raised in these submissions have been raised repeatedly over many years of interactions and negotiations with officials of the DEA, to no avail.

7.2 The parties reserve their rights to comment further on any additional matters arising, in the event that further and better information or clarification of matters raised is provided by the Minister and/or the Department and its officials.

7.3 Despite the concerns and issues raised and the failure of the Minister to consider previous submissions made, as is evident from the form and content of the lists and Regulations as published and the subsequent replies received from various officials of the Department, the parties nevertheless remain committed to proper consultation in good faith with the Minister and/or the DEA and its officials.

7.4 The parties remain willing to assist the Minister and/or the DEA and its officials in any appropriate manner to facilitate and expedite the implementation of the NEM:BA.

From: Ilan Lax [mailto:hallax@sai.co.za]
Sent: 07 March 2014 06:55 PM
To: 'Guy Preston'
Cc: 'Nomahlubi Sishuba'; 'Radia Razack'; Ian Cox
Subject: RE: NEM:BA Alien and Invasive Species List

Dear Dr Preston

Thank you for the opportunity to attend the meeting yesterday.

You called yesterday's meeting acrimonious. We think that mischaracterises a long overdue frank and open discussion about important matters that have been brushed over as "legalese" and "legal nit picking" for far too long. Your suggestion that we are just trying to delay the process could not be further from the truth. The reason we have worked so hard for so long is not to delay the implementation of this law or to embarrass anyone. The delay getting this law passed has and is doing the trout industry very considerable damage. However this is not a reason to ignore good governance. The lack of good governance is the primary reason for the delay.

Yet again the lists and regulations are being sent back to the drawing board so serious mistakes can be addressed. This should not happen when government makes laws that so materially impact on the lives of South Africans. This is especially the case with the NEM:BA where the DEA has had nearly ten years and the experience of many failed attempts to get this right.

You spoke very passionately of the need to get these lists and regulations promulgated and we would agree with you. However, you must recognise that that the failure to get this law off the ground for so long indicates that the DEA is doing something wrong and that must be merit in the criticism that the DEA is receiving.

There is nothing stopping the DEA from listing a great number of species as either exempt alien or invasive without any controversy or complaint from ordinary South Africans. Yet the DEA chooses not to do so. Instead the DEA is delaying the publication of these lists until it has won the fight to list as invasive, species that whatever their biological impacts, also contribute usefully to the economy and the health and well beings of South Africans. We at FOSAF and Trout SA don't "get" this. It seems to us that the DEA is holding the protection of biodiversity to ransom in the pursuit of what ten years of experience should demonstrate are excessively ambitious goals.

It is necessary to emphasise yet again that the NEM:BA is a Constitutional law intended to give effect to the human right set out in section 24 of the Constitution. Legality in law making and the application of those laws is delivered to a large extent by ensuring that this is done in a procedurally fair way. The law must also be just, which means that inter alia, it must be practical, clear and fair. This is not "legalese" or "legal nit picking". It is a fundamental incident of human dignity and the rights guaranteed to every South African. Borrowing your phrase once again, it is absolutely necessary that the DEA and you in particular "get" this.

As we said yesterday and countless times before, we are willing to help. So if you need to discuss any aspect of the submission or of the lists and regulations, please contact us. We will be happy to assist if we can.

In the meantime we would like to record the following undertakings that were given by the DEA:

1. Recording of the meeting
The meeting was recorded. The DEA undertook to make these recordings available to attendees of the meeting. Please provide us with a copy of the recording.
2. Publication of the Notice .
 - a. The DEA acknowledged that notice was not published in a newspaper as is required in terms of The NEM:BA.
 - b. The DEA is going to rectify this and will as a consequence:
 - i. extend the present 14 March 2014 deadline; and
 - ii. notify those who attended stakeholders' meetings of the new submission deadline by email.
3. The sensitive area maps
 - a. The DEA acknowledged that the sensitive area maps are not readily available.
 - b. The DEA also acknowledged that these maps must be readily available if interested parties are to be able to consult on them.
 - c. The DEA are going to make these maps readily available in electronic format on their website. This fact will be included in any new notices that are published which will also contain a reference to the URL where such maps can be accessed.
 - d. Those who attended stakeholders' meetings will be notified by email when the maps are available.
4. The Minister's reasons for listing
 - a. The DEA will make the Minister's reasons for proposing each listing available, including, the considerations and evidence applied as well as the reasoning by which each decision was arrived at.
 - b. These reasons will include the all relevant factors.
5. Formal Consultations
The 30 day period prescribed under the NEM:BA will only run once all of the above has been done.

Kindly acknowledge receipt hereof.

We look forward to hearing from you.

Yours sincerely

Ilan Lax

From: Nomahlubi Sishuba [mailto:NSishuba@environment.gov.za]
Sent: 14 March 2014 08:57 AM
To: Yolanda Nodendwa
Subject: NEMBA Regulations and associated species Lists

Good morning All

Thank you for your active participation in the stakeholder engagement meeting that was held in Pretoria on 6 March 2014. We would like to extend our sincere apologies for any inconveniences caused with regards to logistical arrangements.

As we may all recall, during the meeting, the DEA acknowledged its failure to publish the notice pertaining to the publication of the draft Alien and Invasive Species Regulations in a national newspaper as required in terms of NEMBA. To this end, the DEA undertook to rectify this shortcoming and thus extend the 14 March 2014 deadline. This email, therefore, serves to confirm that the aforementioned notice was published in the City Press on 9 March 2014 with a new submission deadline of 8 April 2014 for stakeholder comments. A copy of the published notice is attached for ease of reference.

Furthermore, please note that the DEA is working on publishing the maps referred to in Regulations on the DEA website and communication will be sent to all attendees as soon as these are available on the DEA website.

Those who have already commented are welcome to add to their comments, should they feel the need, but we would request that these be sent through as additional comments, as we shall be responding to all existing versions of their comments.

Please note that, as stated in the above-mentioned meeting, only written comments will be formally considered as input, and only our formal written responses will constitute a response from the Department.

We look forward to constructive engagements with everyone.

Regards

Nomahlubi Sishuba

PUBLIC COMMENT ON THE PROPOSED ALIEN AND INVASIVE SPECIES REGULATIONS AND ASSOCIATED SPECIES LISTS

On 12 February 2014, the Minister of Water and Environmental Affairs, Ms Bomo Edith Edna Molewa, published for public comment by notice in the Gazette (Gazette No. 37320) in terms of section 100 of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004), the proposed Alien and Invasive Species Regulations and associated species Lists.

Any person who wishes to submit written representation and/or objections to the proposed Alien and Invasive Species Regulations and associated species Lists, published for public comment under sections 66(1), 67(1), 70(1)(a), 71(3) and 71a of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004), is invited to do so by 8 April 2014.

For a copy of the General Notice visit:
https://www.environment.gov.za/sites/default/files/gazetted_notices/nemabiodiversity_invasivespecieslist_n78gon37320.pdf

All representations and comments must be submitted, in writing, via one of the following methods:

- **Post:** The Deputy Director-General: Environmental Programmes,
Department of Environmental Affairs, Private Bag X4390, Cape Town 8001,
Attention: Dr Guy Preston;
- **Hand-delivery:** The Deputy Director-General: Environmental Programmes,
Department of Environmental Affairs, 14 Loop Street, Cape Town, or
- **E-mail:** NSishuba@environment.gov.za

Any enquiries in connection with the proposed Alien and Invasive Species Regulations and associated species Lists can be directed to Ms Nomahlubi Sishuba at (021) 441-2791/2813.



environmental affairs
Department
Environmental Affairs
REPUBLIC OF SOUTH AFRICA



1195115E

Copy of E Mail sent to Ms Sishuba of the DEA on 17 March re defective advertising

Dear Ms Sishuba

Thank you for your e mail though regrettably I must inform you that the requirements of section 100 of the NEM:BA have still not been met. Trout SA and FOSAF deal with the requirements for a proper notice in paragraph 3 of its submission (the Submission) emailed to the department on Thursday 13 March 2014 – copy attached.

Section 79(1) of the NEM:BA states:.

Before publishing a notice in terms of section 66(1), 67(1) 70(1) 71(3) or 71A(1), or amending or repealing such a notice in terms of section 68 or 72, the Minister must follow a consultative process in accordance with sections 99 and 100.

If the Minister does not follow the consultative process prescribed in terms of sections 99 and 100, the Minister cannot publish a notice in terms of the sections quoted above. In other words the Minister cannot make the lists law.

Section 97(3) contains a similar provision dealing with the publication of regulations or the amendment thereof. Thus If the Minister does not follow the consultative process prescribed in terms of sections 99 and 100, the Minister cannot publish a notice making or amending regulations.

A failure to comply with these sections makes any notice or regulation or any amendment thereto invalid. This is probably why the Minister did not purport to amend the notices and regulations published on 19 July 2013. They were not subjected to the consultative process referred to in the above quoted sections and are therefore illegal.

The processes set out in sections 99 and 100 are very clear.

99 Consultation

- (1) Before exercising a power which, in terms of a provision of this Act, must be exercised in accordance with this section and section 100, the Minister must follow an appropriate consultative process in the circumstances.
- (2) The Minister must, in terms of subsection (1)-
 - (a) consult all Cabinet members whose areas of responsibility may be affected by the exercise of the power;
 - (b) in accordance with the principles of co-operative governance set out in Chapter 3 of the Constitution, consult the MEC for Environmental Affairs of each province that may be affected by the exercise of the power; and
 - (c) allow public participation in the process in accordance with section 100.

100. Public participation

- (1) The Minister must give notice of the proposed exercise of the power referred to in section 99-
 - (a) in the Gazette; and
 - (b) in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.
- (2) The notice must-
 - (a) invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power; and
 - (b) contain sufficient information to enable members of the public to submit meaningful representations or objections.
- (3) The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person delegated by the Minister.
- (4) The Minister must give due consideration to all representations or objections received or presented before exercising the power.

The obligation to consult is hammered home time and again in section 99.

1. Section 99(1) says that the Minister must comply with sections 99 and 100 before exercising power. The language is peremptory. The section says must, not may or should have a jolly good try. Must means just that. The Minister either complies or she does not. Getting close or partial compliance is not good enough.
2. Section 99(2)(c) say the Minister must allow the public participation in the process prescribed in section 100.
3. Section 99(1) also says that the Minister must follow an appropriate consultative process in the circumstances. This acknowledges that the process outlined in section 100 is not the only process. The Minister must also comply with the PAJA. Trout SA and FOSAF make this point in paragraph 12.1(e) and elsewhere in its submission (copy attached for ease of reference).

Section 100 describes the nature of the public participation process required under the NEM:BA.

1. The Minister must give notice in the Gazette and in this case in a nationally distributed newspaper.
2. The Notice must invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power.
3. The Notice must contain sufficient information to enable members of the public to submit meaningful representations or objections.

All three of the above are must haves. If they are not they are not there, then section 100 is not complied with. The Minister cannot exercise power until they are complied with and cannot as a result make lists or regulations law.

The Minister failed to deliver on all three of them when Notices 78 and 79 were published in the Government gazette on 12 march 2014. There was noncompliance inter alia because:

1. The notice was not published in a newspaper
2. The notice contained no information contain sufficient information to enable members of the public to submit meaningful representations or objections other than the text of the lists and regulations themselves.
3. The fish sanctuary area maps were not available.

This and a failure to comply with The PAJA (see the representations contained in the submission) meant that members of the public were unable to make meaningful representations, hence the focus of that submission on legal issues of noncompliance.

This was also the focus of Trout SA and FOSAF at the informal stakeholder meeting that took place on 5 March 2013. It was pointed out to Dr Preston that these deficiencies meant that the Minister could not simply advertise in a newspaper as he proposed to do. I understood that he had grasped the importance of this because he said the lack of maps and the lack of sufficient information would be rectified when the notices were advertised again. He agreed that the maps would be referenced by a link to the web page where they would be available in sufficient detail to scale up to cadastral boundaries. He also undertook to notify all those present via their given e mail addresses when this notice was advertised.

My faith in the powers of comprehension of the officials present seems to have been misplaced because the notice that was published in the City Post on 8 March 2014:

1. was only forwarded to me some 6 days after publication on 14 March 2014;
2. makes no reference to the fish sanctuary area maps;
3. contains none of the information that was promised; and
4. does not comply with section 100.

To make matters worse your covering e mail says

Furthermore, please note that the DEA is working on publishing the maps referred to in Regulations on the DEA website and communication will be sent to all attendees as soon as these are available on the DEA website.

This makes a mockery of the undertaking given by Dr Preston on 5 March 2014 and indeed of the entire consultation process prescribed by NEM:BA. This and the failure to supply the information necessary to make meaningful submissions underscores the depth of the contempt the DEA regards these processes and indicates bad faith. It also is destructive of the trust that must exist between Government and the Public if South Africa's biodiversity is to be protected.

This lack of respect for the legally protected rights of South Africans has been a feature of the DEA's attempt to apply this law since its first attempt in 2007. Had The DEA respected South Africans sufficiently to apply the law their elected representatives gave them rather than the dictats of the DEA, South Africa would not find itself faced with this unseemly rush to push through fatally flawed laws just before a general election. Laws dealing with invasive species and those alien species that require management through the permitting of restricted activities would have been in operation years ago had the DEA applied the NEM:BA as was intended.

And this is not legalese or legal nit-picking as officials of the Department have so often claimed. It is the application of the rule of law and the processes that give meaning to the rights given South African's under the Constitution. Compliance with these requirements are the legal bedrock of our democracy. And it is with that thought in mind that I turn to deal with the deficiencies in the form of the notice itself.

The requirements of section 99 are clear.

1. It requires that notice must be given in both the Government Gazette and a nationally distributed newspaper.
2. It must invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power.

The notice that was given on 12 February 2014 is not a proper notice because inter alia it was not published in a newspaper.

The notice published in the Post newspaper on 8 March is not proper notice because it does not invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power. It is not the notice contemplated in section 100. Section 100

This is not legal nit picking. Proper consultation requires respect for the process that is founded on respect for the rules. If those rules say that a process must be followed then the DEA must follow it. It is not for the DEA to concoct another process that better suites its agenda. That is not compliance. If notices are not properly given in terms of section 100 then then the DEA must start again by giving proper notice.

The process adopted by the DEA is not proper or compliant.

The DEA must and honour our laws and its undertakings by waiting until the maps are available and then give proper notice which notice must contain sufficient information to enable the public to submit meaningful representations. In fact it would be a good idea if the DEA took the time to read this act before trying to implement it further. There is a limit to the amount of loss that South African's must expect from the DEA's failure to get things right.

One hopes that sense will prevail and that the DEA will withdraw this process.

Please confirm that this will be the case.

It would be most unfortunate if yet another attempt to make lists and regulations law will be rendered illegal by the DEA's failure to comply with its own laws. Worse still if South Africans are required to approach a court to see that this does not happen. After all we have a right to expect the DEA to behave lawfully. How else can the DEA expect South Africans to respect and obey laws under its administration?

Yours faithfully

I A Cox



environmental affairs

Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA

Enquiries: R RAZACK
Tel: 021 819 2426

Mr Cox

Per email: IanCox@coxattorneys.co.za

Dear Mr Cox

DRAFT ALIEN AND INVASIVE SPECIES LISTS AND REGULATIONS

Your email dated 15 March 2014 herewith refers.

This letter serves to respond to your comments in relation to the Department's compliance with the public consultation processes followed thus far and in particular whether there has been compliance with sections 99 and 100 of the National Environmental Management Biodiversity Act, 2004 (Act No. 10 of 2004) (NEMBA).

Also attached to your email was your comprehensive 68 page formal written comments on the published draft Alien and Invasive Species (AIS) regulations and Lists. We thank you for this detailed and consideration of the draft regulations and lists and these comments will be carefully considered and responded to in due course together with all the other comments received by the Department.

We shall now deal with your comments contained in the email on compliance with sections 99 and 100 of NEMBA. In essence, you have alleged that the Minister has failed to comply with the requirements of section 100 in 3 major respects:

1. The notice was not published in a newspaper;
2. The notice contained insufficient information to enable members of the public to submit meaningful representations or objections other than the text of the lists and regulations themselves.

3. The fish sanctuary area maps were not available.

With respect to the first allegation, as you are aware a notice has subsequently been published in the newspaper (on 9 March 2014) and the comment period has been extended to 8 April 2014. The section does not require that the newspaper notice and the *Gazette* notice be published simultaneously but merely that it invites comments to be submitted within 30 days of the *Gazette* notice being published (this is a minimum period). The Department has in fact extended this time period and the comment period has now been extended to 8 April 2014, almost 2 months since the *Gazette* notice was published.

Secondly the regulations and the lists are sufficiently detailed to enable members of the public to provide comprehensive comments on the issue, which is evidenced by your lengthy 68 page comment document which you have sent to the Department. It is not economically possible or feasible to expect the Department to publish all the background information and reasoning which gave rise to the draft regulations and this is not the intention of the section. However, as we confirmed at the recent stakeholder workshop, we will in the interest of openness and transparency make available specific documents or any scientific rationale which you would require in respect of the listed species which relate to your industry, in order to assist with commenting on the draft lists and regulations.

Lastly the fish sanctuary maps have from the date of publication of the notice in the *Gazette* been available on the internet. However since you appear to have experienced difficulties in accessing these maps, we will publish in the newspaper on Sunday 23 March 2014 and circulate to all stakeholders, a link with a step by step process on how to more easily access the maps to allow you to more readily comment on the maps.

It should be noted that the Department takes this process extremely seriously and most certainly does not undervalue the importance of proper public consultation. Even prior to this formal public participation process we have engaged with all our stakeholders on numerous occasions and continuously and consistently respond to queries and questions regarding AIS. This is evidenced by the numerous interactions and responses between you, the Department and Mr Lax. These regulations and lists have been developed over a long period of time and through an extensive process of consultation over the years including recent correspondence where despite your assertions in paragraph 2 above, the Department has provided to Mr Lax, its scientific rationale for listing of the various trout species.

The Department therefore believes that in light of the above there has been substantial compliance with NEMBA sections 99 and 100.

Yours faithfully


CHIEF DIRECTOR: LAW REFORM AND APPEALS
DEPARTMENT OF ENVIRONMENTAL AFFAIRS
DATE: 24/03/2014.



BY: EMAIL

TO: LGarlipp@environment.gov.za

4 April 2014

Dear Ms Garlipp

Re: Proper Notice and the NEM:BA

I have spoken to Trout SA and FOSAF who share the concerns that I addressed in my email of 17 March 2014 addressed to Ms Sishuba. They have thus asked that I include them as parties to this response.

So that it is easier to make reference to the parties' replies to your response I have:

1. Attached the text of my email addressed to Ms Sishuba at the back of this letter as Annexure "A".
2. Copied relevant extracts from your letter into this letter in red.
3. Copied your full letter as annexure "B"

Publish in a newspaper

Amongst the points made in my e mail to Ms Sishuba about the failure to publish the notice as is required by section 100, I complained:

The notice published in the Post (should have been the City Press) newspaper on 8 March is not proper notice because it does not invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power. It is not the notice contemplated in section 100.

I went on to say:

This is not legal nit picking. Proper consultation requires respect for the process that is founded on respect for the rules. If those rules say that a process must be followed then the DEA must follow it. It is not for the DEA to concoct another process that better suites its agenda. That is not compliance. If notices are not properly given in terms of section 100 then then the DEA must start again by giving proper notice.

SIMPLICITY IN LAW

Physical Address: 23 Jan Hofmeyr Rd, Westville, 3629 | Cell: 082 574 3722 | Tel: 031 266 7563 | Email: iancox@coxattorneys.co.za
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You responded on 24 March 2014 by saying:

as you are aware a notice has subsequently been published in the newspaper (on 9 March 2014) and the comment period has been extended to 8 April 2014. The section does not require that the newspaper notice and the Gazette notice be published simultaneously but merely that it invites comments to be submitted within 30 days of the Gazette notice being published (this is a minimum period). The Department has in fact extended this time period and the comment period has now been extended to 8 April 2014, almost 2 months since the Gazette notice was published.

You with respect could not be more wrong.

1. The right to publish a notice in terms of section 100 reposes in the Minister. It does not repose in the Department. This power cannot be delegated by the Minister to the Department. The notices that were published in the Gazette on 12 February open with the phrase "*I Bomo Edith Edna Molewa, Minister of Environmental herby publish ...*". No such language appears in the notice that was published in the City Press on 9 March 2014. You state that the Department has extended the date. The Department does not have any authority to publish notices in terms of section 100 or extend the date that has been determined by the Minister. It is sheer effrontery and indicative of the general climate of lawlessness and contempt for the rule of law that the Department sought to interfere in the duties and decisions of the Minister. It reduces the Minister to the role of a mere functionary. If this decision emanated from the Department rather than from the Minister then the Department has usurped the Minister's powers. Those responsible for this should be sanctioned.
2. Section 100(2)(a) states that the notice *must invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power.* The phrase *within 30 days of publication* is not a minimum period as you suggest. By no stretch of the imagination can the phrase "*within 30 days*" be interpreted to mean a minimum period. It is the exact opposite. It is a maximum period.
3. Section 100 does not refer to "*a notice*" as you put it but "*the notice*". The section clearly requires the same notice to be published in both the Gazette and a newspaper.
 - a. Section 100(1) creates the obligation. It states that *the Minister must give notice of the proposed exercise of the power referred to in section 99- (a) in the Gazette; and (b) in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.*
 - b. Section 100(2) gives directions as to what the notice in the Gazette and the newspaper must contain. It states that the notice *must invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power.* No mention is made of a notice as you suggest. The reference is to "*the notice*" or in other words a single notice.

The notice that was published the City Press on 9 March 2014 is not the same notice that appeared in the Gazette on 12 February 2014. It is a different notice. It is not the notice required in terms of section 100.

4. You are correct that the notice that must appear in a newspaper need not be published simultaneously with that which must appear in the Gazette. But it must comply with section

100(2)(a) and *must invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power.* The notice that was published in the City Press on 9 March 2014 does not do this. It must also be published at a time that gives members of the public sufficient time within which to object.

5. The Minister does not have the power to extend the notice period as you suggest. This is because the 30 day period sets a maximum period and this is peremptory. That is the effect of the use of the word must. This does not mean that the Minister must ignore representations filed out of time. The Minister has discretion whether or not to consider representations that are filed late.
6. It would be remiss of me if I did not deal in general terms with the purpose of the requirement that the notice must be published in a newspaper.
 - a. Legislation must be published in the Gazette. I dealt with this legal requirement in some detail later on so won't enlarge upon it here. However the ordinary member of the public does not read Gazette's as a general rule. That is why the NEM:BA call for publication in a newspaper as well.
 - b. There have been some attempts to extend this to electronic publication on a web site but the impermanence of this form of publication, its susceptibility to manipulation and the fact that most South African's do not have access to the internet makes this controversial. The NEM:BA does not contain any provision allowing for this.
 - c. The purpose of the communication is to enable members of the public to make representations. So it is not just a case of informing key stakeholders like the parties. Ordinary member of the public must also be notified. The publication of the notice in a newspaper is thus just as important as publication in the Gazette. This is particularly relevant to the second point you make namely that sufficient information had been given.

Sufficient information

You dealt with the sufficiency of the information that has been supplied in these terms.

Secondly the regulations and the lists are sufficiently detailed to enable members of the public to provide comprehensive comments on the issue, which is evidenced by your lengthy 68 page comment document which you have sent to the Department. It is not economically possible or feasible to expect the Department to publish all the background information and reasoning which gave rise to the draft regulations and this is not the intention of the section. However, as we confirmed at the recent stakeholder workshop, we will in the interest of openness and transparency make available specific documents or any scientific rationale which you would require in respect of the listed species which relate to your industry, in order to assist with commenting on the draft lists and regulations.

1. This statement overlooks the undertakings given at the stakeholder meetings that such undertakings would be given. It is possible that you are unaware of the e mail that was sent by Mr Ilan Lax to Dr Guy Preston immediately after that meeting. A copy is attached at the end of this letter as Annexure "C". As you can see that undertaking is not accommodated by your assurance *"as we confirmed at the recent stakeholder workshop, we will in the interest of openness and transparency make available specific documents or any scientific rationale which you would require*

in respect of the listed species which relate to your industry, in order to assist with commenting on the draft lists and regulations.” In any event, the “scientific rationale” is not the same thing as the reasons why the Minister has proposed to exercise the power under the NEM:BA. It is just one of the considerations required to arrive at such a decision.

2. The fact that the parties submitted a 68 page representation is not proof of compliance. If you read the parties submission you will see that it deals entirely with legal matters. This is because we did not have the information to deal with non-legal issues.
 - a. First, we did not have the all-important maps.
 - b. Second, as the parties have repeatedly pointed out, no policies or norms and standards have been formulated with regards to freshwater environments or how the NEM:BA will be applied. One has no context within which to deal with the assertion that trout are invasive in a particular area or with reference to how or why a particular category has been decided upon or why (in our case) trout have been categorized accordingly.
3. Section 100(2)(a) stipulates that the notice *must contain sufficient information to enable members of the public to submit meaningful representations or objections*. You say that it is not economically feasible do this but that is what the NEM:BA requires.
 - a. With the greatest respect if Government lacks the means to publish its reasons for seeking to exercising power then it must lack the means to exercise that power. Thus either the proposed exercise of power is irrational or your excuse for the failure to give reasons is irrational or both the above are irrational.
 - b. You seem to think that the DEA can ignore the NEM:BA when it suites your department to do so.
 - c. I complained in my e mail to Ms. Sishuba of the contempt the DEA has for the rule of law and the rights of ordinary South Africans. Your response confirms the appropriateness of that complaint.

The maps

The maps are just one indication of the DEA's failure to comprehend that South Africa is a constitutional democracy that gives South African's rights. This is what I wrote about the failure to make the maps available.

I understood that he had grasped the importance of this because he said the lack of maps and the lack of sufficient information would be rectified when the notices were advertised again. He agreed that the maps would be referenced by a link to the web page where they would be available in sufficient detail to scale up to cadastral boundaries. He also undertook to notify all those present via their given e mail addresses when this notice was advertised.

This is how you replied.

Lastly the fish sanctuary maps have from the date of publication of the notice in the Gazette been available on the internet. However since you appear to have experienced difficulties in accessing these maps, we will publish in the newspaper on Sunday 23 March 2014 and circulate to all

stakeholders, a link with a step by step process on how to more easily access the maps to allow you to more readily comment on the maps.

1. Firstly, you again ignore the undertakings that were given at the stakeholder meeting that took place on 6 March 2014.
2. Secondly, you do not seem to comprehend the processes that must be followed when making laws in this country. Publication on the internet is not an acceptable manner of publishing laws. Section 16 of the Interpretation Act, 33 of 1957 requires laws, regulations and notices of the kind contemplated in section 70 of the NEM:BA to be published in the Government Gazette. This means the whole law and this is made clear by section 16A(1) which states:

If the President is satisfied that the publication of the Gazette cannot be effected or is likely to be seriously delayed as a result of circumstances beyond the control of the Government Printer, he may by proclamation published in the manner directed by him, make such rules as he may deem fit for the publication, during any period specified in the proclamation, of laws or notices required or authorized by law to be published in the Gazette.

The President has not published any such rules. Thus it is not competent for the Minister to make regulation by reference to another publication as that is not a publication in the Government Gazette

3. Thirdly, saying that the fish sanctuary area maps have been available on the internet forgets that we are dealing here with very specific maps. It is not any fish sanctuary area maps, but those that are published by the Water Research Commission in the cited Report TT500/11 as amended from time to time. That report is still not available on the Water Research Commission website as the screenshot Annexure "D" shows. The parties have however been able to access it with the assistance of a Professor in the Department of Ichthyology at Rhodes University.
4. Fourthly, it ignores the fact that most South Africans do not have access to the internet or that the internet is a very big place. Saying something is on the internet is a bit like telling the public that a needle is in the haystack. It isn't helpful. That is why the parties requested that the next notice supply a URL at which maps could be accessed.

Good faith

The above all casts very considerable doubt on the DEA's claim to good faith. You said in this regard that:

It should be noted that the Department takes this process extremely seriously and most certainly does not undervalue the importance of proper public consultation. Even prior to this formal public participation process we have engaged with all our stakeholders on numerous occasions and continuously and consistently respond to queries and questions regarding AIS. This is evidenced by the numerous interactions and responses between you, the Department and Mr Lax. These regulations and lists have been developed over a long period of time and through an extensive process of consultation over the years including recent correspondence where despite your assertions in paragraph 2 above, the Department has provided to Mr Lax, its scientific rationale for listing of the various trout species.

1. The DEA should not take the fact of an interaction with a group such as FOSAF as a reason not to comply with its obligations in terms of section 100 and notify the public giving *sufficient information to enable members of the public to submit meaningful representations or objections*.
2. FOSAF complains that its interaction with the DEA has been far from satisfactory. They are on record complaining of being lectured to. The list of academic research articles you refer to were supplied about a week before the lists and regulations were published in the Gazette for comment despite FOSAF asking for them over a period of years. Most of these publications are not easily available (some are awaiting publication) and even if FOSAF had them which it does not the DEA has still to provide the policies and standards against which they can be interpreted and considered.
3. Interaction between FOSAF and the DEA has always taken place in the context of the issue at hand at the time. These have varied widely. The general chaos that has marked this process means that much of this interaction has no relevance to what follows.
4. This difficulty can be illustrated by the following example.
 - a. Dr Preston wrote to Mr Lax on 10 January supplying FOSAF with draft lists regulations and maps on a confidential basis for comment. Similar documents were supplied to other stakeholders. This is what he said about those maps.

The second key component is that the transfer / introduction of any invasive fresh-water fish species into any Fish Sanctuary Area as shown in the map, or into any of four Protected Areas (National Parks, Provincial Nature Reserves, Mountain Catchment Areas or Forestry Reserves), is prohibited, except for the existing permits mentioned in the Transitional Arrangements in #1. There are a caveat here. The map on page 59 is an interim map, and I shall be finalizing it tomorrow. That said, it is our intention to develop these maps further, together with stakeholders, and incorporating concepts from the maps done by Dr Swartz with the industries, within the next two years.

- b. The map is annexed marked "E". The parties submitted 18 pages of comments but this effort was ignored because the draft lists and regulation were published within days of the DEA making that submission.
- c. The map was omitted from the draft regulations and as I have pointed out the Water Research Commission report which had been published some two years earlier was not readily available.
- d. That report and the database that informs it, was only made available to the parties on Monday 24 March 2014. That map has two series of maps that are not the same and are thus very difficult to interpret. They are not the same as the map which is annexed marked "E".
- e. Those maps demarcate as fish sanctuary areas nearly all South Africa's trout waters. Yet the Sunday Tribune and Sunday Independent of 23 March 2014 reports Dr Preston as saying

"In most parts of the country - where the species already occur - there will be no restrictions on the farming of trout species in dams. Trout will also be allowed to be

fished in most parts of the country, including catching and releasing the species, without a permit"

- f. That report was widely read with the result that the public has been misled as to the Department's true intentions.
- g. This is the true nature of the interaction you talk about.

Substantial Compliance

The Department therefore believes that in light of the above there has been substantial compliance with NEMBA sections 99 and 100.

1. You seem to have misconstrued the import of section 100. Section 100 is drafted using peremptory language. It states:

Public participation

*(1) The Minister **must** give notice of the proposed exercise of the power referred to in section 99-*

(a) in the Gazette; and

(b) in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.

*(2) The notice **must**-*

(a) invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power; and

(b) contain sufficient information to enable members of the public to submit meaningful representations or objections.

(3) The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person designated by the Minister.

*(4) The Minister **must** give due consideration to all representations or objections received or presented before exercising the power.*

(Highlighting inserted)

2. The use of the word "must" in subsections 1, 2 and 4 in contrast to the word "may" which is used in sub-section 3 highlights this. Thus the Minister has a discretion regarding oral representations but has no discretion elsewhere.
3. This must be seen in conjunction with section 99 which states:

Consultation

*(1) Before exercising a power which, in terms of a provision of this Act, **must** be exercised in accordance with this section and section 100, the Minister **must** follow an appropriate consultative process in the circumstances.*

*(2) The Minister **must**, in terms of subsection (1)-*

(a) consult all Cabinet members whose areas of responsibility may be affected by the exercise of the power;

(b) in accordance with the principles of co-operative governance set out in Chapter 3 of the Constitution, consult the MEC for Environmental Affairs of each province that may be affected by the exercise of the power; and

(c) allow public participation in the process in accordance with section 100.

(Highlighting inserted)

4. Again peremptory language is used obliging the Minister to consult.
5. There is no provision in the NEM:BA that allows for substantial compliance such as for example exists in section 6(9) of the Companies Act, 71 of 2008. Exact compliance is required.
6. The right to consultation is the bedrock of the constitutional right to just administrative action set out in section 33 of the Constitution.
 - a. Section 7(2) of the Constitution says that the state must protect the Bill of Rights.
 - b. Section 39(2) of the Constitution states that the purpose and objects of the Bill of Rights must be protected when interpreting legislation.
 - c. Section 33(3) requires national legislation to be enacted to give effect to this right. Section 99 and 100 of the NEM:BA does this.
7. There can be no doubt that strict compliance is required.
8. The DEA's conduct in any event falls woefully short of what might be regarded as substantial compliance.
9. Any other interpretation would perpetuate a situation where the DEA can ride roughshod over the rights of ordinary South Africans and the rule of law.

We remain of the view that this process is fatally defective and seek your confirmation that you will not be carrying on with it.

Yours Faithfully

(Electronically sent and therefore unsigned.)

Ian Cox

Annexures to Ian Cox,s letter to Ms Garlipp dated 4 April 2014

Pages 9 to 21 of that letter are annexures that are referred to in this supplementary report and have not been copied as part of the letter to save spoace but can be accessed in the report as follows:

Annexure **"A"** See Annexure **"D"** of the Supplementary Report;

Annexure **"B"** See Annexure **"E"** of the Supplementary Report;

Annexure **"C"** See Annexure **"A"** of the Supplementary Report;

Annexure **"D"** See Annexure **"K"** of the Supplementary Report;

Annexure **"E"** See Annexure **"L"** of the Supplementary Report.

USING THE BOIS WEBSITE TO DETERMINE WHETHER OR NOT YOUR FARM FALLS WITHIN THE FISH SANCTUARY AREAS REFERRED TO IN THE PROPOSED ALIEN AND INVASIVE SPECIES REGULATIONS AND ASSOCIATED SPECIES LISTS

On 12 February 2014, the Minister of Water and Environmental Affairs, Ms Bomo Edeni Edrú Motswagole, published for public comment by notice in the Gazette (Gazette No. 37530, Notice No. 78 of 12 February 2014) and newspaper advert published in the City Press on 3 March 2014, in terms of section 100 of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004), the proposed Alien and Invasive Species Regulations and associated species lists. The National List of fresh water fish species in the above-mentioned draft Regulation make reference to fish Sanctuary Areas that are provided in the National Freshwater Ecosystem Priority Area maps published by the Water Research Commission in Report T7500/11.

To further assist anyone wishing to identify whether or not their farm/land falls within the Fish Sanctuary Areas, please visit the following link:

<http://www.environment.gov.za/itrm/517-fish-sanctuaries-map-for-south-africa.html>

Should you experience any difficulty accessing or operating the maps, please do not hesitate to contact our support staff for assistance using one of the following methods: Tel: (021) 793 8753 (Monday - Friday) 08:00 - 17:00 or e-mail your 1401 code (the unique 21 digit number given to each property by the Surveyor General) to bois@edpsib.org.za



environmental affairs
Department
Environmental Affairs
REPUBLIC OF SOUTH AFRICA



1/11/14

www.environment.gov.za

From: Ilan Lax
To: "Guy Preston"
Cc: "Nomahlubi Sishuba"; "Radia Razack"; "Linda Garlipp" (LGarlipp@environment.gov.za);
"Ian Cox"
Subject: RE: NEM:BA Alien and Invasive Species List
Date: 04 April 2014 05:50:00 PM

Dear Dr Preston

Further to the email below which has not yet been acknowledged:

1. With regard to 1. The recording of the meeting, we remind you that we await this as a matter of urgency and before the close of the consultation period. If someone has prepared something, a draft "minute or note" of the matters discussed at the consultation meeting, this would also be appreciated.
2. The matters raised under 2. Publication of the Notice and 3. The sensitive area maps below, now form the basis of other correspondence between the parties and the Department. Suffice it to mention that the parties do not accept the correctness of the purported compliance with these aspects of the undertaking.
3. With regard to 4. The Minister's reasons for listing, we record that these have not been forthcoming. We await these as soon as possible.
4. With regard to 5. Formal Consultations, given the arguments noted in Mr Cox's letter to Ms Garlipp this afternoon, it is clearly not possible to extend the 30 day period and given all the other problems encountered with this process as noted in our submission and elsewhere, the entire process will have to commence again once all the correct information is available.

Kindly acknowledge receipt hereof.

We look forward to hearing from you as soon as possible.

Yours sincerely

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3.4 Fish sanctuaries

Fish sanctuaries are rivers and associated sub-quaternary catchments that are important for protecting threatened and near threatened fish species indigenous to South Africa. At least one third of South Africa's indigenous freshwater fish species are threatened. The Inkomati and Odlonski/Doorn Water Management Areas are 'hotspots' of threatened fish species.

Fish sanctuaries are rivers and their associated sub-quaternary catchments that are essential for protecting threatened and near threatened freshwater fish that are indigenous to South Africa (Table 3.1). These include large anjing species like yellowfish as well as small fish like reeffish.

Figure 3.4 shows the number of threatened and near threatened fish species within each fish sanctuary, ranging from one to as many as seven species. A goal of WRFM is to keep further freshwater species from becoming threatened and to prevent those fish species that are already threatened from going extinct. In order to achieve this, there should be no further deterioration in river condition in fish sanctuaries and no new permits should be issued for stocking invasive alien fish in farm dams in the associated sub-quaternary catchments. Fish management plans need to be developed in all fish sanctuaries to protect the fish they contain. These plans should address issues such as management of a particular stretch of the river habitat within the sub-quaternary catchment, the construction of weirs to keep invasive alien fish species to a minimum (following an environmental impact assessment), and managing aquaculture and angling to ensure no further introduction of invasive alien fish species.

Invasive alien fish such as trout and bass should not be introduced or stocked in sub-quaternary catchments that have been identified as fish sanctuaries, whether for angling or aquaculture.

The IBCU Red List of threatened fish species (<http://www.ichu.org.za/fish/redlist/>) was used as a starting point for identifying threatened and near threatened fish species in South Africa, which included those that are critically endangered, endangered, vulnerable and near threatened (Table 3.1). These species listed by the IBCU as data deficient but deemed by South African fish biologists to be threatened, were also included in the Red List. The Red List also includes species that require a specific angling that will allow them into river systems. It defines red-listed species as those that are considered to be at high risk of extinction and each range was treated similarly to threatened species.

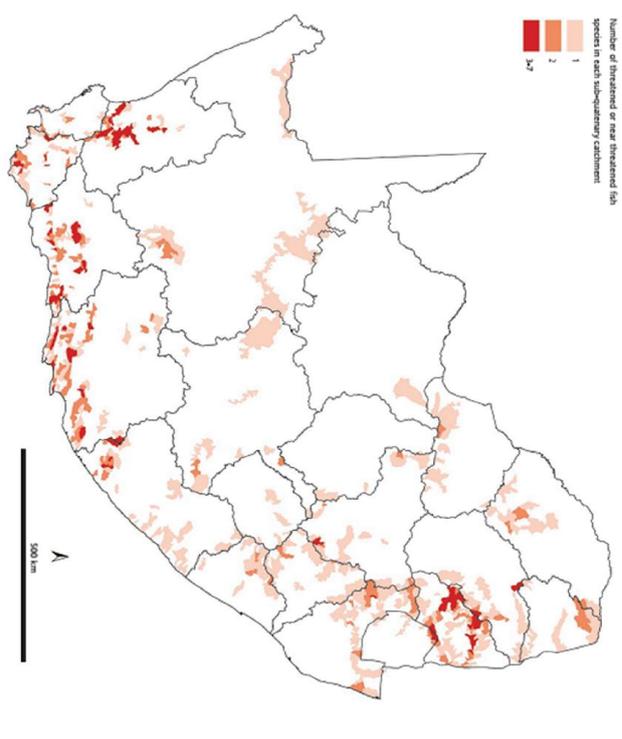


Figure 3.4. Fish sanctuaries for threatened and near threatened freshwater fish species indigenous to South Africa



For species and species lineages considered critically endangered or endangered, a target of 100% of all confirmed existing populations was set. For vulnerable and near threatened species and species lineages, a target of ten populations was set (or maximum confirmed populations if fewer than ten exist), coinciding wherever possible with sub-quaternary catchments selected for critically endangered and endangered species, and species lineages. The target of ten populations was derived from the IUCN criteria for conservation status which specify that as soon as a species drops below ten populations it becomes endangered (IUCN 2001).

Fish point locality data from SAUD and the Albany Museum were used to guide selection of rivers and associated sub-quaternary catchments that would serve as fish sanctuaries for each species. This database was supplemented with expert knowledge from experienced fish biologists in different regions of the country. Historical records that are no longer valid (owing to local extinctions) were excluded from consideration. Fish sanctuary maps were identified for each species, with three possible categories:

- **Fish sanctuaries:** These are rivers and associated sub-quaternary catchments required to meet threatened and near threatened fish population targets. Fish sanctuaries in a good condition (A or B ecological category) were selected as FEPA's, and the remaining ones became Fish Support Areas. Fish sanctuaries are shown on the FEPA maps with a fish symbol (see Part 2 of this atlas). A red fish denotes a fish sanctuary that contains at least one critically endangered or endangered population; the remaining fish sanctuaries are shown with a black fish.
- **Fish migration areas:** These cater for large migratory fish that require connectivity between certain habitats, usually between mainstem and tributary habitat. Fish migration areas are shown as Fish Support Areas on the FEPA maps, but differ from fish sanctuaries in that they do not contain a fish symbol (see Part 2 of this atlas).
- **Fish upstream management areas:** These are rivers and associated sub-quaternary catchments in which human activities need to be managed to prevent degradation of downstream fish sanctuaries and fish migration areas. All fish upstream management areas are identified on the FEPA maps either as Upstream Management Areas, or in some cases as FEPA's if they were also required for representing river ecosystem types.

Fish sanctuaries for every threatened and near threatened species were combined and the number of threatened fish populations within each sub-quaternary catchment was calculated to derive figure 3.4. A list of threatened and near threatened fish that occur within any particular fish sanctuary can be obtained from the NIFPA DVD, either by querying the fish sanctuary shapefile, or by using the unique sub-quaternary code shown on the FEPA maps (Part 2 of the atlas) to consult the lookup table on the DVD.

Table 3.2: Freshwater fish species for which fish sanctuaries were explicitly identified. Species marked with an asterisk require taxonomic updating as recent research shows that they contain several distinct lineages. Species classified as data deficient (DD) by IUCN, but which contain several distinct lineages that are considered threatened were also included, as well as near threatened species (NT).

Genus	Species	Common name	IUCN Status	Genus	Species	Common name	IUCN Status
<i>Amphilius</i>	<i>acostaei*</i>	Natal mountain catfish	DD	<i>Ctenosoma</i>	<i>rhodesiae</i>	Solar catfish	LC
<i>Austroglanis</i>	<i>bornandi</i>	Spotted rock catfish	EN	<i>Gobioides</i>	<i>zebrinus*</i>	Cape Gobioides	DD
<i>Austroglanis</i>	<i>gilli</i>	Chimiliyan rock catfish	VU	<i>Hydrogobius</i>	<i>nitidus</i>	Tigerfish	LC
<i>Austroglanis</i>	<i>actinot*</i>	Rock catfish	LC	<i>Kribia</i>	<i>quercutro</i>	Southern loach	CR
<i>Borbus</i>	<i>omolobus</i>	Amazale barb	VU	<i>Labo</i>	<i>sekeri</i>	Chimiliyan sandfish	EN
<i>Borbus</i>	<i>ondraei</i>	Wink	EN	<i>Labo</i>	<i>umbertus</i>	Mogget	LC
<i>Borbus</i>	<i>omulius*</i>	Chubbyhead barb	DD	<i>Laboburbus</i>	<i>capensis</i>	Southern barred minnow	VU
<i>Borbus</i>	<i>berghensis</i>	Shorfin barb	NT	<i>Opannam</i>	<i>peripangyi</i>	Mozambique Stegla	LC
<i>Borbus</i>	<i>calvus</i>	Chimiliyan redbin	VU	<i>Oreochromis</i>	<i>mosambicus</i>	Eastern Cape redbin	NT
<i>Borbus</i>	<i>erubescens</i>	Tree River redbin	CR	<i>Pseudoborbus</i>	<i>olivi*</i>	Sandiscale redbin	NT
<i>Borbus</i>	<i>hagrus</i>	Namakwa barb	LC	<i>Pseudoborbus</i>	<i>oliveri</i>	Burchell's redbin	EN
<i>Borbus</i>	<i>limonocidus</i>	Line-dotted barb	VU	<i>Pseudoborbus</i>	<i>burckhigi*</i>	Berg River redbin	EN
<i>Borbus</i>	<i>moederusii</i>	Marico barb	VU	<i>Pseudoborbus</i>	<i>burgi*</i>	Frey's redbin	CR
<i>Borbus</i>	<i>potillius*</i>	Golden barb	DD	<i>Pseudoborbus</i>	<i>philypsiae*</i>	Eastern Cape redbin	EN
<i>Borbus</i>	<i>seno</i>	Sarfin	EN	<i>Pseudoborbus</i>	<i>quarthimber*</i>	Madori redbin	EN
<i>Borbus</i>	<i>sp. "Sunshine"</i>	Barkhe barb	CR	<i>Pseudoborbus</i>	<i>demus*</i>	Slender redbin	NT
<i>Borbus</i>	<i>sp. "Ohngoroo"</i>	Ohngoroo barb	DD	<i>Sinella</i>	<i>bohali</i>	Eastern Cape rody	EN
<i>Borbus</i>	<i>sp. "Wuwerberg"</i>	Wuwerberg barb	NT	<i>Sinella</i>	<i>capensis*</i>	Cape burper	DD
<i>Borbus</i>	<i>truncatus</i>	Trou river barb	EN	<i>Serranochromis</i>	<i>marisburus</i>	Lowe's largemouth	EN
<i>Borbus</i>	<i>trivialis</i>	Border barb	EN	<i>Silhouette</i>	<i>oboya</i>	Shaji goby	EN
<i>Chiro</i>	<i>benxi</i>	Orange-fringed river bream	EN	<i>Vivorchinus</i>	<i>nitidulensis</i>	Incomati chidmouth	NT
<i>Chirogobius</i>	<i>blancus</i>	Incomati suckermouth	EN				

Description of IUCN categories

CR	Critically Endangered	Facing an extremely high risk of extinction in the wild
EN	Endangered	Facing a very high risk of extinction in the wild
VU	Vulnerable	Facing a high risk of extinction in the wild
NT	Near Threatened	Likely to qualify as CR, EN or VU in the near future
DD	Data Deficient	Inadequate information to make an assessment of its risk of extinction
LC	Least Concern	Not threatened



From: Ian Cox
Sent: 24 March 2014 06:06 PM
To: 'Linda Garlipp'
Subject: RE: Re: Fwd: NEMBA Regulations and associated species Lists

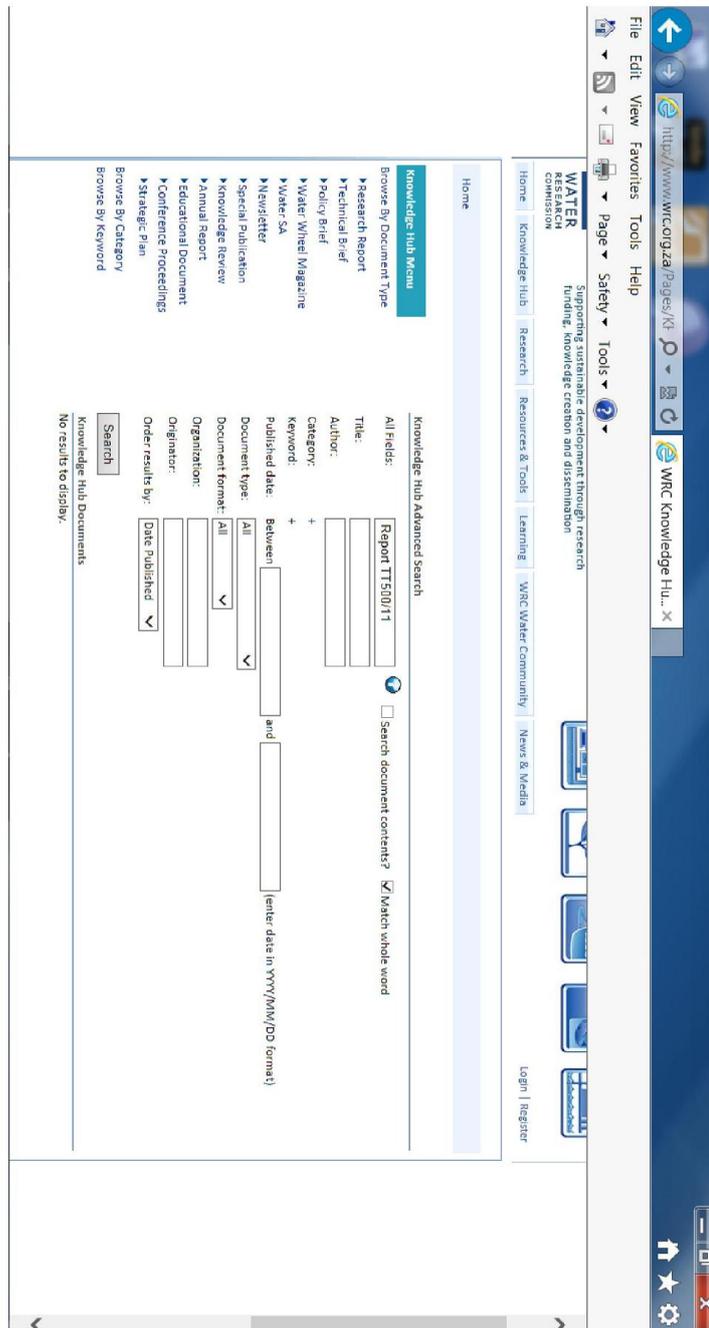
Dear Ms Garlipp

I will respond to your reply in due course. Suffice it to say that even at a first glance it appears to fall far short of what is required.

A matter requiring a very urgent response is that of the so called fish sanctuary areas. I have just today been notified of the link to the maps. I enclose a print version I extracted of the Mpumalanga region. Am I correct that the various fish sanctuaries are shaded in pink deepening to red or are the various green areas also fish sanctuaries? If not what are the fish sanctuaries in this and other areas?

Kind regards

Ian Cox



Fish sanctuary with critically endangered and endangered fish

